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DIESEL FUEL AND GASOLINE CONSERVATION ACT OF 1977

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HEARING

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BEFORE THE

SUBCOMMITTEE ON

ENERGY CONSERVATION AND REGULATION

OF THE

COMMITTEE ON

ENERGY AND NATURAL RESOURCES

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

FIRST SESSION

ON

S. 1699

A BILL TO PROVIDE ENERGY CONSERVATION BY ALLEVIATING CURRENT AND CONTINUING FUEL WASTE, TO REDUCE EMPTY VEHICLE MOVEMENTS, AND TO INCREASE EFFICIENCY IN TRANSPORTING GOODS BY MOTOR CARRIERS WHICH WILL ULTIMATELY BENEFIT CONSUMERS, AND FOR OTHER PURPOSES

JUNE 27, 1977

Publication No. 95-104



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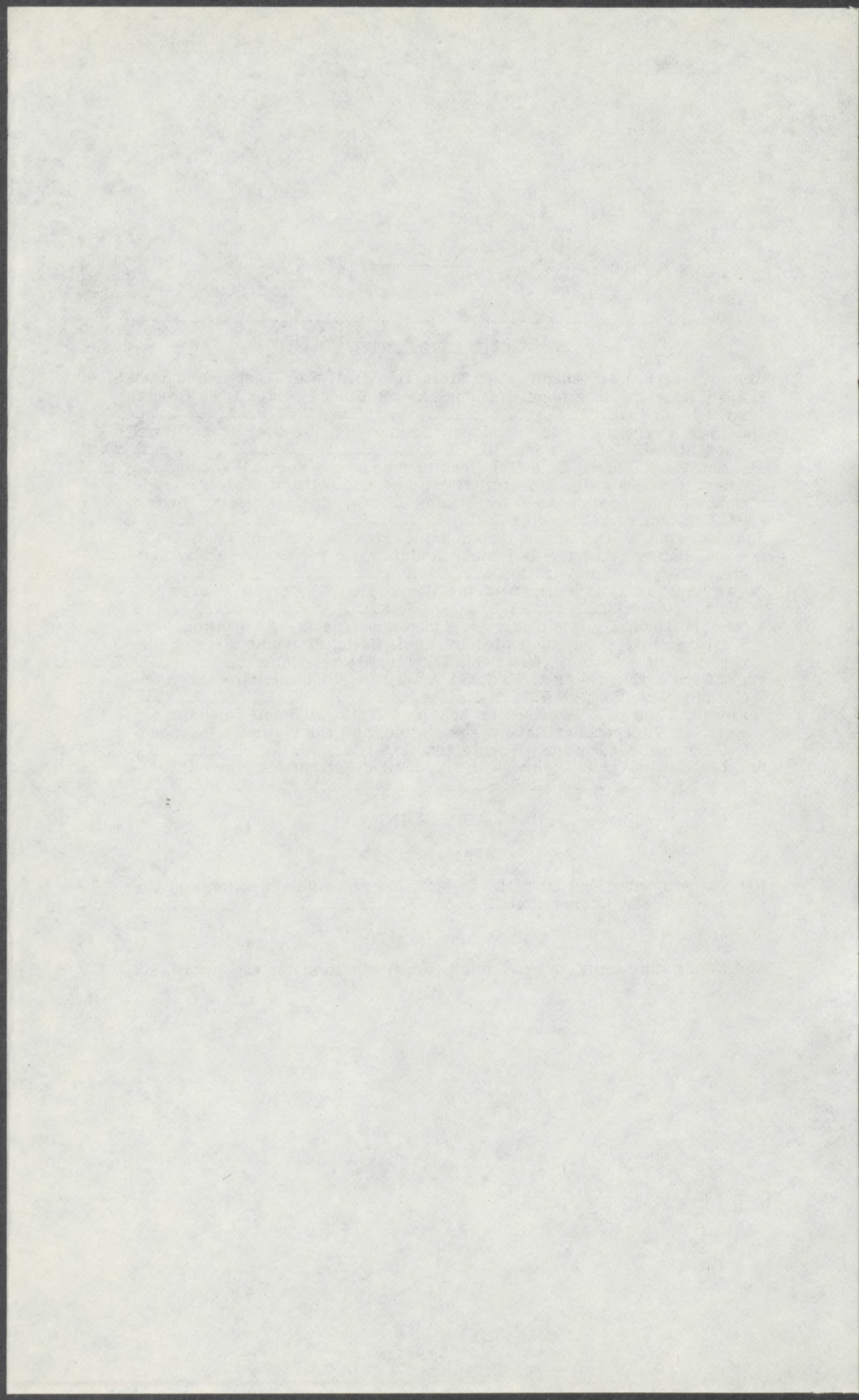
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DIESEL FUEL AND GASOLINE CONSERVATION ACT OF 1977

MONDAY, JUNE 27, 1977

U.S. SENATE,
SUBCOMMITTEE ON ENERGY CONSERVATION AND REGULATION,
OF THE COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, D.C.

The subcommittee met, pursuant to notice, at 8 a.m. in room 3110, Dirksen Office Building, Hon. J. Bennett Johnston presiding.

Present: Senators Johnston, Jackson, Ford, Metzenbaum, Hansen, and Domenici.

Also present: James T. Bruce, counsel.

OPENING STATEMENT OF HON. J. BENNETT JOHNSTON, A U.S. SENATOR FROM THE STATE OF LOUISIANA

Senator JOHNSTON. The hearing will come to order. This morning, we are considering S. 1699 which is a bill which will permit backhauling. In this energy crisis we must continue to search out every possible method of encouraging thrift in the use of gasoline, encouraging to the maximum extent possible every conservation measure we can find.

S. 1699 addresses one of the more obvious problems, I think, in energy conservation. The Robinson-Patman Act was never intended to prevent backhauling, particularly backhaulings which were not discriminatory, which would not lead to any monopolistic practices and did not, in any way, deter competition. However, out of either misinterpretation of the Robinson-Patman Act or because of overcaution on the part of those who interpreted it, a practice grew of permitting backhauling, but not allowing backhaul allowances to differ even when there was a significant difference in the cost of delivery to the different customer.

This morning, S. 1699 will address that question. S. 1699 in effect says it is not unlawful to offer differing backhaul allowances if they are cost-justified, but keep in mind, those allowances must be offered in a nondiscriminatory manner so as to satisfy the conditions and provisions of the Robinson-Patman Act.

We want to be very careful, of course, not to discriminate particularly against the smaller business firms. We do not want to put them at any disadvantage at all. Hence, our hearing today will seek to determine the answers to all of those possible problems that this bill may create.

Without objection I will insert in the record the bill S. 1699 and my opening statement.

[The information follows:]

95TH CONGRESS
1ST SESSION

S. 1699

IN THE SENATE OF THE UNITED STATES

JUNE 15 (legislative day, MAY 18), 1977

Mr. JOHNSTON (for himself, Mr. BUMPERS, Mr. McCLURE, and Mr. STONE) introduced the following bill; which was read twice and referred to the Committee on Energy and Natural Resources and, if and when reported, to be referred to the Committee on Commerce, Science, and Transportation by unanimous consent

A BILL

To provide energy conservation by alleviating current and continuing fuel waste, to reduce empty vehicle movements, and to increase efficiency in transporting goods by motor carriers which will ultimately benefit consumers, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Diesel Fuel and Gasoline
4 Conservation Act of 1977".

5 SEC. 2. Section 382 of the Energy Policy and Conserva-
6 tion Act of 1975 (42 U.S.C. 6201) is amended by adding a
7 paragraph (d) to read as follows:

8 “(d) It shall not be unlawful for a seller of goods,

1 wares, or merchandise pursuant to a uniform zone delivered
2 pricing system to grant backhaul allowances to a buyer where
3 the backhaul function is actually performed by the buyer
4 or an authorized carrier serving the buyer, where the allow-
5 ance is no greater than the actual savings in delivery costs to
6 the seller and where the allowances are available to all the
7 seller's customers on a nondiscriminatory basis.'".

STATEMENT OF HON. J. BENNETT JOHNSTON, A U.S. SENATOR FROM THE STATE OF LOUISIANA

This morning the Subcommittee on Energy Conservation and Regulation will consider S. 1699, the Diesel Fuel and Gasoline Conservation Act of 1977. I consider this bill to be the first in a series of measures referred to this Subcommittee that will address our national energy problems in a different way than President Carter's "moral equivalent of war".

Instead of the frontal assault we will seek to skirmish with the *indirect*, the more subtle ways we waste energy. I expect that many of these measures will alter legislation of the past or perhaps revise regulatory schemes that have the unintended result of wasting energy, of creating inefficiencies in our use of energy.

The Subcommittee will carry on of course with the major legislative energy initiatives. But part of the set of solutions to our energy problems, I believe, is that we must ferret out the more subtle causes of energy waste. Their number is legion. Taken separately, the amount of energy to be saved is perhaps small, relative to the major energy initiatives such as insulating our homes. But if the contributions of these measures are aggregated and considered over time, the result will be substantial and a necessary part of the overall solution that the Nation is seeking.

I sponsored the legislation we are considering today. I hope to sponsor other such measures in the future and I trust that my colleagues will be bringing legislation of this nature before the Congress as well.

S. 1699 aims to clarify an ambiguity that has arisen with respect to the application of the Robinson-Patman Act to uniform zone delivered pricing markets. This ambiguity is discouraging backhauling in such markets. The result is that trucks are returning empty from their fronthaul assignments when they could otherwise carry cargo. Consequently, we are unnecessarily wasting diesel fuel and gasoline. The nature of the ambiguity is that merchants are unsure as to what is the permissible backhaul allowance that can be granted in this type of market. S. 1699 would leave no doubt as to the legality of granting backhaul allowances up to the actual savings in delivery costs saved to the seller because of the backhauling. The bill itself simply says:

"(d) It shall not be unlawful for a seller of goods, wares or merchandise pursuant to a uniform zone delivered pricing system to grant backhaul allowances to a buyer where the backhaul function is actually performed by the buyer or an authorized carrier serving the buyer, where the allowance is no greater than the actual savings in delivery costs to the seller and where the allowances are available to all the seller's customers on a non-discriminatory basis."

I will stop here with my description of S. 1699 because we have only until 10 o'clock to complete our testimony. I urge our witnesses to summarize their remarks as we will include their entire prepared statement in the record.

Senator JOHNSTON. Senator Hansen, did you wish to speak?

STATEMENT OF HON. CLIFFORD P. HANSEN, A U.S. SENATOR FROM THE STATE OF WYOMING

Senator HANSEN. Thank you, Mr. Chairman. I would just briefly observe—I note in looking through Mr. London's statement, he says a problem I am sure you recognize, however, is one man's backhaul may be someone else's front haul.

We have talked with Wyoming Trucking Association representatives and that is their concern. I share your hope that a mechanism can be found that will make possible the conservation of fuel and at the same time do no damage to commercial carriers.

I approach the hearing with an open mind. It is difficult to resolve the problems of one segment and not create problems for another segment.

Senator METZENBAUM. I have no opening statement.

Senator FORD. No.

Senator JOHNSTON. We are pleased to welcome Mr. Paul London and Owen Johnson.

Gentlemen, all statements will be entered in the record. If you insist, we will let you read, but we would rather you summarize.

STATEMENT OF PAUL A. LONDON, DEPUTY ASSISTANT ADMINISTRATOR FOR CONSERVATION, FEDERAL ENERGY ADMINISTRATION

Mr. LONDON. I will speak up if the microphones are not working, and I will try to summarize the statement.

I am Paul A. London, Deputy Assistant Administrator for the Office of Conservation and Environment in the Federal Energy Administration. I am here this morning to present the views of the FEA on S. 1699, the Diesel Fuel and Gasoline Conservation Act of 1977.

Section 2(a) of the Clayton Antitrust Act, as amended by the Robinson-Patman Act, which makes it unlawful for a seller to discriminate between different purchasers in the prices at which he offers his merchandise, has been the subject of a great deal of attention by private trucking interests since long before the energy situation reached today's critical proportions.

The unhappy consequence of the present interpretation of section 2(a) is that private truckers too often must make a return trip empty because they cannot make a pickup from a seller of goods, wares, or merchandise in the proximity of the truckers' delivery points.

This is the problem you want to get at in S. 1699, Mr. Chairman, and it is a problem FEA wants to get at.

No businessman who operates a truck wants it to be running empty, but that is what the present interpretation of section 2(a) frequently causes to happen.

The Diesel Fuel and Gasoline Conservation Act would serve to clarify the Robinson-Patman Act provisions with respect to backhaul allowances, and provide private truckers the opportunity to reduce the amount of empty backhaul their vehicles run, thereby improving the fuel efficiency of their operations, their equipment, et cetera.

A problem which I am sure you recognize, however, is that one man's backhaul may very well be someone else's fronthaul. S. 1699 probably will not result in more freight being carried.

Instead, it is possible that increased loads for private trucks will cause decreased loads for regulated carriers who often may be required to continue to run, but now with somewhat lower load factors.

The FEA has been concerned over the past 2½ years about the empty backhaul problem of private truckers—in fact, of all truckers and of all transportation modes.

We believe there is much that can be done to improve the situation with important benefits in the conservation of energy.

We think S. 1699 will save energy and we support the bill. FEA's Food Industry Advisory Committee has contributed greatly to our ability to consider the backhaul problem.

In the spring of 1975, the Committee provided FEA with an analysis of the food industry's experience with empty backhaul resulting from the Federal Trade Commission's interpretation of section 2(a).

That analysis included the committee's conclusions regarding potential annual fuel and cost savings that could be attained by removing the restrictions imposed by current applications of section 2(a).

We were impressed by the committee's findings although we had reservations concerning the total extent of fuel savings promised.

These reservations were prompted by the caution I have expressed about the impact on the load factors of all classes of carriers and because we did not have data from other sources that would allow us to make a completely objective evaluation of the problem.

At that time, the FTC was considering a request made by the Director of the Council on Wage and Price Stability for a new interpretation of section 2(a) that would "permit actual cost backhaul allowances."

In August 1975 the FEA urged the Commission to give positive consideration to the Council's requests "as soon as possible," pointing out that we felt the potential energy savings were great enough to warrant such action.

However, this was qualified by our reservation concerning the extent of fuel savings that could be expected to result.

That situation holds today. We still do not have the information that would enable us to predict the fuel savings that would result from S. 1699, and I am not sure they could be established very precisely.

The most important project that has been undertaken along these lines is the recently concluded empty/loaded truck-mile survey performed by the Interstate Commerce Commission, which FEA supported during its formulation and conduct.

This survey covered a sample of 13,165 trucks. What the survey shows in part is that, for the sample tested, the proportion of private truck runs which are empty does not exceed the proportion experienced by ICC authorized trucks by as much as we had previously believed.

This higher than anticipated proportion for regulated trucks may well indicate that more runs would be dropped by them than we had expected, resulting in additional fuel savings.

However, an argument has been made that most runs will continue and that this amendment could cause some economic readjustments among those carriers offering freight service to all shippers without saving energy.

In conclusion, Mr. Chairman, the FEA supports S. 1699, but with reservations as I have explained them. We believe that the effects of the Diesel Fuel and Gasoline Conservation Act of 1977 will have to be closely monitored to assure that the promised energy savings and increased economic efficiencies are achieved.

Senator JOHNSTON. Thank you very much.

[The prepared statement of Mr. London follows:]

STATEMENT OF PAUL A. LONDON, DEPUTY ASSISTANT ADMINISTRATOR FOR
CONSERVATION, FEDERAL ENERGY ADMINISTRATION

Mr. Chairman and Members of the Subcommittee, I am Paul A. London, Deputy Assistant Administrator of the Office of Conservation in the Federal Energy Administration. I am here this morning to present the views of the

Federal Energy Administration on S. 1699, the Diesel Fuel and Gasoline Conservation Act of 1977, and your remarks, Mr. Chairman, in introducing the bill.

Section 2(a) of the Clayton Anti-Trust Act, as amended by the Robinson-Patman Act, which makes it unlawful for a seller to discriminate between different purchasers in the prices at which he offers his merchandise, has been the subject of a great deal of attention by private trucking interests since long before the energy situation reached today's critical proportions. The unhappy consequence of the present interpretation of Section 2(a) is that private truckers too often must make a return trip empty because they cannot make a pick-up from a seller of goods, wares or merchandise in the proximity of the truckers' delivery points. This is the problem you want to get at in S. 1699, Mr. Chairman, and it is a problem FEA wants to get at.

No businessman who operates a truck wants it to be running empty, but that is what the present interpretation of Section 2(a) frequently causes to happen. The Diesel Fuel and Gasoline Conservation Act would serve to clarify the Robinson-Patman Act provisions with respect to backhaul allowances, and provide private truckers the opportunity to reduce the amount of empty backhaul their vehicles run, thereby improving the fuel efficiency of their operations, their equipment, etc.

A problem which I am sure you recognize, however, is that one man's backhaul may very well be someone else's fronthaul. S. 1699 probably will not result in more freight being carried. Instead, it is possible that increased loads for private trucks will cause decreased loads for regulated carriers who often may be required to continue to run, but now with somewhat lower load factors.

The FEA has been concerned over the past two and a half years about the empty backhaul problem of private truckers—in fact, of all truckers and of all transportation modes. We believe there is much that can be done to improve the situation with important benefits in the conservation of energy.

Our Food Industry Advisory Committee has contributed greatly to our ability to consider the backhaul problem. In the spring of 1975, the Committee provided FEA with an analysis of the food industry's experience with empty backhaul resulting from the Federal Trade Commission's interpretation of Section 2(a). That analysis included the Committee's conclusions regarding potential annual fuel and cost savings that could be attained by removing the restrictions imposed by current applications of Section 2(a). We were impressed by the Committee's findings although we had reservations concerning the total extent of fuel savings promised. These reservations were prompted by the caution I have expressed about the impact on the load factors of all classes of carriers and because we did not have data from other sources that would allow us to make a completely objective evaluation of the problem.

At that time, the FTC was considering a request made by the Director of the Council on Wage and Price Stability for a new interpretation of Section 2(a) that would "permit actual cost backhaul allowances." In August of 1975 the FEA urged the Commission to give positive consideration to the Council's request "as soon as possible," pointing out that we felt the potential energy savings were great enough to warrant such action. However, this was qualified by our reservation concerning the extent of fuel savings that could be expected to result.

That situation holds today. We still do not have the information that would enable us to predict the fuel savings that would result from S. 1699, and I am not sure they could be established very precisely. The most important project that has been undertaken along these lines is the recently concluded empty-loaded truck mile survey performed by the Interstate Commerce Commission, which FEA supported during its formulation and conduct. This survey covered a sample of 13,165 trucks. What the survey shows in part is that, for the sample tested, the proportion of private trucks runs which are empty does not exceed the proportion experienced by ICC authorized trucks by as much as we had previously believed. This higher than anticipated proportion for regulated trucks may well indicate that more runs would be dropped by them than we had expected, resulting in additional fuel savings. However, an argument has been made that most runs will continue and that this amendment could cause some economic readjustments among those carriers offering freight service to all shippers without saving energy.

In conclusion, Mr. Chairman, the FEA supports S. 1699, but with reservations as I have explained them. We believe that the effects of the Diesel Fuel and Gasoline Conservation Act of 1977 will have to be closely monitored to assure that the promised energy savings and increased economic efficiencies are achieved.

Senator JOHNSTON. Next, we welcome Mr. Owen Johnson, and we hope you will summarize your statement.

STATEMENT OF OWEN M. JOHNSON, JR., DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION, ACCOMPANIED BY DARIUS M. GASKINS, DIRECTOR, BUREAU OF ECONOMICS

Mr. JOHNSON. Thank you, Mr. Chairman. I will try to summarize, although in this difficult area, it is difficult to stray too far from the text.

I have with me this morning Mr. Darius M. Gaskins, Director of our Bureau of Economics.

My appearance before the committee today is as a member of the Commission's staff, and the views I express are not those of the Commission or of any Commissioner.

This proposed amendment to the Energy Policy and Conservation Act of 1975, as I understand it, is designed to remedy an inequity now worked on buyers desiring to use their own trucks to pick up goods purchased at sellers' warehouses or mills.

Senator JOHNSTON. Let me interrupt. The views are not those of the Commission or any Commissioner. Is that the usual views?

Mr. JOHNSON. We have two kinds of views. In the first kind, staff makes a statement on behalf of the Commission. The other alternate is what I am representing here today, that is, the views of a staff member.

These differences arose because there may be a case in litigation at the FTC that would preclude the Commissioners from taking an official position on the merit of a bill—

Senator JOHNSTON. Thank you.

Mr. JOHNSON [continuing]. Instead of being obliged to pay mandatory delivered prices entailing delivery provided by the seller. This inequity is accentuated when the buyers' empty trucks are available to pick up purchases on the way home from deliveries to the buyers' own customers or outlets.

Under mandatory delivered pricing systems, such pickups are impossible, and the buyers' trucks return home empty—or travel "dead-head"—with a resultant loss in distribution efficiency and an increase in fuel consumption.

S. 1699 proposes to remedy this waste of gasoline and diesel fuel by making it lawful for a seller to quote both a delivered price and a so-called f.o.b. price, which can be calculated by allowing the deduction of a so-called backhaul allowance from the delivered price for a buyer who provides his own transport. This backhaul allowance may not be greater than the actual savings in delivery costs to the seller.

The proposed legislation is the result of industry fears that quotation of two such prices can result in violations of the Robinson-Patman price discrimination law.

Such price quotations could result in different prices to competing customers, a practice proscribed under some circumstances by the Robinson-Patman Act. Therefore, S. 1699 seems aimed at carving out a backhaul allowance exception to the prohibitions of the price discrimination law.

In this instance, I believe the committee may have collared the wrong culprit by viewing the Robinson-Patman Act as the impediment to backhaul allowances and associated energy savings.

Indeed, backhaul allowances can be entirely lawful under the Robinson-Patman Act. The real problem is the refusal of many manufacturer-sellers, perhaps involving whole industries, to offer buyers any alternative to delivered prices.

This problem is not remedied by the bill, which in any event does not require, but only permits, backhaul allowances.

The history of the backhaul issue at the Federal Trade Commission is both long and complex. With the committee's permission, I will submit for the record a series of advisory opinions, clarifying statements, and correspondence attempting to communicate the Commission's position on backhaul allowances and the Robinson-Patman Act.

The volume of this material reflects the difficulty of the issue and the apparent failure of the business community to understand the current FTC position. I will briefly undertake to review this matter.

The Robinson-Patman Act obliges a seller to offer the same price to all competing customers under normal circumstances. This is to prevent price discrimination in favor of large "power" buyers to the injury of competition with smaller buyers.

Thus, a delivered price which, on the basis of some formula, is uniform for all competing buyers, does not violate the Robinson-Patman Act because it does not discriminate.

Likewise, an f.o.b. price, where the buyer bears the cost of transportation, is entirely lawful so long as it is uniform for all competing buyers.

What the Commission has simply said is that as long as the delivered price is uniform and the f.o.b. price is also uniform, the law is satisfied.

Therefore, a backhaul allowance reducing a uniform delivered price to a uniform f.o.b. price is in no way violative of the Robinson-Patman Act.

Were the matter so simple in its execution, of course the Commission would not have issued so many clarifications, S. 1699 would not have been proposed, and I would not be here.

The problem arises in connection with how uniform delivered prices are determined. Though a delivered price is the same to all, obviously the sellers' cost of delivery to distant customers is greater than the cost of delivery to closer customers.

What sellers do to create uniform delivered prices is to use a system of zones or some system of freight cost averaging, or a combination of both, to equalize our transportation costs and make them the same for all customers within a zone.

Thus, the distant buyer gets a bargain in his share of freight costs and the closer customer is disadvantaged by so-called phantom

freight, representing a share of the distant customers' freight costs that he must bear. Customers in some places subsidize customers in others.

When backhaul allowances are deducted from uniform delivered price systems, they are usually computed as the sellers' so-called actual cost of delivery to the particular buyer seeking the allowance.

This would apparently be the case under S. 1699 for instance. But the distant buyer gets to deduct more from the uniform delivered price than his competitor, a close-in buyer, resulting in a variance in the pick-up, or f.o.b. price, and thus a price discrimination that may violate the Robinson-Patman Act.

The law may be violated because at the seller's loading dock the price of goods should naturally be the same to all buyers of the same quantities and types of goods. In such circumstances, different costs are not incurred by sellers in dealing with close-in and faraway buyers, as the sellers bear no freight costs.

The Commission's current interpretation requires that an f.o.b. price, however calculated, should be uniform as among competing customers. Economic realities being what they are, close-in customers may be inclined to elect an f.o.b. price, and distant customers may be inclined to elect the delivered price.

Nevertheless, if the result is both a uniform f.o.b. price and a uniform delivered price available at the election of the buyer, the Robinson-Patman requirements are met.

Senator METZENBAUM. Would you mind giving us an example of what you are discussing? I think I understand it, but I want to be certain.

Mr. JOHNSON. Let me take as an example a seller who has established a zone for customers of his plant out 100 miles. He figures his typical customer within that zone has a freight cost to deliver the \$100 product of \$10. He currently will be quoting a delivery price of \$100 to all customers in that zone.

He has the ability, but is not required to quote an f.o.b. price. The FTC's interpretation is he could take any price he wants reflecting cost savings and deduct that from his delivered price and make that his f.o.b. price.

If his average cost is \$10, he could quote a mill price of \$90.

Senator METZENBAUM. The zone is what area?

Mr. JOHNSON. It doesn't matter. The zone is entirely the buyer's own doing. If you get alleged inequities between close-in buyers and far out buyers, you can get it by indicating other zones. You will get these anomalies in this pricing system.

Senator METZENBAUM. Do you think the legislation has to provide some standards in order to determine what the zone should be?

Mr. JOHNSON. I think that is an impossible task. I think that should be left to the seller.

I simply alert you to the allegation that the Robinson-Patman Act is causing the problems in this area. The introductory statement made when this bill was introduced indicates part of the problem of the close-in buyer.

If a seller were to sell a price of \$90 at the mill where he has got customers whose true cost factor runs from zero up to \$20 in that

initial zone, the theory is all of the customers in the close-in zone to whom the cost factor is \$10 or less probably would exercise the backhaul action, would come by with their own truck, deliver to their own warehouse at less than \$10.

The customers who are from \$10 to \$20 in the second half, the further out half of the zone, would probably elect to take the delivered price since they cannot backhaul, in all probability, for less than the \$10 freight factor built into the delivered price.

Senator JOHNSTON. Mr. Johnson, let me cut you off at that point. Most of us have read your statement, and it will give us time for a little give and take here.

As I read your testimony, you oppose S. 1699, or at least you fail to endorse it because you say it may not be the real culprit, but you propose a required delivery price minus the cost of transportation.

My first question is, do you oppose S. 1699? Is there any mischief in it or do you think it might be more effective to do it another way?

Mr. JOHNSON. My feeling about S. 1699, Mr. Chairman, is it probably does not go beyond the current FTC interpretation. If there is mischief in it, it is in the ambiguity that would allow me to say it does or does not go beyond the FTC interpretation.

By that I have in mind the fact the bill says a seller may give a backhaul allowance no greater than the actual cost of delivery to the buyer.

It could be anywhere in a range of up to the actual cost of delivery to that buyer. The bill also states such an allowance shall be given on a nondiscriminatory basis. The ambiguity in my mind is on a nondiscriminatory basis means the f.o.b. price must be the same for all competing buyers. The allowance would be what the FTC, in its current interpretation of the backhaul problem, permits.

Senator JOHNSTON. The answer is then, no, it does not have any mischief other than the ambiguities. Would you explain what the mischief would be in the ambiguity, if any?

Mr. JOHNSON. As I have read some of the literature on the bill, it seems fairly apparent some of the proponents would not read "on a nondiscriminatory basis" as I do. They would back out actual cost to the buyer in discriminatory or differential f.o.b. prices.

The ambiguity in the bill is what it means on a nondiscriminatory basis.

Senator JOHNSTON. It would do no harm other than setting the lawyers to scratching their heads about what it means.

Mr. JOHNSON. I think the bill would introduce ambiguity in this area.

Senator JOHNSTON. You recognize there are many people in the business today who think many provisions of the Robinson-Patman Act are not clear, as they would like to grant backhaul allowances. But, they say we really don't know what this means, therefore, we are not going to do it. You are aware of that?

Mr. JOHNSON. I am aware of that criticism, but I have to wonder to what extent Robinson-Patman is the villain. I think with the latest clarification, which was in October 1975, the industry has been on notice as to what they can do under the Robinson-Patman Act.

I don't think there is any lack of clarity there. I don't have any empirical evidence on this, but I suspect backhaul is increasing, particularly in the food distribution industry.

Senator JOHNSTON. S. 1699 permits a backhaul allowance up to the actual delivery cost. The FTC says, in effect, only the average delivery cost can be allowed as an allowance.

Mr. JOHNSON. The FTC does not care how the f.o.b. price is calculated as long as it is nondiscriminatory.

Senator JOHNSTON. It can be actual or average?

Mr. JOHNSON. Or arbitrary.

Senator JOHNSTON. Is that clear under all of the FTC interpretations?

Mr. JOHNSON. I think it is clear under our latest interpretations.

Senator METZENBAUM. If you say you don't care, as long as it is the same to all, then would you explain to me the language in your statement which reads:

In effect, large buyers, especially grocery chains, would be seeking the right to buy at mill prices which are lower than the prices quoted to some smaller competitors.

Then you go on to say:

A heavy burden should be placed upon the proponents of such a law to explain why f.o.b. prices should not be the same for all competing buyers.

I don't understand (a) how that is in the bill and (b) why the mill prices for some buyers would be less than they are for other buyers. I don't recognize this bill as providing a different f.o.b. price. Do you say that it does?

Mr. JOHNSON. I think we would interpret it to do so. If I could go back to my example before where you have a zone with an average freight factor of \$10 and a uniform delivered price of \$100, if you were the seller and you were to back out the actual cost, you might have a large chainstore that was out at the very edge of that zone to whom the freight factor is say, \$20, under this bill, as I interpret it, it could be interpreted in terms of what does nondiscriminatory mean.

OK, the seller could say the delivery price is \$100 to you. I am backing out the full cost factor to your warehouse, which is \$20. My f.o.b. mill price is \$80.

Now, there might be another grocery store in the middle of the zone to whom he would quote a price of \$100 less \$10. That is the cost factor to him. It happens to be the average cost factor, as well, and he would have an average cost price of \$90. If either of them arrive at the dock with their own truck, the one customer is being quoted an \$80 price; the other, a \$90 price, and there is no justification in terms of the seller's costs—

Senator METZENBAUM. Is that the mischief you find in this bill? Is that the failure? The failure to prohibit discriminatory f.o.b. pricing?

Mr. JOHNSON. I find that in the ambiguity—

Senator METZENBAUM. If the bill contained a special provision prohibiting discriminatory f.o.b. pricing, would you find the bill to be more supportive?

Mr. JOHNSON. Yes. In that view, it would reflect the FTC interpretation of the Robinson-Patman Act.

Senator METZENBAUM. Would you be kind enough to have the FTC lawyers draft an amendment? I do not understand that to be the thrust of this legislation, Mr. Chairman. It is your bill. I don't understand that the thrust of the bill is to permit discriminatory f.o.b. pricing—you can charge more or less to different people, depending on how far away their operations are from the location of the mill.

If they were to draft an amendment which prohibited discriminatory f.o.b. pricing, that all f.o.b. pricing would be the same for everybody, would you accept a distinction based upon quantity?

Mr. JOHNSON. Oh, yes, as long as the quantity discount was based on actual cost savings associated with the larger shipment.

Senator JOHNSTON. I think everybody wants to achieve what Mr. Johnson is saying, and what I am saying, we want to, in effect, permit the backhauling, and we want to do it under nondiscriminatory competitive circumstances.

I have been advised that the FTC rules have not been clear and that sellers are afraid of granting backhaul allowances, afraid they will be in violation of FTC rules.

What Mr. Johnson is saying, as I understand it, is this bill would permit everybody to offer a delivery price minus transportation and figure out the transportation cost on a per mile basis.

Senator METZENBAUM. I don't think he is saying that, from what I understand. What I understand him to say, they would find this bill far more acceptable if it had a specific provision in it that prohibited discriminatory mill pricing, the discriminatory f.o.b. pricing. Their concern is with the backhaul allowances. It could wind up that one buyer would be getting a higher allowance than the other buyer. Am I stating it correctly?

Mr. JOHNSON. That is absolutely correct.

Senator METZENBAUM. Since it seems to me there is some validity to what he is saying, I am wondering if you think such an amendment is acceptable?

Senator JOHNSTON. I think he ought to get a higher allowance if he has further to haul it. It ought to be an actual cost-of-delivery allowance, not a uniform allowance as we appreciate what the present FTC rules presently require.

Isn't the present system such that you can have a delivered price, but it has to be the same for everyone. And you can offer an f.o.b. price, but it has to be the same for everyone, which results in a constant backhaul allowance regardless of the distance you have to haul the goods.

Mr. JOHNSON. Constant within a zone, the same for all customers. That is correct, but as I read the bill, it certainly could be read, as I have said, to be the same as the FTC interpretation. It does not say they have to absolutely back out the actual cost which might be difficult to calculate. It says they can grant any backhaul allowance up to the actual cost, so it could be a lesser amount to accommodate zones under the bill.

Senator JOHNSTON. Would it be practical to have—to disregard zones and have it per mile?

Mr. JOHNSON. It could be possible. They would have to drop the zones. Otherwise, you would have a discriminatory practice.

Senator METZENBAUM. If you gave a backhaul allowance related to distance, whether it is per mile or per zone, I am not certain how that would be discriminatory between the larger purchases and the smaller competitors. The smaller competitors might be further removed from the mill and the larger ones might be closer or vice versa. I do not see how you get into that issue.

Mr. JOHNSON. It is not necessarily large versus small. It is the outlying customer versus the closer-in customer.

Senator METZENBAUM. Then you have to explain to me the sentence, "In effect, large buyers, especially grocery chains, would be seeking the right to buy at mill prices which are lower than the prices quoted to some smaller competitors." That is your language.

Mr. JOHNSON. I think it is my assumption the people who will utilize the backhaul option in any event would be the large chain-store buyers in the industry who do have a fleet of trucks out there on the road.

Senator JOHNSTON. As I understand it, S. 1699 clearly means backhaul allowances may reflect the actual delivery cost. Are we agreed on that? But, current interpretations say backhaul allowances may give only the average cost, average within the zone.

Mr. JOHNSON. Then we say the mill price has to be uniform. What you say is true. If you have a zone system and you have a common factor, obviously you can only back out that factor or some equal portion of that factor to arrive at an f.o.b. mill price.

We do not say specifically how you have to back out or what you have to back out, whether it is an actual cost factor, actual cost factor or arbitrary, we are saying the mill, f.o.b. mill price has to be nondiscriminatory.

Senator JOHNSTON. Do you think the Commission would back you up in that?

Mr. JOHNSON. I am fairly certain of it. The composition of the Commission has changed since October 1975, but I cannot believe they have changed that interpretation.

Senator JOHNSTON. Thank you very much, gentlemen.

Senator METZENBAUM. I would say to Mr. Johnson, if the Bureau of Competition has any suggested language which they feel would make this bill a better bill and eliminate the ambiguities, I would be interested in seeing that language.

Mr. JOHNSON. I will be happy to submit some language that would clarify, in our view, this problem of potential discrimination.

I should say the legislative proposal I have attached to my testimony would go beyond the FTC interpretation or this bill by making the offering of an f.o.b. price mandatory.

I think the real problem in the approach of S. 1699 is that it leaves the incentives about where they are right now. That is sellers may, but are under no compulsion, offer an f.o.b. price. The heart of the matter is the delivered pricing system and the failure to give the f.o.b. option.

Senator METZENBAUM. Mr. Chairman, it seems to me you might want to point that out to some of the other witnesses who might care to comment.

Senator JOHNSTON. I was just getting ready to say that. If the other witnesses would take a look at Mr. Johnson's proposal and give us their judgment on it, we would appreciate that.

[The prepared statement of Mr. Johnson and subsequent information follow:]

STATEMENT OF OWEN M. JOHNSON, JR., DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION

Thank you, Mr. Chairman, for this opportunity to testify on S. 1699, the Diesel Fuel and Gasoline Conservation Act of 1977. My appearance before the Committee today is as a member of the Commission's staff, and the views I express are not those of the Commission or of any Commissioner. This proposed amendment to the Energy Policy and Conservation Act of 1975,¹ as I understand it, is designated to remedy an inequity now worked on buyers desiring to use their own trucks to pick up goods purchased at sellers' warehouses or mills instead of being obliged to pay mandatory delivered prices entailing delivery provided by the seller. This inequity is accentuated when the buyers' empty trucks are available to pick up purchases on the way home from deliveries to the buyers' own customers or outlets. Under mandatory delivered pricing systems, such pick-ups are impossible, and the buyers' trucks return home empty—or travel "deadhead" with a resultant loss in distribution efficiency and an increase in fuel consumption.

S. 1699 proposes to remedy this waste of gasoline and diesel fuel by making it lawful for a seller to quote both a delivered price and a so-called f.o.b.² price, which can be calculated by allowing the deduction of a so-called backhaul allowance from the delivered price for a buyer who provides his own transport.³ This backhaul allowance may not be greater than the actual savings in delivery costs to the seller.

The proposed legislation is the result of industry fears that quotation of two such prices can result in violations of the Robinson-Patman price discrimination law. Such price quotations could result in different prices to competing customers, a practice proscribed under some circumstances by the Robinson-Patman Act.⁴ Therefore, S. 1699 seems aimed at carving out a backhaul allowance exception to the prohibitions of the price discrimination law.

In this instance, I believe the Committee may have collared the wrong culprit by viewing the Robinson-Patman Act as the impediment to backhaul allowances and associated energy savings. Indeed, backhaul allowances can be entirely lawful under the Robinson-Patman Act. The real problem is the refusal of many manufacturer-sellers (perhaps involving whole industries) to offer buyers any alternative to delivered prices. This problem is not remedied by the bill, which in any event does not require, but only permits, backhaul allowances.

The history of the backhaul issue at the Federal Trade Commission is both long and complex. With the Committee's permission, I will submit for the record a series of advisory opinions, clarifying statements, and correspondence attempting to communicate the Commission's position on backhaul allowances and the Robinson-Patman Act. The volume of this material reflects the difficulty of the issue and the apparent failure of the business community to understand the FTC position. I will briefly undertake to review the matter.

The Robinson-Patman Act obliges a seller to offer the same price to all

¹ The proposed amendment adds a new paragraph (d) to section 382 of the act, "Energy Conservation in Policies and Practices of Certain Federal Agencies."

² Free-on-board, meaning a price at the seller's facilities involving a pick-up by the buyer. There are many synonyms for f.o.b. including "point of origin" price, "mill" price, "true f.o.b." price, "pick up" price, and "loading dock" price, among others.

³ The proposed legislation does not apply to common carriers, which are subject to Interstate Commerce Commission jurisdiction.

⁴ A violation of Robinson-Patman requires, of course, more than a mere difference in price. Numerous jurisdictional requirements must be met, competitive injury must be demonstrated, and various defenses must be unavailable.

competing customers under normal circumstances. This is to prevent price discrimination in favor of large power buyers to the injury of competition with smaller buyers. Thus, a delivered price which, on the basis of some formula, is uniform for all competing buyers, does not violate the Robinson-Patman Act because it does not discriminate. Likewise, an f.o.b. price, where the buyer bears the cost of transportation, is entirely lawful so long as it is uniform for all competing buyers. What the Commission has simply said is that as long as the delivered price is uniform and the f.o.b. price is also uniform, the law is satisfied. Therefore, a backhaul allowance reducing a uniform delivered price to a uniform f.o.b. price is in no way violative of the Robinson-Patman Act.

Were the matter so simple in its execution, of course, the Commission would not have issued so many clarifications, S. 1699 would not have been proposed, and I would not be here. The problem arises in connection with how uniform delivered prices are determined. Though a delivered price is the same to all, obviously the sellers' cost of delivery to distant customers is greater than the cost of delivery to closer customers. What sellers do to create uniform delivered prices is to use a system of zones or some system of freight cost averaging (or a combination of both) to equalize out transportation costs and make them the same for all customers within a zone. Thus, the distant buyer gets a bargain in his share of freight costs and the closer customer is disadvantaged by so-called "phantom freight," representing a share of the distant customers' freight costs that he must bear. Customers in some places subsidize customers in others.

When backhaul allowances are deducted from uniform delivered price systems, they are usually computed as the sellers' so-called actual cost of delivery to the particular buyer seeking the allowance. This would apparently be the case under S. 1699, for instance. But the distant buyer gets to deduct more from the uniform delivered price than his competitor, a close-in buyer, resulting in a variance in the pick-up, or f.o.b. price, and a price discrimination which may violate the Robinson-Patman Act. The law may be violated because at the sellers' loading dock the price of goods should naturally be the same to all buyers of the same quantities and types of goods. In such circumstances, different costs are not incurred by sellers in dealing with close-in and far-away buyers, as the sellers bear no freight costs.

The Commission's current interpretation requires that an f.o.b. price, however calculated, should be uniform as among competing customers. Economic realities being what they are, close in customers may be inclined to elect an f.o.b. price, and distant customers may be inclined to elect the delivered price. Nevertheless, if the result is both a uniform f.o.b. price and a uniform delivered price available at the election of the buyer, the Robinson-Patman requirements are met. This is the Commission's position. To this extent, the Robinson-Patman Act is not an impediment to the implementation of backhaul, assuming that sellers in fact want to facilitate backhaul. If sellers afford an f.o.b. option as permitted by the Commission's interpretations, we strongly suspect that backhaul would be increasingly utilized and delivered pricing systems would be abandoned in favor of a straight f.o.b. method of sale.

The pressing issue of energy conservation may force us to take another look at delivered price systems. They, not the Robinson-Patman Act, are the real culprit in denying the efficiencies which can be achieved through buyer-provided transportation. While S. 1699 is an apparent attempt to provide further stimulus for buyer-provided transportation, particularly "backhaul," it does not, on its face go beyond the existing F.T.C. interpretation of what the Robinson-Patman Act permits. This depends, of course, upon what S. 1699 means when it states that backhaul allowances no *greater* than the sellers' savings in delivery costs are to be made available *on a nondiscriminatory basis*. If "nondiscriminatory" means that the resulting f.o.b. prices are to be *uniform*, as applied to competing customers, then S. 1699 merely repeats the current F.T.C. view. On the other hand, if S. 1699 would legitimize differences in f.o.b. prices, then such prices are "discriminatory" in the traditional, Robinson-Patman sense. In effect, large buyers, especially grocery chains, would be seeking the right to buy at mill prices which are lower than the prices quoted to some smaller competitors. This would be a special exemption from the price discrimination laws for a limited group of large buyers. A heavy burden should be placed upon the proponents of such a law to explain why f.o.b. prices should not be the same for all competing buyers.

There are other problems with S. 1699. In the first place, it guarantees nothing in the way of energy savings because it merely permits, rather than requires, the backhaul alternative to delivered pricing. A seller can continue to offer delivered prices only and refuse backhaul allowances. Or, a seller can set his backhaul allowance at so low a level that few buyers, if any, will utilize it. Energy savings are therefore difficult to quantify, and may be non-existent. Further, the bill applies only to sellers utilizing *zone* delivered pricing systems. Many sellers utilize delivered price systems that do not feature zones. The reason for their exclusion is not apparent. Nor does the legislation apparently affect buyers utilizing common carriers instead of their own freight capacities. The current F.T.C. interpretation does not involve any such limitation. The bill will also not affect sellers who offer *non-uniform* delivered prices based on actual delivery costs. This neglects another opportunity for fuel-efficient backhaul which current F.T.C. interpretations would permit.

My own view of the backhaul dilemma is based on my scepticism towards delivered price systems generally. In many industries, uniform delivered prices are the only prices available to buyers, irrespective of their desire to utilize their own freight capabilities. That these systems result in inefficiency is implicit in S. 1699. The bill does little to dismantle delivered prices because, as noted earlier, it merely *permits* sellers to offer backhaul allowances. The proposed legislation could be interpreted to legalize price discrimination in uniform zone delivered price industries but, at the same time, to permit preservation of those delivered price systems. The real question, in my mind, is whether uniform delivered price systems currently merit special legislative provisions.

Historically, delivered pricing systems have been an effective device for implementation and policing of price fixing agreements, territorial allocation arrangements, and other forms of anticompetitive conduct. Where price competition is replaced by administered, or "lockstep" prices, consumers can be seriously exploited. Moreover, in trying to cope with interdependent pricing in oligopolistic industries under the present antitrust laws, any legislative provisions which declare certain uniform delivered pricing practices to be "not unlawful" will make it that much more difficult to mount an antitrust challenge against the delivered price system itself. The "reasonableness" of such systems will be assertedly confirmed by the offering of a meaningless backhaul option.

Some of the evils inherent in delivered prices were described in the 1955 *Report of the Attorney General's National Committee to Study the Antitrust Laws*—

"Where sellers desire to suppress price competition, a strictly enforced compulsory 'delivered' pricing formula among all industry members can materially contribute to success. A uniformly maintained industry-wide system of 'delivered' quotations immediately simplifies each participant's pricing structure. He merely sets a base price which the formula automatically converts into the actual invoice cost to each customer. At the same time, rather than necessitating a complex series of individual freight computations for numerous buyers, the 'delivered' price list immediately discloses the effective prices that everyone pays. Such simplification facilitates mutual surveillance of business rivals' price offers, enabling any departure from a fixed price to be quickly caught. To this extent a 'delivered' pricing system eases the task of policing and supervision which is indispensable to the success of any collusive stabilization."

My proposal to the Committee, Mr. Chairman, is that a substitute for S. 1699 be drafted that insures substantially greater energy savings than would accrue from the existing bill and that strikes at the core of the delivered pricing problem itself. My proposal is based on one made by Congressman John D. Dingell in an August 7, 1973 letter to then-FTC Chairman Lewis A. Engman. Congressman Dingell suggested:

"It could be *required* that as an alternative to *any* delivered price, an undelivered price *must* be offered which would be equal to the delivered price minus the average cost of delivery." (Emphasis added.)

Such an amendment would apply to *all* delivered prices, and would obligate the seller to offer a pick-up, or meaningful f.o.b. option price whenever he offers a delivered price. The pick-up price would be less by an amount at least equal to the sellers' cost savings and would have to be offered on a nondiscriminatory basis to all customers. This would be in harmony with the Robin-

son-Patman Act. Tremendous energy savings might be realized across all industries; buyers could shop for the most efficient form of transportation; and delivered pricing systems would be significantly curtailed to the benefit of competition in general, and ultimately the American consumer. I have attached to my testimony such a proposed draft substitute for S. 1699.

Thank you, Mr. Chairman, for your invitation to testify on this most important problem.

Section 382 of the Energy Policy and Conservation Act of 1975 (42 U.S.C. 6201) is amended by adding a paragraph (d) to read as follows:

(d) It shall be unlawful for a seller of goods, wares or merchandise pursuant to a delivered pricing system, to fail or refuse to provide a backhaul allowance to a buyer, where the backhaul function will be performed by the buyer, or an authorized carrier serving the buyer. Such allowances shall be made available to all the seller's customers on a nondiscriminatory basis and shall be no less than the amount of the actual transportation cost involved in the delivery of the goods. The actual transportation cost shall be the cost that the seller incurs in delivering the goods either by operating his own transportation equipment or by payment to a contract or common carrier.

FEDERAL TRADE COMMISSION,
BUREAU OF COMPETITION,
Washington, D.C., June 30, 1977.

Hon. J. BENNETT JOHNSTON,

Chairman, Subcommittee on Energy Conservation and Regulation, Senate Committee on Energy and Natural Resources, Washington, D.C.

DEAR SENATOR JOHNSTON: This letter is a follow-up to my testimony of June 27, 1977, commenting on S. 1699. I promised in my testimony to provide the Committee with a full history of the backhaul allowance issue at the FTC, and I am enclosing these materials at this time.

Also, during the hearing Senator Metzenbaum asked if a simple amendment to S. 1699 could be formulated providing for a uniform f.o.b. price that would be the same to all buyers, thereby eliminating Robinson-Patman problems in the current draft. I believe this would be possible by the addition at the end of the bill of the words "so as to result in uniform f.o.b. prices to all competing buyers."

Yours truly,

OWEN M. JOHNSON, Jr.,
Director, Bureau of Competition.

Enclosures.

RECAPITULATION OF THE COMMISSION'S ACTIONS RESPECTING "BACKHAUL ALLOWANCE"

1. Advisory Opinion No. 147 (16 CFR 15.147) was issued by the Commission on October 2, 1967 to, and at the request of, General Foods Corporation. Advisory opinions are issued pursuant to Sections 1.1 through 1.4 of the Commission's Rules of Practice and Procedure (16 CFR 1.1-1.4). Copy of the relevant sections of the Rules are attached.

2. Copy of October 2, 1967 advice letter to General Foods Corporation.

3. Copy of press release digest of Advisory Opinion No. 147.

4. Summary of General Foods' advice request:

"General Foods Corporation informed the Commission, in substance, that it was engaged in the sale of food products on a delivered price basis, and that it, accordingly, did not permit customers to pick up products at a General Foods' warehouse or plant shipping point.

"It proposed institution of a program whereunder customers who had trucks returning to their warehouses would be permitted to pick up products at a General Foods' warehouse or plant shipping point and be paid an allowance (i.e. a discount from the delivered price) equal to the amount General Foods would otherwise pay a common carrier for delivery to the customer."

5. Summary of the Commission's 1967 advice:

"The Commission, in substance, advised that, assuming the presence of all other elements necessary to determination of a violation of Section 2(a) of the amended Clayton Act, the proposed allowances would result in non-cost justified differences in price between customers, and would thus probably violate the statute.

"A seller is not required under the statute to pass on his cost savings to a customer but where he elects to do so in one instance, the statute does require that he not discriminate between purchasers where such discrimination has the proscribed adverse effect on competition."

6. On the basis of ensuing inquiries, including inquiries from the Cost of Living Council and the National Commission on Productivity, the Commission on December 26, 1973, issued a clarifying statement requesting Advisory Opinion No. 147. Copy of this clarifying statement is attached.

7. Summary of 1973 Clarifying Statement:

"This statement sought to make it entirely clear that no legal impediment whatever exists under the laws the Commission administers to prevent a seller, selling on a uniform delivered price basis, from offering to his customers *the option* of purchasing at a nondiscriminatory true f.o.b. shipping point price."

8. Pamphlet subsequently issued by the National Commission on Productivity, pointed out that, although some sellers continue to resist giving their customers backhaul opportunities, the Commission's 1973 Clarifying Statement made it clear that their argument to the effect that legal difficulties or a legal roadblock exists to providing backhaul opportunities are incorrect. Copy of pamphlet attached (see pages 16 and 17).

9. On March 19, 1975, the Commission undertook to further clarify its position (press release of March 28, 1975) explaining that, under the Robinson-Patman amendment to the Clayton Act:

"* * * no question of unlawful discrimination would arise [from an f.o.b. shipping point price option if made available by a uniform delivered price seller] so long as the f.o.b. price is (1) uniform and (2) available to all customers on a nondiscriminatory basis."

A copy of this statement is attached.

10. The Commission's last backhaul clarification was issued in response to a letter from the former Director of the Council on Wage and Price Stability, Albert Rees. That statement explains why the granting of varying allowances for backhauling is not justified by valid cost differences to the seller.

11. Representative staff responses to congressional inquiries concerning backhaul are attached, for information as follows:

- (a) Letter of 8-15-76 to Congressman Dingell;
- (b) Letter of 12-29-75 to Congressman Mills;
- (c) Letter of 12-15-75 to Mr. Deaton, office of Senator McClellan.

PROCEDURES AND RULES OF PRACTICE

Part 1—General Procedures

SUBPART A—INDUSTRY GUIDANCE

Advisory opinions

§ 1.1 *Policy*.—Any person, partnership, or corporation may request advice from the Commission with respect to a course of action which the requesting party proposes to pursue. It is the Commission's policy to consider requests for such advice and, where practicable, to inform the requesting party of the Commission's views. A request ordinarily will be considered inappropriate for such advice: (a) where the course of action is already being followed by the requesting party; (b) where the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or another governmental agency; or (c) where the proposed course of action or its effects may be such that an informed decision thereon cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry.

§ 1.2 *Procedure*.—The request for advice should be submitted in writing to the Secretary of the Commission and should include full and complete information regarding the proposed course of action. Conferences with members of the Commission's staff may be held before or after submittal of the request. Submittals of additional information may be required. The original submittal should affirmatively show that the proposed course of action is not currently being followed by the requesting party and is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency. If the request is for advice as to whether the proposed course

of action may violate an outstanding order to cease and desist issued by the Commission, such request will be considered as provided for in § 3.61 of this chapter.

§ 1.3 *Advice*.—(a) On the basis of the facts submitted, as well as other information available to the Commission, and if practicable, the Commission will inform the requesting party of its views and may take such other action as may be appropriate.

(b) Any advice given is without prejudice to the right of the Commission to reconsider the questions involved and, where the public interest requires, to rescind or revoke the advice. Notice of such rescission or revocation will be given to the requesting party so that he may discontinue the course of action taken pursuant to the Commission's advice. The Commission will not proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

§ 1.4 *Public disclosure*.—(a) Advisory opinions, and requests therefor, including names and details, will be placed in the Commission's public record immediately after the requesting party has received the Commission's advice, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's rules, and the public interest.

(b) All requests for advice submitted under § 1.2 concerning proposed mergers, together with supporting materials, will be placed on the public record as soon after they are received as circumstances permit, except for which confidential classification has been requested, with a showing of justification therefor, and which the Commission, with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public. Within thirty (30) days after such requests and materials are placed on the public record, any person may file formal written objections or comments with the Secretary of the Commission. Such objections or comments shall be placed on the public record except for information for which confidentiality has been requested, with a showing of justification therefor, and which the Commission with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public. Additionally, any communications, written or oral, concerning such proposed mergers, received by any individual member of the Commission, or by an employee involved in the decisional process, will be placed on the public record immediately after their receipt. In the case of an oral communication, the member or employee shall immediately furnish the Commission with a memorandum setting forth the full contents of such communication and the circumstances thereof and such memorandum will immediately be placed on the public record. Any advice given under § 1.3 concerning proposed mergers, together with a statement of supporting reasons, will be published when given.

OCTOBER 2, 1967.

In re File No. 683 7026.

ALBERT G. PERKINS, Esq.,
Law Department,
General Foods Corp.,
White Plains, N.Y.

DEAR MR. PERKINS: This is with further reference to your request for an advisory opinion with respect to your proposal to grant so-called "back-haul" allowances to customers who pick up their own purchases at General Foods' warehouses.

You state that you presently sell dry (non-frozen) grocery products on a delivered price basis with bracket pricing and do not permit customers to pick up products at warehouses or plants. Customers with trucks returning empty to their warehouses along routes near General Foods' warehouses and plants are now demanding the opportunity to pick up products and to earn an allowance by so doing. You further state that you are now considering a program whereunder customers would be permitted to pick up products and be paid an allowance equal to the amount you would otherwise have to pay a common carrier to deliver to the customer.

Assuming a favorable opinion as to this question, you further request an opinion as to whether the program may lawfully be offered under conditions which would limit its availability to large (truck-load) orders. This restriction is contemplated because of limited loading dock space at your warehouses and plants and because you intend to load orders on customer equipment. Hence you intend to impose uniform restrictions on the type of equipment that may be used and upon the size of the order that may be picked up.

In the Commission's view, this proposal is governed by the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which, in brief, provides that it shall be unlawful for a seller to discriminate in price between different purchasers of goods of like grade and quality where the effect may be to substantially lessen competition or to create a monopoly and where none of the defenses afforded by the Act are present. It is the Commission's further view that the proposal is also governed by the provisions of the order under that Section in Docket 6018, issued against your Corporation in 1956.

The Commission has given your first proposal its careful consideration and has concluded that, assuming the presence of all the other elements necessary to a determination of a violation of this statute, its implementation would probably result in a violation of the Act and the order in Docket 6018. This result would seem to necessarily flow from the use of a delivered pricing system, for in such a case the freight factor included within the price is not the actual freight to any given point, but an average of the freight costs for all customers within the zone wherein the delivered price is quoted, or, at least, a figure determined by some formula apart from actual costs. If one customer is then given a "back-haul" allowance for the actual freight saved, it would seem that a serious possibility of discrimination would exist in any delivered pricing system and it is highly doubtful that the defense of cost justification, at least, would be available.

While this conclusion may seem unreasonable from one point of view, since the allowance will be for no more than the actual freight saved, it would seem to be a necessary result of using a delivered pricing system. Whenever such a seller departs from his delivered prices for the benefit of one customer, he leaves himself open to a charge of discriminating against his other competing customers who order in the same quantities and hence fall within the same pricing bracket because he failed to make allowances for the individual cost factors present in their situations. The law does not require that a seller pass on his cost savings to his customers, but where he elects to do so in one instance it does require that he not discriminate between his purchasers where such discrimination has the proscribed adverse effect on competition.

In view of this disposition of your first question, there does not appear to be any need for the Commission to pass upon the second.

By direction of the Commission, Commissioner Elman not concurring.

JOSEPH W. SHEA,
Secretary.

[From Advisory Opinion Digest No. 147]

GRANTING OF "BACK-HAUL" ALLOWANCES TO CUSTOMERS PICKING UP THEIR OWN ORDERS

The Commission recently rendered an advisory opinion advising a manufacturer of food products that it would probably be illegal to grant so-called "back-haul" allowances to customers who pick up their own purchases at the manufacturer's warehouses.

The manufacturer in question presently sells its products on a delivered price basis with bracket pricing and does not permit customers to pick up products at warehouses or plants. Customers with trucks returning empty to their warehouses along routes near the manufacturer's warehouses and plants are now demanding the opportunity to pick up product and to earn an allowance by so doing. Consequently, the manufacturer proposed to institute a program whereunder customers would be permitted to pick up products and be paid an allowance equal to the amount the manufacturer would otherwise have to pay a common carrier to deliver to the customer.

The Commission advised that the proposal was governed by the provision of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,

which, in brief, provides that it shall be unlawful for a seller to discriminate in price between different purchasers of goods of like grade and quality where the effect may be substantially to lessen competition or to create a monopoly and where none of the defenses afforded by the Act are present. Considered in the light of this statute, the Commission concluded that, assuming the presence of all the other elements necessary to a determination of a violation of the statute, the implementation of this proposal would probably result in a violation of the law. This result seemed to the Commission necessarily to flow from the use of a delivered pricing system, for in such a case the freight factor included within the price is not the actual freight to any given point, but an average of the freight costs for all customers within the zone wherein the delivered price is quoted, or, at least, a figure determined by some formula apart from actual costs. If one customer is then given a "back-haul" allowance for the actual freight saved, the opinion advised serious possibility of discrimination would exist in any delivered pricing system and it is highly doubtful that the defense of cost justification, at least, would be available.

While this conclusion may seem unreasonable from one point of view, since the allowance would be for no more than the actual freight saved, it seemed to the Commission to be a necessary result of using a delivered pricing system. Whenever such a seller departs from his delivered prices for the benefit of one customer, he leaves himself open to a charge of discrimination against his other competing customers who order in the same quantities and hence fall within the same pricing bracket because he failed to make allowances for the individual cost factors present in their situations. The law does not require that a seller pass on his cost savings to his customers, the Commission stated, but where he elects to do so in one instance it does require that he not discriminate between his purchasers where such discrimination has the proscribed adverse effect on competition.

Commissioner Elman did not concur.

NOTE.—In conformity with Commission policy concerning publication of digests of advisory opinions, this news release is the only material of public record. The advisory opinion itself and all background papers are confidential and are not available to the public.

[From the Federal Trade Commission News, Washington, D.C.]

CLARIFYING STATEMENT ON "BACKHAUL" ALLOWANCES IS ISSUED BY COMMISSION

The Federal Trade Commission today issued a statement clarifying an advisory opinion it rendered in 1967 (No. 147). That advisory opinion states that the granting of "backhaul" allowances by a seller using a uniform zone delivered pricing system would raise questions under Section 2(a) of the Robinson-Patman Act, which prohibits price discriminations endangering competition. (Backhaul allowances are those granted to customers making their own pickups at the seller's warehouse.)

In its clarifying statement, the Commission expressed the view that questions probably would not arise under the laws it administers if sellers, using valid uniform, zone delivered pricing systems, offer to all customers, on a non-discriminatory basis, in lieu of a delivered price, the option of purchasing at a true f.o.b. shipping point price.

The Commission added that it intends to:

Scrutinize delivered price systems in the food products industry in order to determine whether they are unfair to customers or to ultimate consumers, and thus violate Section 5 of the FTC Act.

Develop empirical information on the impact on food prices of such delivered price systems which will enable it to make this determination.

The Commission took this action in view of representations made by interested parties, including the Cost of Living Council, and the National Commission on Productivity.

The text of the 1967 advisory opinion follows.

[From the Federal Trade Commission News, Washington, D.C.]

FTC CLARIFIES "BACKHAUL" ALLOWANCE RULING

The Federal Trade Commission announced today clarification of its 1967 Advisory Opinion No. 47 concerning "backhaul" allowances. (Backhaul allow-

ances are those granted to customers making their own pickups at the seller's warehouse.)

Specifically, the 1967 Opinion says that the granting of "backhaul" allowances by a seller using a uniform zone delivered pricing system would raise questions under Section 2(a) of the Robinson-Patman Act, which prohibits price discriminations endangering competition.

On December 26, 1973, the Commission issued a statement which said that: "questions probably would not arise under the laws [the Commission] administers if sellers, using valid uniform, zone-delivered pricing systems, offer to all customers, on a non-discriminatory basis, in lieu of a delivered price, the option of purchasing at a true f.o.b. shipping point price."

Today, the Commission announced that:

"Some unfortunate confusion has arisen as a result of the Commission's use of the term 'true f.o.b. shipping point price.' In fact, no question of unlawful discrimination would arise so long as the f.o.b. price is (1) uniform and (2) available to all customers on a nondiscriminatory basis. No legal requirement exists that the alternative f.o.b. price be of any particular amount or computed in any particular way."

The clarification came in a letter dated March 19, 1975 to an attorney for Consumers Union.

Copies of the December 26, 1973, Commission statement and the March 19, 1975 letter are available upon request to Legal and Public Records, Federal Trade Commission, Washington, D.C. 20580.

[From the FTC News, Washington, D.C.]

COMMISSION PLACES ON THE PUBLIC RECORD CORRESPONDENCE ON BACKHAUL ALLOWANCES

The Federal Trade Commission has by unanimous vote placed on the public record:

A letter from Albert Rees, Director, Council of Wage and Price Stability, Executive Office of the President, relating to the Commission's recent clarification, in a March 19 letter to Consumers Union, of the legality of backhaul allowances under Section 2(a) of the Robinson-Patman Act; and

The Commission's reply to Mr. Rees.

The text of the Commission's reply follows. Mr. Rees' letter is available for public inspection at the FTC's Division of Legal and Public Records, Washington, D.C. 20580.

OCTOBER 8, 1975.

HON. ALBERT REES,

Director, Council on Wage and Price Stability, Executive Office of the President, Washington, D.C.

DEAR DIRECTOR REES: This is in reply to your letter of April 1, 1975, relating to the Commission's recent clarification, in a letter to Consumers Union of March 19, 1975, of the legality under Section 2(a) of the Robinson-Patman Act of backhaul allowances.

Your letter suggests that the Commission's clarification will discourage backhaul practices. It was the Commission's intention in the March 19 statement to eliminate confusion over the options available to the delivered price seller. It emphasized that the seller who uses a uniform delivered price can, in addition to the delivered price, offer his customers the option of purchasing f.o.b. his shipping point as long as the optional f.o.b. price is uniform and available to all customers on a nondiscriminatory basis. The Commission sees no reason why this clarification of the available options should discourage backhaul practices.

You further recommend that the Commission should adopt a policy of allowing backhaul allowances equal to the actual cost of transportation to each customer. Such a policy, your letter urges, can be based on the premise that the Robinson-Patman Act does not mandate uniformity as to f.o.b. prices, because that Act permits a seller to offer different prices where justified by different costs.

However, those differences in cost under the Robinson-Patman Act that justify price differentials are limited " * * * strictly to those actual differences traceable to the particular buyer for and against whom the discrimination is granted, to the different methods of serving them, and to the different quan-

titles in which they buy." *House Committee Report No. 2287*, March 31, 1936. The cost justification provision, accordingly, was designed " * * * to leave the test of a permissible differential upon the question: If the more favored customer were sold in the same quantities and by the same methods of sale and delivery as the customer not so favored, how much more per unit would it actually cost the seller to do so, his other business remaining the same?" *Senate Committee Report No. 1502*, February 3, 1936. "There can be no doubt," the Supreme Court has stated, "that the § 2(a) proviso as amended by the Robinson-Patman Act contemplates, both in express wording and legislative history, a showing of actual cost differences resulting from the differing methods or quantities in which the commodities in question are sold or delivered." *United States v. Borden Co.*, 370 U.S. 460, 467 (1962).

It follows, therefore, as the Commission understands these requirements, that the Robinson-Patman Act's Section 2(a) cost proviso cannot be interpreted so as to cost justify price differentials between backhaul customers purchasing f.o.b. at the seller's shipping point, if those price differentials represent only the *absence* of delivery cost differentials that *would have been incurred* had the commodities in question in fact been transported to different delivery destinations and, in that contingency, would have occasioned differing cost obligations upon the seller.

To state the matter in another way, if different backhaul customers purchase identical goods in identical quantities and according to exactly the same method of sale and delivery (i.e. by pick-up in their own trucks at the seller's shipping point) then, as the Commission see it, no cost differences to the seller, as contemplated under the cost justification provision of Section 2(a) of the Robinson-Patman Act, obtain. In particular, in such transactions, because no transportation of goods by the seller to affect delivery occurs, no delivery cost differentials arise such as would justify differences with respect to the f.o.b. price. Accordingly, f.o.b. price differences, in these circumstances, would not be cost justified under Section 2(a) of the Robinson-Patman Act in the Commission's view.

As the Commission heretofore has indicated, questions would not arise under the laws it administers if sellers using valid uniform zone delivered pricing systems offer to all customers, in lieu of a uniform delivered price, the option of purchasing f.o.b. the seller's shipping point, if that optional f.o.b. price is uniform and available to all customers on a nondiscriminatory basis.

The Commission does not understand that economies would not consistently be realized through backhauling, by customers with empty trucks returning via their suppliers' factory and/or warehouse shipping points, if those suppliers make uniformly available a nondiscriminatory shipping-point price option. You suggest, in this regard, that geographically distant customers would not be able to afford to make use of such an option if the f.o.b. price is no lower than the seller's uniform zone-delivered price minus his average transportation cost for that zone. However, it appears to us that the only significant costs to the customers of backhauling in this situation are the additional wages, if any, required to be paid to the driver of the backhauling truck for the added time required to accomplish the pickup and the additional fuel cost incurred in traveling full rather than empty, insofar as these costs were less than the difference between the supplier's delivered price and his f.o.b. price, the customer would be realizing a saving. This would be apart from any general or public economies such as a reduction in overall fuel requirements.

The Commission has carefully considered the views that you have expressed and sincerely appreciates your concern in this matter. As indicated, however, the Commission is unable to construe the cost justification proviso of Section 2(a) of the Robinson-Patman Act as justifying differing backhaul allowances on the basis of hypothetical, and not actual, delivery cost differences. While the Commission would be happy to take action which would result in the additional reduction of fuel and other costs, it is not empowered to do so except as such may be incident to the proper exercise of its statutory responsibilities and consequently it can encourage backhauling only so far as it is consistent with the Commission's interpretation of the Robinson-Patman Act.

By direction of the Commission.

CHARLES A. TOBIN,
Secretary.

BACKHAUL IN FOOD DISTRIBUTION

FOREWORD

(By Dr. John T. Dunlop, Chairman, National Commission on Productivity and Work Quality)

Distribution has been described as the "wasteland" of our economy. Despite considerable progress in the past 25 years, parts of the distribution system have continued to exhibit low rates of productivity improvement compared to other sectors of the economy. If wasteful practices that contribute to higher costs can be achieved that will benefit suppliers, distributors, and particularly the consumer, who in the final analysis, pays the bill.

The National Commission on Productivity and Work Quality has been deeply interested in finding ways to improve productivity in the food sector of the economy. Sharply rising costs of energy, labor, fertilizer, equipment, and supplies are pushing food prices ever upward, placing a heavy burden on those who can least afford to pay. Measures to improve productivity in the food sector are urgently needed to lessen inflationary pressures.

In 1972, the Commission, at the request of the Chairman of the Cost of Living Council, conducted a search for opportunities to improve productivity in the food sector. Business, labor, and professional experts from all segments of the industry assisted in this exploration. Obstacles requiring the attention of government, business, and labor were identified. Many dealt with problems of improving productivity in the transportation of food by rail and truck. One result of the Commission's initiative was the start-up of a unit train for shipping produce from the West to the East Coast, with significant savings in time and reduction in spoilage and waste.

This booklet deals with measures to improve the distribution system through more efficient use of the 500,000 trucks which are used principally in the transportation of processed foods. These trucks consume approximately one billion gallons of fuel a year. But a substantial proportion are running empty part of the time—a wastage of equipment, fuel, and labor that we cannot afford. More effective use of trucks through "backhaul" could result in significant cost savings to suppliers, retailers, and wholesalers and ultimately to consumers throughout the country.

If more rapid progress is to be made in reducing waste in the food distribution system, greater cooperation among suppliers, retail and wholesale distributors, and government is necessary. The National Commission on Productivity and Work Quality is trying to assist in this process by identifying the benefits and costs of backhaul and by bringing together representatives of these sectors to make a contribution to a constructive resolution of their problems. Through voluntary cooperation, we can make progress toward improving productivity in this vitally important sector of the economy.

INTRODUCTION

The purpose of this pamphlet is to highlight initiatives to reduce "deadhead" truck runs wherever possible and make food distribution more efficient through backhauling by food wholesalers and retailers. These significant points are emphasized:

Careful cost analysis, route planning and detailed agreement between suppliers and distributors can provide profitable loads on return truck runs.

Backhauling can cut waste, build profit, and benefit the consumer.

Annual savings in food distribution costs through fuller utilization of truck operating time have been estimated at about \$100,000,000 for the Nation.

This pamphlet is part of ongoing efforts by the Commission to encourage the adoption by suppliers and distributors of constructive practices such as backhaul that improve productivity in food distribution. A list of suppliers who allow their customers backhaul privileges is being compiled for the use of suppliers and distributors.

Information for this pamphlet was obtained from experts in the food industry and in government. The Commission is grateful for their cooperation and assistance.

WHAT IS BACKHAUL?

In many food distribution organizations, the distributor's truck returns empty to its home base after deliveries are made to outlets. Food wholesalers' trucks deliver goods to retailers and return empty even though they pass manufacturers who supply the wholesaler. Retail food chains supply their retail stores by truck from a central warehouse and the truckers return empty even though they pass suppliers who deliver to the retail warehouse.

Backhaul is simply avoiding this type of "deadheading"—the empty return of a truck—and using the distributor's truck to pick up its own supplies, wherever possible. The purpose of a backhaul arrangement is to reduce as far as possible the number of trucks returning empty to the warehouse—to cut down "dead-heading," and to reduce costs.

Under a backhaul arrangement, a food distributor's truck, after delivering its load, would stop at a supplier's dock to pick up freight destined for its own warehouse, instead of returning empty. Thus, the distributor's truck and driver pick up and haul back his own freight. Backhauling eliminates the waste of truck "dead-heading" on the part of the distributor returning empty from his store deliveries and on the part of the supplier, returning empty from delivery to his customer's warehouse.

In a June 1974 survey of food chains by Cornell University's Department of Agricultural Economics, 8 out of 19 firms reported that backhauling on the average comprised about 3 percent of the total number of cases received; another 8 firms reported backhauling about 20 percent of the total cases received. The percent backhauled by the 19 firms increased from about 7 percent in 1973 to about 11 percent in 1974. The group expects another 50 percent increase in the proportion of cases backhauled in 1975.

Dr. Gordon F. Bloom, past Chairman of the National Association of Food Chains and Senior Lecturer at the Massachusetts Institute of Technology's Sloan School of Management, reports that one large chain, which has made maximum backhauls a definite objective of operational policy, has succeeded in raising backhaul freight to about 25 percent of total incoming merchandise at its warehouse.

A 1973 survey of 45 wholesalers by the National American Wholesale Grocers' Association (NAWGA) showed a wide range in the proportion received by backhaul out of total tonnage received by wholesale warehouses. A total of 17 reported less than 10 percent backhaul; another 17, from 10 to 19 percent; and 11, from 20 to 34 percent. The average was 15.4 percent. Gerald E. Peck, Executive Vice President of NAWGA estimates that about 30 percent backhauled is the maximum attainable by wholesalers under 1973 conditions.

Clearly, the very nature of truck operation makes some "deadheading" inevitable and 100 percent backhaul is unattainable. However, the possible savings can be substantial in relation to the margins available in food distribution.

Why is backhauling an important issue for the food industry and the national economy?

It is widely recognized that backhauls represent a potential significant reduction in the cost of handling merchandise. A cooperative effort to reduce distribution costs is in the great tradition of the food industry to act together in the interests of an efficient system, while at the same time acting as highly competitive separate segments.

In addition to operating economies for food distributors and suppliers, national developments underscore the vital importance of increasing productivity at every level of the national economy. The problem of conserving energy makes fuel waste a national issue, and "deadhead" trucking an intolerable waste. Also, there is concern about the impact of urban traffic congestion on productivity and the quality of life.

The contributions to cost control through backhauls come primarily from the actual lowering of transportation costs between the supplier's shipping point and either the wholesaler's or the retailer's receiving point. There could also be savings from other sources:

- Increased utilization of equipment and manpower.

- Reduced inventory investment through more precise timing of merchandise receipt at warehouses of suppliers and distributors.

- Reduction in lost sales from out-of-stock conditions.

Reduction in warehousing costs through balanced workweeks for warehouse crews by scheduling backhauls when other work requirements are at a minimum.

Each of these potential savings requires objective appraisal. Not every backhaul opportunity meets all of these criteria or enough of them to justify the practice. Backhaul must be subjected to thorough cost analysis.

What are potential benefits of backhaul to distributors?

In a market economy, the final measurement of benefit in any practice is made in terms of dollars saved, or in terms of profit gained.

While backhaul can be justified in terms of national interest, the money measurement is equally convincing. The potential saving through maximum use of backhaul throughout the Nation has been estimated at as high as \$250,000,000 a year. But, since not all "deadheading" can be avoided, some experts feel the amount that could more realistically be saved is in the area of \$100,000,000.

Based on estimates by 27 companies of their savings from backhauling as reported to the Super Market Institute, the median backhaul saving for every \$1,000 of sales was \$1.80, a significant amount when it is considered that the average supermarket income after taxes is less than 1 percent of sales.

The range of backhaul savings was as little as 80c per \$1,000 of sales for the store saving the least (the 25th percentile), with yield reported as high as \$4 per \$1,000 of sales for the store saving most (the 75th percentile).

In a further breakdown, for the smaller number of supermarkets reporting \$20 to \$100 million in annual sales, the average backhaul savings was \$1.10 per \$1,000 of sales, while the firm in the 25th percentile reported backhaul savings of 50c per \$1,000 of sales.

If through greater effort a firm in the 25th percentile increased the volume of goods backhauled to attain average savings, it could achieve an annual gain of \$36,000 a year in backhaul savings.

Based on Bureau of Census reported figures on truckhauls of processed food, "deadhead" mileage may consume nearly a quarter of a billion gallons of fuel a year.

What are the backhaul benefits to suppliers?

In simplest terms, what is good for the merchandise at the level of final consumption is also good for the supplier and manufacturer.

While officials of some major product lines have resisted backhaul, there is increasing support from suppliers who see backhauling as a beneficial practice in their industry. Some maintain that their competitive position is enhanced against companies that do not allow backhaul.

Marketing officials of major product lines who allow backhaul have outlined their reasons.

From the Director of Marketing of a major line of canned goods: "I think the program has been successful for a variety of reasons, number one of which is making our merchandise available at the discretion of the buyer to enable him to increase his turnover; and secondly, to afford the customer the opportunity of increased profits through his own trucking operation."

From the Director of Trade Relations of that same company: "I actually believe that 90% of our customers could get 30 to 35 turns a year on our merchandise very easily. This, of course, affords a buying department a means of controlling its inventories, and at the same time getting the maximum of turns a year, which naturally is a great savings."

From a major bottler of a nationally distributed food product to a large outlet for the product: "This has been a very nice arrangement for us and the increase you have given us indicates this has been the key to eliminating any out-of-stock conditions you have experienced in the past. You can understand why our customers' trucks get first preference at our loading docks."

From a large packaged food supplier to the general manager of a supermarket chain: "This arrangement has solved our delivery problems to your warehouse. This plan also enables your buyer to definitely know when our merchandise will arrive at your warehouse, and plan his orders accordingly. Thanks again for solving our mutual problem of being 'out of stock' due to your tremendous increase in business, and the difficulty we encountered by trying to deliver to your warehouse. We estimate that under this arrangement, you will exceed 35 'turns' per year with no out-of-stock conditions."

In a period of high interest rates, the number of turns on merchandise becomes critically important to distributors.

There are definite operating benefits to suppliers. Backhaul by distributors makes it unnecessary for the supplier to arrange for a delivery appointment, to prepare bills of lading or to register and pay freight bills. The supplier does not make any trucking assignments, except for an appointment time for the distributor's pickup.

A survey of manufacturers' backhaul policy made in 1973 by the National American Wholesale Grocers' Association, disclosed that 55 out of 77 respondents permitted backhaul. Of those 55, 51 reported the approximate share of their sales to food distributors that is picked up by distributors as follows: 20 companies reported under 4 percent picked up; 9 companies, 5-18 percent; 13 companies, 19-24 percent; and 10 companies, 25 percent or more.

The foregoing does not indicate universal support on the part of suppliers for backhaul, but there is an increased interest since the Federal Trade Commission in December 1973 clarified its position on the legality of the practice. Some important suppliers say they are now developing backhaul programs.

How do distributors obtain backhaul privileges?

The initial step is an analysis of the location of suppliers in an area to determine which suppliers represent an economic backhaul opportunity. This systematic analysis can be done by computer, using programs that factor in data on travel time, distance, fuel consumption, equipment availability, and inventory position involved in each backhaul decision.

Where a backhaul opportunity exists, the process becomes one of getting the supplier to permit backhaul. Where the supplier already has a policy of allowing backhaul, the only requirement is to work out suitable operational arrangements.

When the supplier is reluctant, the solution may lie in resolving the major problems that backhaul poses. Many suppliers dislike customer backhauls because the practice may cause additional congestion at loading and receiving docks. This objection can be met with the assurance that backhauls can and will be scheduled to take such problems into account.

Another supplier objection may be that the practice may improve distributor efficiency at the expense of the supplier's efficiency. Again this argument can be met with the assurance that pick-ups will be handled in an efficient manner taking the supplier's dock problems into account.

Several operating matters require close attention. Suppliers and distributors must reach an understanding about such details as the quantities making up the backhaul loads, the lead time for order placement, the pricing, terms of sale, the backhaul allowance, and how promotional offers are to be treated.

In addition to these overall agreements, it is necessary to reach an understanding of the operating requirements at each dock where a backhaul is permitted.

Operating requirements take into account the arrival time for trucks to pick up a backhaul, the leeway in time permitted for trucks making a scheduled pickup for backhaul, the way to report delay on the road to the supplier, and the penalties for late arrival without notification. The understanding would likely include agreement on how backhauls are to be loaded and by whom, and the responsibility for the safety of the load.

Experience with backhaul has shown it is very important that receivers of the backhaul consider it a privilege, and that they enter into a pickup agreement which establishes the ground rules.

One successful pickup agreement calls for the following:

The order must be placed sufficiently in advance with the supplier's warehouse (at least 48 hours in advance of the pickup). Date and hour of the pickup must be furnished with the order, and the release to the warehouse will include this information to enable scheduling of the pickup.

Pickups will be made from such regularly assigned warehouses as are shown in the agreement.

The warehouse will make delivery to the tailgate of the truck, and loading must be done by the driver.

Once the product is delivered to the tailgate, subsequent loss and damage are to the account of the receiver.

All allowances will be off invoice only, and no allowance other than as shown will be made.

These conditions of agreement are cited only as a general guide to what is involved in developing an ongoing backhaul relationship with a supplier. The object is to minimize non-productive waste motion for both parties.

In essence, backhaul arrangements are no different from the practices of the common carriers. Where efficient backhaul operations are now underway, better receiving and on-time records have been achieved in some cases by distributors' trucks than by common carriers.

What kind of operating problems arise?

The basic problem in developing a successful backhauling operation is the commitment on the part of the supplier and the backhauler to make it work.

Experience with successful backhaul agreements shows that the distributor's buyer and the supplier sales representative can usually work out a mutually satisfactory operating program.

While backhaul arrangements will necessarily differ from supplier to supplier, some of the basic considerations to meet operating problems include:

The buyer's order must be in proper pallet quantities, and the buyer must know the capacity of the truck that is going to make the pickup.

Scheduling is very necessary. The supplier knows that it is impossible to state the exact time a truck is going to stop by to pick up, but the time element must be held as close as possible.

Warehouses do have closing hours, and sufficient time must be allowed to insure loading prior to closing time. The warehouse needs time to pick the orders and to get them set up—preferably a day or two—so that they are ready when the truck arrives for a backhaul.

The driver should know what order he is picking up. He should have this information so there is no question when he arrives at the dock.

Most suppliers will exchange standard pallets, but require that they be of equal condition.

At a National Association of Food Chains clinic on warehousing, traffic and transportation, a spokesman for a major supplier outlined the types of problems encountered in a backhaul operation and how such problems are best resolved:

"The first is *cooperation*. Two-way cooperation is truly the key element because we both want this program to work—our people and your people have both learned the value of cooperation. On a few occasions, we have had to withdraw the pickup option because of lack of cooperation, but fortunately these have been rare. Usually, face-to-face discussions have resolved our problems.

The second one is *unitized loads or mechanization*. We use the Grocery Manufacturer Association pallet, which is soon to become the Grocery Pallet Council pallet. Mechanized loading and unloading are a must in order to get your trucks loaded and unloaded fast. Time wasted in hand-loading and unloading would chew up a lot of the cost savings available to you in pickup. Unitized loads require that we provide your buyers with ordering guides so orders can be placed in pallet quantities per item. It is also to your advantage, but not a requirement to round your orders to the number of pallet units to fill a truck. This is normally 20 or 22 pallets on the floor.

The third key point is *scheduling*. The appointment system is a must and it is primarily for your (the buyer's) benefit. If you can schedule an appointment and keep it, we (the supplier) can have your order already staged and loaded promptly, usually in as little as one half hour. Missed appointments can cause delays which are costly. If you cannot make the pickup or do not make the pickup, we reserve the right to deliver, in order to meet the delivery date promised to your buyer.

The fourth key point is *simplicity*. We have learned the value of the phrase: Keep it simple. You and we both want to reduce errors and misunderstandings. The freight allowance calculation is a good example. We use weight because freight is paid for by weight. Our computer totals the weight on the invoice on the order and calculates the f.o.b. discount on the invoice. This simple system eliminates additional paperwork, billings, and arguments."

This discourse represents the views and practices of one major supplier who permits backhaul, and further points up the elasticity in arrangements, indicating that in each case the agreements must serve the best interests of both parties. The general requirement that backhaul must embody cooperation is an underlying factor in all such agreements.

What are the legal issues arising out of backhaul?

Manufacturers have been wary of granting backhaul allowance, fearing that they might be held in violation of the Robinson-Patman Act, which prohibits price discrimination among customers.

This concern over legal complications arose as a result of a 1967 Federal Trade Commission opinion requested by a supplier who used a uniform zone delivered pricing system. The freight factor included in the delivered price was " * * an average of the freight costs for all customers within the zone wherein the delivered price is quoted * * *."

The Commission advised that if one customer is then given a backhaul allowance for the actual freight saved, this action could raise a serious possibility of discrimination against competing customers.

To reassure manufacturers of Commission approval of backhaul systems, the FTC on December 26, 1973, issued a clarifying statement expressing the view that " * * * questions probably would not arise under the laws it administers if sellers, using valid, uniform, zone delivered pricing systems, offer to all customers, on a non-discriminatory basis, in lieu of a delivered price, the option of purchasing at a true f.o.b. shipping point price."

The key to the Commission position is that when a backhaul allowance is given to one customer, all customers must be offered the option of purchasing at a true f.o.b. shipping point price by a vendor who uses a valid uniform zone delivered pricing system. If all his customers are offered the opportunity to purchase at a true f.o.b. shipping point price, then availability of that f.o.b. price to all customers would obviate a charge of discrimination from his allowing backhaul while using the uniform zone delivered pricing system.

NOTE.—The Federal Trade Commission issued the clarification on the basis of representations made by various parties, including the Cost of Living Council and the National Commission on Productivity.

While the Federal Trade Commission advisory opinion removes what has been considered in some quarters a legal roadblock to backhaul, there remains resistance by some suppliers and manufacturers who incorrectly maintain that backhauling still presents legal difficulties. Others offer policy and operational reasons as grounds for not giving backhaul allowances.

Such opposition has in past instances been overcome by insistence on the part of buyers seeking freight allowances that backhaul represents both an economic consideration and a conservationist need. Retailers and wholesalers who have a policy of making special efforts to obtain backhaul from their suppliers frequently meet with cooperation and success.

Under what pricing systems are backhaul allowances permitted?

This question has arisen repeatedly since the Federal Trade Commission issued its advisory opinion in 1967 (No. 147), advising a manufacturer of food products using a uniform, zone delivered pricing system that it probably would be illegal to grant so-called backhaul allowances to customers who pick up their own purchases at the supplier's warehouse.

The Commission position as clarified in the December 26, 1973, statement (discussed above) is that true f.o.b. pricing, in addition to a valid uniform, zone delivered price, probably would not raise questions under laws the Commission administers as long as the f.o.b. option is offered to all customers. In an f.o.b. purchase, the distributor pays the freight, whether he chooses to have it delivered by common carrier or by his own trucks. The distributor also pays for the cost of delivery in a valid uniform zone delivered price, the total price to all customers being based on an average of all seller's cost factors in the area.

What is being done to improve productivity in backhauling?

While increasing and extending the use of backhaul is widely needed, the benefits of the practice are more apparent in an efficiently organized approach.

Backhauls can be developed efficiently on runs around 100 miles from a supplier's warehouse. It is up to each individual firm to determine whether the backhaul is worthwhile. This depends ultimately on the commodity picked up, the revenue derived, location of stores that are served and the supplier's warehouse.

A key element is the need for palletizing shipments, making possible mechanized loading and unloading. Deadpiling requiring manual loading, instead of palletizing of shipments, causes delay and inefficiency.

Considerable gain in productivity beyond the backhaul itself can be made if the pallet utilized for the backhaul is the same size as the one that can be used in the distributor's warehouse.

Vehicles and materials handling equipment should be well maintained with optimum equipment for the loading and unloading tasks.

Where profits disappear is where loading time, or unloading time, is slowed down. There can be slowing down at the dock if a scheduled pickup appointment has not been made. The loading can be slowed if not enough equipment has been assigned for the job. The equipment should be in good repair to avoid delays due to breakdowns. The truck bed should be at about the same height as the loading platform.

Essentially, the problem is one of clearly defining the areas of concern, knowing costs, and developing a management approach that will expedite pickups to maximize the cost saving potential. The distributor must take care that special efforts to increase backhaul do not impair delivery to retail stores.

Looking ahead, industry experts foresee substantial improvements in productivity resulting from greater standardization of pallets, shipping containers, and packages. Modularization of packaging would result in more stable unit loads, reduced damage, and more effective use of space in transport vehicles. It would facilitate the introduction of automated warehouses. Not only backhaul of many different products but all the physical distribution steps, from manufacturer to wholesaler and retailer, would be made more efficient.

What are the economics of backhaul?

The economics of backhaul will vary depending on the location of supplier's loading docks in relation to the distributor's warehouse, the type of load, and the efficiency of the operation.

The experience of a major supplier in 1973 shows how the revenue allowance on backhauls has worked:

In his experience, the average backhaul allowance among the distribution centers of his company was about 24¢ a hundredweight. (Today the allowance no doubt, would be much higher). An average palletized truckload of the grocery products of the company is roughly 30,000 pounds. This generates savings of \$72. If this is an optimum backhaul [meaning if there is no route deviation] the truck is already going close to the supplier's loading dock. Accordingly, there is no travel time.

Time at the supplier's loading dock is estimated at one hour, with an additional hour for unloading at the distributor's warehouse. With efficient fork-lift operators, the loading and unloading time can be cut further, according to company officials.

Out-of-pocket costs of the backhaul are estimated at \$20. Initially, they were estimated at \$60, but experience has cut these estimates sharply.

Using these assumptions, the net savings is \$52 a load as a working average. There are cases where this is being accomplished with 45-foot trailers and good loads, generating \$96 in savings with loading and unloading both accomplished within an hour.

How does backhaul work for this distributor? The distributor points out:

"It does work where there is true backhaul. We have found, to the amazement of some of our old-timers, that customers do cooperate. There is self-interest involved here, and they do, and I have no bashfulness about saying it is a pleasant surprise. We have good cooperation where it works."

Staff for the National Commission on Productivity and Work Quality: George H. Kuper, Acting Executive Director; Edgar Weinberg, Project Director; A. N. Weckler, Writer. Members, National Commission on Productivity and Work Quality: John T. Dunlop, Chairman, Professor, Harvard University and Coordinator of the President's Labor/Management Advisory Committee; I. W. Abel, Vice Chairman, President, United States Steelworkers of America; Donald C. Burnham, Vice Chairman, Chairman, Westinghouse Electric Corp.; Willaim E. Simon, Secretary of the Treasury; Peter J. Brennan, Secretary of Labor; Frederick B. Dent, Secretary of Commerce; L. William Seidman, Assistant to the President for Economic Affairs; Roy L. Ash, Director, Office of Management and Budget; Alan Greenspan, Chairman, Council of Economic Advisers; Albert Rees, Executive

Director, Council on Wage and Price Stability; Daniel J. Evans, Governor, State of Washington; Thomas Bradley, Mayor, Los Angeles, Calif.; C. L. Dennis, President, Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers Express and Station Employees; Frank E. Fitzsimmons, President, International Brotherhood of Teamsters; John H. Lyons, President, International Association of Bridge, Structural and Ornamental Iron Workers; William H. McClennan, President, Public Employees Department, AFL-CIO; F. E. Barnett; Chairman, Union Pacific Railroad; Berkeley G. Burrell, President, National Business League; Catherine B. Cleary, President, First Wisconsin Trust Co.; R. Heath Larry, Vice Chairman, United States Steel Corp.; John F. O'Connell, President, Bechtel Corp.; Wayne L. Horvitz, Chairman, Joint Labor/Management Committee of the Retail Food Industry; Jerome M. Rosow, Planning Manager, Public Affairs Department, Exxon Corp., and former Assistant Secretary of Labor; Charles L. Schultze, Senior Fellow, The Brookings Institution.

AUGUST 15, 1976.

Re Statement of Mr. Louis Fox, Corres. No. 33160.

HON. JOHN D. DINGELL,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN DINGELL: This is in response to your letter of July 13, 1976, requesting comments concerning a statement by Mr. Louis Fox, Chairman of the Food Transportation Task Force, Food Industry Committee, Federal Energy Administration, regarding revision of the Robinson-Patman Act. Mr. Fox urges amendment of the Robinson-Patman Act as a solution to the potential violation of federal antitrust laws that may result from the granting of varying "backhaul" allowances by sellers otherwise selling according to uniform delivered price systems in the food products industry.

Mr. Fox states that a simple revision in the Robinson-Patman Act might be of significant help in solving problems of both high food costs and shortage of energy. In support of this position, he cites statements by Federal Energy Administrator Frank Zarb and the Director of the Federal Trade Commission's Bureau of Economics, Frederic M. Scherer, among others.

Meaningful discussion of the "backhaul" question depends upon a clear understanding of the Federal Trade Commission statements on this subject. A copy of each portion is enclosed. These statements disclose, in sum, why the Commission declined from the outset to give blanket approval under the Robinson-Patman Act to a proposal by a "delivered price" food manufacturer to grant varying discounts or allowances based on common carrier rates to customers who pick up goods in their own trucks for self-delivery. The manufacturer was otherwise only willing to sell its products on a uniform delivered price basis to all customers located in a particular geographic area or price zone, regardless of the actual common carrier cost of delivery.

The Commission concluded that, in connection with such a uniform delivered price system, where transportation costs are assessed in the same amount against both close-at-hand and distant customers, to then offer substantially differing transportation allowances to different customers would result in noncost-justified discriminations in price. The likelihood of violation of Section 2(a) of the Robinson-Patman Act results, accordingly, when a manufacturer that has elected to sell pursuant to a uniform delivered price system continues to charge that delivered price to some customers while, at the same time, granting varying special shipping point prices to others. The Federal Trade Commission has made it clear, however, that no legal impediment, under the Robinson-Patman Act, would prevent uniform delivered price sellers from offering their customers the option of a *nondiscriminatory* f.o.b. shipping point price.

Mr. Fox does not charge that this advisory opinion was in error. He does state that its result or effect may be uneconomic and that it causes waste of energy. He therefore suggests that the law be changed.

Among the specific arguments advanced by Mr. Fox is the unreliability of common carrier delivery which may result in either a need for overstocking

or out-of-stock conditions. He estimates the expense of one day of additional inventory for a year at \$45 million. He also suggests the need for additional information concerning the percentage load factor of truck cargoes as a possible indication of the extent of the "backhaul" problem.

Mr. Fox referred to a booklet entitled "Backhaul in Food Distribution" published by the National Commission on Productivity. It may be of interest to you to be apprised that on pages 16 and 17 of this booklet there is a discussion of the so-called Robinson-Patman "roadblock" to backhauling and to the continued resistance by some sellers to providing nondiscriminatory backhauling opportunities.

"To reassure manufacturers of Commission approval of backhaul systems, the FTC on December 26, 1973, issued a clarifying statement expressing the view that: "* * * questions probably would not arise under the laws it administers if sellers, using valid, uniform, zone delivered pricing systems, offer to all customers, on a nondiscriminatory basis, in lieu of a delivered price, the option of purchasing at a true f.o.b. shipping point price.

"The key to the Commission's position is that when a backhaul allowance is given to one customer, all customers must be offered the option of purchasing at a true f.o.b. shipping point price by a vendor who uses a valid uniform zone delivered pricing system. If all his customers are offered the opportunity to purchase at a true f.o.b. shipping point price, then availability of that f.o.b. price to all customers would obviate a charge of discrimination from his allowing backhaul while using the uniform zone delivered pricing system.

"While the Federal Trade Commission advisory opinion removes what has been considered in some quarters a legal roadblock to backhaul, there remains resistance by some suppliers and manufacturers who incorrectly maintain that backhauling still presents legal difficulties. Others offer policy and operational reasons as grounds for not giving backhaul allowances."

Mr. Fox's arguments and the Commission Advisory Opinion disclose that there are solutions that do not depend on any amendment of the Robinson-Patman Act. Manufacturers may abandon the use of delivered pricing systems, or offer a nondiscriminatory f.o.b. price at their delivery point to all customers as an alternative to the delivered price.

Mr. Fox's statement to the Supermarket Institute workshop on May 3, 1976, states that the list of manufacturers allowing "backhaul" has increased to 104 and that only 4 major manufacturers are not permitting "backhaul." It appears from this statistic that most manufacturers have been able to find some workable solution to the problem without the need for law revision.

It is therefore the considered opinion of the Federal Trade Commission staff that revision to the Robinson-Patman Act so as to allow "backhaul" allowances is not warranted by the facts that have been presented, that revision is not necessary to resolution of the problems of economic and energy loss which can result from denial to manufacturers who maintain delivered price systems of the right to grant full cost-justified "backhaul" allowances to their customers, and that preservation of the Robinson-Patman Act constraints is essential to the deterrence of anticompetitive discounts and "backhaul" allowances in the food products industry.

The views expressed in this letter are solely the opinions of the staff based upon their understanding the facts and arguments presented and their interpretation of Advisory Opinion #147 and the Commission's clarifying statements. Your interest in obtaining the comments of the Federal Trade Commission staff is appreciated. Please inform us if we may be of further assistance in this matter.

Very truly yours,

OWEN M. JOHNSON, Jr.,
Director, Bureau of Competition.

DECEMBER 29, 1975.

Hon. WILBUR D. MILLS,
House of Representatives, Washington, D.C.

DEAR CONGRESSMAN MILLS: Your letter of October 28, 1975, directed to the Commission's Secretary, Charles A. Tobin, has been referred to me for reply. Your inquiry concerns the matter of "backhauls" and the application of the Robinson-Patman Act to backhauling practices.

Robinson-Patman issues arise, with respect to backhauling, only when and if a manufacturer, otherwise engaged in the sale of products on a uniform delivered price basis, elects to make available to customers operating their own trucking fleets the opportunity of purchasing on a non-delivered or f.o.b. shipping-point basis at *non-uniform* f.o.b. shipping-point prices. The Robinson-Patman Act's application to the overall backhaul problem is, accordingly, as I see it, a somewhat limited one.

It has no application, for example, to the question of whether there may or may not be adequate utilization of backhauling capacity in the "common-carrier" trucking sector.

Application of the Commission's Advisory Opinion No. 147 dealing with the Robinson-Patman issue (as well as the Commission's three subsequent clarifying statements), is limited to the discriminatory consequences of a practice of granting to "private-carrier" customers *varying* backhaul discounts. It is further limited to situations where manufacturer-vendors otherwise sell their products pursuant to a system of uniform delivered pricing.

A uniform delivered price system is, in effect one in which transportation costs are averaged out and added (by application of an equal delivery cost burden) as part of a constant "destination price," without regard to the differing geographic locations of the customers involved or the differing actual costs of transporting goods to them. Under a uniform delivered price system, accordingly, all customers pay the same price for delivered goods.

Thus, the practice of granting to "private-carrier" customers non-uniform backhaul allowances from a uniform delivered price, necessarily results in higher prices to some customers and varying, non-cost-justified lower prices to other customers. This is the circumstance which requires the application of Section 2(a) of the Robinson-Patman Act, which prohibits price discriminations endangering competition.

However, as the Commission has explained, *no* question of unlawful price discrimination arises if sellers using valid uniform delivered pricing systems offer to all of their customers, in lieu of the delivered price, the option of purchasing f.o.b. the seller's shipping point, when such an optional f.o.b. price is uniform and available to all customers on a nondiscriminatory basis.

The Commission observed in its recent letter to Dr. Albert Rees, as Director, Council on Wage and Price Stability, Executive Office of the President:

"Your letter suggests that the Commission's clarification will discourage backhaul practices. It was the Commission's intention in the March 19 statement to eliminate confusion over the options available to the delivered price seller. It emphasized that the seller who uses a uniform delivered price can, in addition to the delivered price, offer his customers the option of purchasing f.o.b. his shipping point as long as the optional f.o.b. price is uniform and available to all customers on a nondiscriminatory basis. The commission sees no reason why this clarification of the available options should discourage backhaul practices."

I hope the foregoing observations will be helpful to you in assessing the application of the Robinson-Patman Act to backhauling practices. For your convenience, with respect to the Commission's public statements in this area, I am enclosing a copy of the digest of its Advisory Opinion No. 147, each of the subsequent clarifying statements, and a copy of the Commission's recent letter to Dr. Rees. Your interest is most appreciated.

Sincerely,

ROBERT J. LEWIS,
General Counsel.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
Washington, D.C., October 28, 1975.

Mr. CHARLES A. TOBIN,
Secretary, Federal Trade Commission, Washington, D.C.

DEAR Mr. TOBIN: For some time I have been interested in the problem of backhauls, particularly as it affects those in the grocery business.

It is my understanding that a decision has been reached that Section 2(a) of the Robinson-Patman Act does not permit the granting of different backhaul allowances so as to accommodate the needs of the grocery business.

In view of the contention by people in the industry, that 100 million gallons of fuel and \$300 million in food costs could be saved each year by granting the use of backhaul, I am thinking in terms of legislation to amend the Robinson-Patman Act in this respect. If you are in agreement with the idea to amend the law, I would appreciate your advising me of what you think should be done in the area of legislation to accomplish the purposes that this group has in mind.

In the event that you do have some thoughts, either as Secretary to the Commission or simply as a citizen, I would treat it as you would have me treat it.

With kindest regards and best wishes, I am
Sincerely yours,

WILBUR D. MILLS.

FEDERAL TRADE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., December 15, 1975.

Mr. RON DEATON,
c/o Hon. John L. McClellan,
U.S. Senate, Washington, D.C.

DEAR MR. DEATON: As you requested in your telephone call of November 12, I will here undertake to describe some of the background of the Commission's actions with respect to "backhaul" allowances.

As I advised you during our conversation, such comments as I provide must be understood as reflecting my own personal interpretations and views only, and, except where I may reference specific Commission statements, do not constitute an official statement of the position of the Commission. You indicated, however, that you desired to receive from me a background explanation, and the following personal observations are offered in the hope that they will be of help to you.

Advisory Opinion No. 147 (File No. 683 7026, Digest No. 147) was issued by the Commission on October 24, 1967, to, and at the request of, General Foods Corporation.

General Foods at that time had informed the Commission, in substance, that it was engaged in the sale of food products on a delivered price basis, and that it, accordingly, did not permit customers to pick up products at a General Foods' warehouse or plant shipping point. General Foods requested advice with respect to the proposed institution by it of a program whereunder customers who had trucks returning to their warehouses, would be permitted to pick up products at a General Foods' warehouse or plant shipping point and be paid an allowance (i.e., a discount from the delivered price) equal to the amount General Foods would otherwise pay a common carrier for delivery to the customer. The Commission advised, in substance, that implementation of the proposal would probably result in a violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, on the part of General Foods.

The Commission's conclusion in the matter, as it pointed out in its opinion, rested essentially on the effect of General Foods' discount proposal in the context of its, already existing, uniform zone delivered price system.

A freight (i.e., cost of delivery) factor, in a uniform delivered price method of pricing, is *already included* within the "delivered" price (from which the proposed backhaul discount would be deducted) which does *not* reflect the actual freight cost to any given point (although the actual freight figure would be used to measure the amounts of the discounts proposed to be given), but consists, rather, of an *averaging* of the freight costs for all customers within an entire price zone. Accordingly, under the proposed discount plan, some customers would be treated, for pricing purposes, on one basis, while others would be charged on a completely different basis.

The opinion was directed to the narrow issue of whether General Foods Corporation might violate Section 2(a) of the Clayton Act, as amended, if it continued the sale of products pursuant to a uniform zone delivered price program to some customers while, at the same time, undertaking to provide varying special shipping point discounts to others.

Although Section 2(a) of the Robinson-Patman Act exempts from its proscription price discriminations, which make only due allowance for differences

in cost to the seller resulting from differing methods or quantities in which his goods are sold or delivered, such cost justification would appear unavailable in the context of General Foods' specific backhaul allowance proposal. The proposed allowances would, for example, afford different private-carrier purchasers—even though purchasing identical goods by precisely the same method, i.e., by pick-up in their own trucks at General Foods' dock or warehouse, and in exactly the same quantities—substantially different net purchase prices. No differing costs to the vendor would be involved. Such prices would not only be lower for some private-carrier purchasers than for others (similarly taking possession of the goods at General Foods' dock or warehouse) but all such "allowance" prices would also be lower by varying amounts than the prices available to "delivered-price" customers variously located throughout the area serviced from that General Foods' dock or warehouse.

Commission Advisory Opinion No. 147, unfortunately, was divergently interpreted by members of the business community during the subsequent years. On the basis of inquiries by a number of interested parties, including the Cost of Living Council and the National Commission on Productivity, the Commission on December 26, 1973, issued a clarifying statement. This statement was issued to make it clear that no legal impediment, under the laws the Commission administers, would prevent uniform delivered price sellers from offering their customers the option of a *nondiscriminatory* f.o.b. shipping point price.

It may be of interest to you to be apprised that the National Commission on Productivity subsequently issued a pamphlet, titled *Backhaul in Food Distribution*, which, inter alia, discusses some of the above circumstances, and points out that sellers continuing to resist giving their customers backhaul opportunities, maintaining that legal difficulties or a legal roadblock to backhauling exists due to that 1967 opinion, are incorrect. On pages 16 and 17 of the pamphlet appears the following explanation:

"To reassure manufacturers of Commission approval of backhaul systems, the FTC on December 26, 1973, issued a clarifying statement expressing the view that: '* * * questions probably would not arise under the laws it administers if sellers, using valid uniform, zone delivered pricing systems, offer to all customers, on a nondiscriminatory basis, in lieu of a delivered price, the option of purchasing at a true f.o.b. shipping point price.'

"The key to the Commission's position is that when a backhaul allowance is given to one customer, all customers must be offered the option of purchasing at a true f.o.b. shipping point price by a vendor who uses a valid uniform zone delivered pricing system. If all his customers are offered the opportunity to purchase at a true f.o.b. shipping point price, then availability of that f.o.b. price to all customers would obviate a charge of discrimination from his allowing backhaul while using the uniform zone delivered pricing system.

"While the Federal Trade Commission advisory opinion removes what has been considered in some quarters a legal roadblock to backhaul, there remains resistance by some suppliers and manufacturers who incorrectly maintain that backhauling still presents legal difficulties. Others offer policy and operational reasons as grounds for not giving backhaul allowances."

The National Commission on Productivity initially explains in the subject pamphlet, that in many food distribution organizations, distributors' trucks return empty after deliveries are made to outlets. Food wholesalers' and retail food chains' trucks return empty even though they pass close by manufacturer-suppliers who deliver to them. The potential savings attributed to increased use of backhaul, as noted in the pamphlet, is estimated as realistically reaching the \$100 million mark. The National Commission on Productivity observes, however, that there is less than universal support on the part of suppliers for backhaul, although there is increased interest since the Federal Trade Commission in December 1973 clarified its position on the legality of the practice.

Availability to all customers of a *nondiscriminatory* f.o.b. purchase price option such as would affirmatively accommodate backhauling, remains essentially the decision of uniform delivered price sellers as the pamphlet discussion demonstrates. This Commission's interpretation of the requirements of the Robinson-Patman Act, manifestly, bears no application, in this regard, to sellers utilizing uniform delivered price systems. As the Commission has indicated, moreover, no question of unlawful discrimination arises when an f.o.b.

price option is offered by a uniform delivered price seller, so long as that f.o.b. price is uniform and available to all customers on a nondiscriminatory basis.

On March 19, 1975 the Commission undertook to further clarify its position (press release of March 28, 1975) again explaining that:

"In fact, no question of unlawful discrimination would arise [from an f.o.b. shipping point price option if made available by a uniform delivered price seller] so long as the f.o.b. price is (1) uniform and (2) available to all customers on a nondiscriminatory basis."

Currently, the Commission has made public reply by it to former Director Albert Rees, Council of Wage and Price Stability, Executive Office of the President, concerning aspects of the Commission's position relative to backhaul allowances, and, in particular, its interpretation of the application of the Robinson-Patman Act's cost justification proviso.

Enclosed are copies of the digest of the Commission's Advisory Opinion No. 147 and its three subsequent clarifying statements, inclusive of a copy of the Commission's recent letter to Dr. Rees.

Very truly yours,

BARTLEY T. GARVEY,
Attorney, Office of General Counsel.

Senator JOHNSTON. We want to urge you not to read your statements. We want you to give us your judgment. That is what you are here for. We will read the statements later. Mr. Aders.

STATEMENT OF ROBERT O. ADERS, PRESIDENT, FOOD MARKETING INSTITUTE, WASHINGTON, D.C.

Mr. ADERS. Thank you, Mr. Chairman. I am Robert Aders. I am president of the Food Marketing Institute. We represent about 950 retailers of all sizes and some wholesalers.

We are here today to strongly support S. 1699. We think it is vitally needed to conserve precious energy resources and to promote a more efficient system for distributing food in this country.

Attached to my testimony is a pamphlet which describes in layman's language what this issue is all about. I will not attempt to read from that nor will I describe a backhaul. All of you know what that is, I think.

Suffice to say, we estimate about one-third of all grocery trucks you see on the roads of this country are operating empty.

Senator METZENBAUM. I don't have any pamphlet.

Mr. ADERS. If it is not attached, it will be. It was late to arrive.

I think the hardest thing to do is attempt to quantify the savings available. The Federal Energy Administration published a report in 1975 based on information passed on to them by the Transportation Task Force of the Food Service Advisory Committee to which the FEA witness referred. That report estimated at that time that the effect of removing FTC barriers would produce the following annual effects in the food industry alone: 100 million gallons of fuel; 500 million miles of transportation, which would quantify to about one-third of a billion dollars in savings.

The savings come not only from the fuel and the labor costs, but also from the cost of maintenance of trucks, the capital cost of investment in trucks, and the so-called soft savings behind the scene such as better inventory control and less out-of-stock conditions in the store.

In attempting to quantify this, other witnesses or other sources will give you different figures. That is quite understandable. It all depends on what assumptions you make and what evidence you are working with as to what evidence you come up with.

I think we can all agree the saving potential is large. It is obvious to us, and this concept spreads through other industries, the savings will magnify.

Senator JOHNSTON. You said two-thirds of all the trips were empty now?

Mr. ADERS. One-third.

Senator JOHNSTON. How much of that one-third could you cure with a proper bill?

Mr. ADERS. The target is all of it. It is not realistic to expect all of it. Some manufacturers simply do not want to or their systems do not accommodate this sort of shipment. They would not enter into this. Perfection is not available to us.

My estimate would be fully half of this would be recaptured, or perhaps two-thirds of it. The legislation, as proposed, will not require sellers to grant backhaul allowances, only to permit it, on a nondiscriminatory cost-justifiable basis.

What this means to the food industry is transportation savings can be made available to sellers in reduced prices regardless of the size of the company.

The larger chains often can transport their own; smaller retailers are serviced by wholesalers. So, whether they get it directly as chain buyers or indirectly as a passthrough from the wholesaler, the savings will benefit all members of the industry.

As to the need for legislation, the Federal Trade Commission witness offers his opinion that the FTC interpretation now permits what this bill seeks to establish and I respectfully disagree.

The Federal Trade Commission's position is ambiguous. It is not clearly understood. It has resulted in many manufacturers simply backing away from offering backhaul upon advice of counsel and other manufacturers offering less than cost-justified allowances to play it safe.

This matter has been addressed by several Government agencies. In each case they have asked the Federal Trade Commission to clarify the rule to permit more backhauling and it has not happened yet. And, I think legislation is the answer.

Senator JOHNSTON. How are they asked to clarify it?

Mr. ADERS. Let me refer to the Cost of Living Council. In its request about 1973, and the Productivity Commission's pamphlet issued in 1974, I think, called upon the Commission to clarify this, to permit more backhaul.

The Council on Wage and Price Stability, in 1975, as I recall, as well as the Federal Energy Administration—all of them have asked FTC to make it clear and up to this point it has not happened.

I think the passage of S. 1699 will clarify it. I think I would like to cover one more point and then move on.

Mr. Chairman, I think it is important to say what S. 1699 will not do. S. 1699 will not in any way modify or amend the Robinson-

Patman Act. All it will do is to clarify that it is not illegal to permit cost-justified nondiscriminatory backhaul allowances. This important clarification creates greater opportunities for eliminating deadheading and conserving fuel resources.

It is not a big business, small business issue. The benefits of backhaul will be available to all grocers regardless of size.

Second, the issue is not intended to involve transportation other than that of the buyer's own product. It will not affect regulations of the Interstate Commerce Commission nor the status of the common carrier.

Mr. Chairman, if I may, I would like to ask for a portion of my time—to give a portion of my time to two food retailers here in the room.

We have here Mr. David Wyndall Smith of Wyndall Enterprises, a small retailer in Kentucky, and on the other end of the spectrum, Mr. Frank Daleiden from a large company in Chicago, Jewell Co., who have perhaps the full range of experience. They would like to make brief statements, if you would permit it.

Senator JOHNSTON. If we have time, we will do so. Senator Ford advises he is from your hometown.

Senator FORD. He is a fine, decent fellow. He has a grocery store on Route 65 and now has a chain.

Mr. SMITH. We operate seven supermarkets. I am from Owensboro, Ky. We operate in four towns. We realize we are small. We have to depend on our suppliers for merchandise, most of it anyway. We support this bill. We believe anything that helps our supplier will help us. We think it will save energy. In fact, we know it will. We, at times, have trucks—without backhaul, it does not justify for us to do it. It would save a lot of energy when you can have a load both ways.

We have been in business 39 years. Senator Ford did not give us credit for the whole time we have been open. We appreciate coming before this panel, and we certainly hope this bill passes, and we look forward to seeing what you can do.

Senator JOHNSTON. Were you named after Wendell Ford?

Senator FORD. No. I was named after him. He is much older than I am. [Laughter.]

[The prepared statements of Mr. Aders and Mr. Smith follow:]

STATEMENT

on

S.1699
DIESEL FUEL AND GASOLINE CONSERVATION
ACT OF 1977

Before The

ENERGY CONSERVATION AND REGULATION SUBCOMMITTEE
SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

For

FOOD MARKETING INSTITUTE

By

ROBERT O. ADERS

June 27, 1977

I am Robert O. Aders, President of Food Marketing Institute (FMI), a non-profit trade association, incorporated in Washington, D.C. FMI represents more than 950 food retailers and wholesalers, including food chains, independent grocers, voluntary wholesalers and cooperative wholesalers. The trade association conducts programs in research, education and public affairs on behalf of its members.

FMI strongly supports the Diesel Fuel and Gasoline Conservation Act of 1977 (S.1699). This legislation is vitally needed by the food industry and the nation in order both to conserve our vital energy resources and to promote a more efficient method for distribution of food and other products.

I. Objectives of the Legislation

The retail and wholesale food industry is fully committed to energy conservation and efficiency in the distribution of food products. These goals should be shared by all of us in this period of rapidly escalating fuel costs and decreasing supplies of energy. Our industry has been aware for some time now that we could conserve enormous quantities of diesel and gasoline fuel by removing certain impediments to backhauling caused by regulatory uncertainty. As it is now, we estimate that one-third of the grocery trucks on the road today are running empty.

Backhaul in the food industry is fully described in a pamphlet attached to my testimony. (Attachment A). As we understand it to be used in this legislation, backhaul refers only to the pick-up of products by the buyer from a supplier's warehouse for redistribution throughout the buyer's retail stores or through customers' stores in the case of a wholeseller. For example, a food distributor's trucks may start out in the morning from its warehouse with a full load of merchandise to be delivered to its various retail locations. Returning to the warehouse after the goods are delivered, the food distributor's vehicle passes a supplier's warehouse where it could pick up a full load of product scheduled for delivery to the buyer's warehouse. Unless this pick-up opportunity -- backhaul -- is utilized, our industry finds itself in the wasteful practice of delivering products to our outlets and then returning empty, or deadheading, back to the warehouse. At

the same time, suppliers' warehouses that we may pass on the way are delivering products to our warehouses and then deadheading back to their plants. In other words, you have a situation where trucks operated by both the supplier and buyer are passing each other, pulling empty trailers. This is a needless waste of money and fuel which S.1699 would correct.

The magnitude of this unnecessary waste of energy resources and inefficiency in food distribution was dramatically set forth in a report published in 1975 by the Transportation Task Force - Food Service Advisory Committee, Federal Energy Administration. That report estimated that removal of existing backhaul barriers would have the potential to reduce fuel consumption, within the food industry alone, by 100 million gallons annually. "Deadheading" would be reduced by 500 million miles annually and the overall reduction in the cost of food distribution would be approximately 1/3 of a billion dollars. Now I know that other reputable studies may produce savings estimates which differ from these, depending upon their basic assumptions, but by any standards, the saving potential is very large indeed. It is obvious that this energy conservation would be multiplied as other industries enjoy the benefits of backhaul that this legislation would permit.

This legislation will permit, not require, sellers to grant cost-justified backhaul allowances to all the seller's customers on a non-discriminatory, cost-justified basis. What this means to the food industry is that transportation savings from more efficient energy usage can be made available by sellers in terms of reduced prices to food wholesalers and food retailers. These savings can benefit all members of the retail and wholesale

grocery industry, regardless of their size. While some companies who perform the backhaul services themselves can receive the savings directly, others who operate through food wholesalers can receive the benefits as a pass-on from the wholesalers. Thus, the energy cost savings will be reflected throughout the chain of distribution. For the same reason, as the food retailers' costs are lowered, the benefits will flow through to consumers.

II. The Need for Legislation

The conditions giving rise to the existing waste of energy resources and higher costs of distribution stem from advisory opinions of the Federal Trade Commission which cast doubt on the legality of backhaul allowances under certain circumstances where they might be deemed discriminatory. The result has been confusion as to the true state of the law and a dampening effect on suppliers' willingness to grant backhaul allowances in a large number of circumstances even though the allowances would be available on a non-discriminatory basis and would amount to no more than the costs actually saved by the suppliers.

The Federal Trade Commission first generated uncertainty regarding backhaul in 1967 by issuing its Advisory Opinion No. 147. 72 F.T.C. 1050 (1967). Since that time the Commission has issued two additional Advisory Opinions, two "clarifying opinions" and an FTC news release. Its most recent expression on the issue consists of an October 8,

1975 letter to the Council on Wage and Price Stability which basically confirms its earlier pronouncements.

In summary, the FTC has suggested that it may be unlawful for a supplier who normally operates under a uniform zone delivered price system to grant backhaul (or pick-up) allowances in an amount representing the actual savings to the supplier from the buyer's performance of this function. According to the Commission, the only alternative in a zone price context is for a supplier to offer all buyers the option of picking merchandise up at the suppliers' warehouse at an f.o.b. price which must be identical to all customers. This alternative would not permit the realization of actual delivery cost savings, which is the only approach that would bring about maximum energy conservation and efficient distribution. It has apparently been the FTC's view that any price difference to different purchasers, even one fully justified by savings in the seller's delivery costs, is a possible violation of law.

Despite these advisory opinions the FTC has not issued a single complaint or formal rule attempting to prohibit or limit backhaul allowances, nor should it have. In fact, some recent consent orders of the Commission and pronouncements of the Department of Justice, which have concurrent jurisdiction for antitrust enforcement are at odds with the advisory interpretations and would support the thrust of S.1699.

Nevertheless, a large number of suppliers have been discouraged by the existing confusion from making cost justified pick up allowances available to buyers. As a result, cost-justified backhaul allowances are not generally available. Since there are additional costs borne by the buyer in performing the delivery function, that function cannot be performed without a cost justified allowance from the seller. The cloud placed over these allowances by the FTC's interpretations has thus prevented the energy and cost savings I described previously from being realized. Clarifying legislation such as S.1699 represents the only effective and sure resolution of this matter.

While I have covered the barriers to backhaul in summary form, there is attached to my statement a legal memorandum examining this issue in depth. (Attachment B).

III. What S.1699 Will Not Affect

I also think that it is important to understand what S.1699 will not do. First, S.1699 will not in any way amend or modify the Robinson-Patman Act. All that S.1699 will do is clarify that it is not illegal to permit cost-justified, non-discriminatory backhaul allowances. This important clarification will create tremendous opportunities for eliminating deadheading and in turn conserving vital fuel resources.

Secondly, since this legislation involves only transportation of a buyer's own products, the legislation will not affect regulations of the Interstate Commerce Commission or the status of a common or contract carriers.

IV. Summary

In view of our nationwide energy crisis, we in the food industry consider it to be our obligation to maximize the efficiency of food distribution in order to conserve fuel and reduce distribution costs.

The adoption of S.1699 will supply the needed incentive to both sellers and buyers to make more productive use of their respective delivery systems. Instead of having millions of gallons of fuel wasted on millions of miles of deadheading trucks, more companies will avail themselves of the opportunity to load empty trucks at the seller's warehouse and backhaul the merchandise. These substantial energy and cost benefits can be made available by S.1699 and we respectfully urge its passage into law.

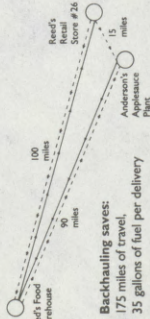
Backhaul Can Benefit Consumers Through Reduced Costs and Energy Savings

Let's look at a few hypothetical examples to see how backhauling can ultimately benefit consumers.*

I Reed's Food Company is a regional chain, with stores located up to 120 miles from its warehouse. Reed's has its own fleet of delivery trucks. Store #26 is 100 miles from the warehouse. A truck can leave in the morning, deliver a supply of grocery products to the store and deadhead 100 miles back. . . . OR . . . this truck can very route just slightly and deadhead only 15 miles, until it reaches Anderson's Appliance plant. The truck can pick up a full load of appliances for the remaining 90 miles of the round trip.

Mileage: If Reed's truck travels 100 miles full and deadheads back 100 miles, and Anderson's truck (on delivery to Reed's warehouse) travels 90 miles full and 90 miles deadheading, a total of 380 miles is covered by the two trucks. However, if Reed's truck backhauls, the total mileage per trip would be 205. The mileage saved is 380 minus 205 or 175 miles.

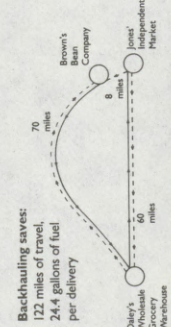
Benefits: 175 miles of travel eliminated, and 35 gallons of fuel saved (based on 5 miles per gallon). A reduction in expense to both Reed's Food and Anderson's Appliance. Now there is a savings which can be passed along to consumers.



2 Daley is a wholesaler. His warehouse is 60 miles from Jones' Independent Market, one of the many stores to which he delivers a wide variety of products. Formerly he would have made this 60 mile delivery and deadheaded back, because no other stores he supplies are on the same route. Now Daley makes an 8 mile sidetrip to Brown's Bean Company and returns with a full load, traveling 70 miles on the return trip. Brown provides Daley with a backhaul allowance, which he can pass along to his independent stores by reducing the price of the product they buy from him. After all, it costs him less now, than when Brown's used to deliver to him.

Mileage: Before the backhaul arrangement between Daley and Brown was made, Daley traveled 120 miles round-trip to deliver to Jones and Brown, traveled 140 miles round-trip to deliver to Daley's, a total of 260 miles traveled. Now Daley makes a round trip of 138 miles, so 122 miles of truck travel are saved per delivery.

Benefits: 122 miles of travel eliminated, and 24.4 gallons of fuel saved (based on 5 miles per gallon). A reduction of operating costs which can be passed along to consumers.



Suppliers Support Backhaul
Many companies still do not offer cost-justified backhaul allowances, often because of lack of clarity concerning FTC interpretations. Those who do, report that their service to customers is improved by providing backhaul. The marketing director of a major canned goods firm comments: "I think the program has been successful for a variety of reasons, number one of which is making our merchandise available at the discretion of the buyer to enable him to increase his turnover."

The bottler of a nationally distributed food product comments to the owner of a large outlet for his product: "This has been a very nice arrangement for us and the increase you have given us on our product has been the key to eliminating any out-of-stock conditions you have experienced in the past." You can understand why our customers' trucks get first preference at our loading docks."

Become a Backhaul Backer Now!
By removing regulatory impediments we have an opportunity to cut down on fuel waste and reduce costs which may be passed along to consumers at the checkout counter.

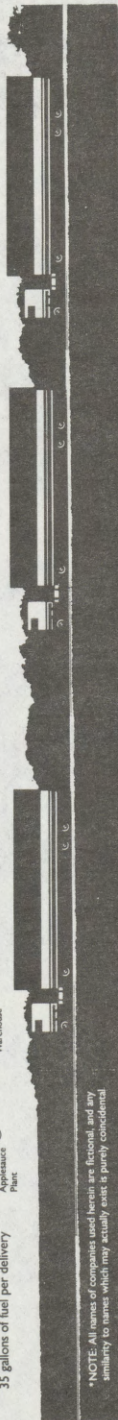
*Productivity Backhaul in Food Distribution, National Commission on Productivity and Work Quality

The Transportation Task Force Food Service Advisory Committee of the Federal Energy Administration has estimated that removal of backhaul barriers could reduce food distribution travel by 500 million miles; reduce fuel consumption by 100 million gallons; and reduce food distribution costs by up to \$330-million annually.

When Dr. John T. Dunlop, former Secretary of Labor, was Chairman of the National Commission of Productivity and Work Quality he wrote:

"Distribution has been described as the 'wasteland' of our economy. Despite considerable progress in the past 25 years, parts of the distribution system have continued to exhibit low rates of productivity improvement compared to other sectors of the economy. If wasteful practices that contribute to inefficiency are eliminated, the nation's distribution system can be achieved that will benefit suppliers, distributors, and particularly the consumer, who in the final analysis, pays the bill."

S.1699, the "Diesel Fuel and Gasoline Conservation Act of 1977" can remove impediments imposed by current FTC interpretations. This bill has the support of consumer groups. Let us all join in the support of this practical and common sense legislation, and do our part to save energy and reduce costs.



*NOTE: All names of companies used herein are fictional, and any similarity to names which may actually exist is purely coincidental.

So What's the Problem?

In providing backhaul service, a grocery company incurs additional cost for time and money, and therefore expects an allowance for the shipping services it is providing. In many cases suppliers of products charge the grocery company a price which includes delivery. If the service to its warehouse it wants a backhaul allowance. In the grocery industry, this is referred to as a "cost" interpretation by the Federal Trade Commission regarding cost-justified backhaul allowances have deprived buyers of the economic incentive they need to use their trucks to backhaul. So the deadheading and waste of fuel continues.

Is There a Solution?

Yes, There Ought to Be a Law!

With the backing of consumers and distributors, a bill was recently introduced in the Senate of the United States. It was written to remove the impediments imposed by current FTC regulatory interpretations. This bill is S.1699, the "Diesel Fuel and Gasoline Conservation Act of 1977," which provides as follows:

It shall not be unlawful for a seller of goods, wares or merchandise pursuant to a uniform zone delivered pricing system to grant backhaul allowance to a buyer where the backhaul service is actually performed by the buyer or an authorized carrier. The backhaul allowance shall be no greater than the actual savings in delivery costs to the seller and where the allowances are available to all the seller's customers on a non-discriminatory basis.

The passage of this legislation will provide increased energy conservation by removing certain impediments to backhaul.

The bill makes it clear that so long as a backhaul allowance is available to all the seller's customers on a non-discriminatory basis, and is equal to no more than the actual savings to the seller, then the allowance is permissible. Since S.1699 involves only transportation of the buyer's ordered products the legislation would not affect the regulations of the Interstate Commerce Commission nor the status of common or contract carriers.

Stretching Natural Resources

The retail and wholesale grocery industry is committed to energy conservation and efficiency in food distribution. One opportunity for this industry and others to save significant amounts of fuel is through increased "backhauling" in truck transportation.

Backhaul Means Coming Back Full, Not Empty

"Backhaul" is a transportation industry expression. It applies to truck delivery of products to their scheduled destination followed by pick-up of other products for the return trip. Backhauling eliminates an empty return trip, called "deadheading."

Backhauling in the Grocery Industry

There are many kinds of backhaul, but we are dealing with only one company backhauling products for itself. For example, when a grocery company schedules one of its own trucks to bring back products it has purchased from a supplier, after delivering a load of groceries to a warehouse near the supplier, it is engaged in backhaul.

Backhauling in the Food Industry Alone Could Save 100 Million Gallons of Fuel Annually

It may be surprising to learn that one out of three food retailer or wholesaler trucks now on our nation's highways is traveling empty. It is estimated that deadheading within the food industry wastes up to 100 million gallons of fuel annually. Deadheading not only wastes fuel but boosts operating costs which show up ultimately at the checkout counter. By reducing unnecessary deadheading, total food distribution costs could be reduced by \$330 million annually.*

*Reported by the Transportation Task Force—Food Service Advisory Committee of the Federal Energy Administration, May 1975.



Support Backhaul

Support S. 1699

As a public service, this brochure has been published by the Food Marketing Institute on behalf of its members and others who support S.1699. FMI is a non-profit organization, which conducts program research, education and public affairs in behalf of its more than 350 member companies and the customers they serve. FMI members are food retailers and wholesalers, including food chains, independent grocers, voluntary wholesalers and cooperative wholesalers.

Food Marketing Institute

1750 K Street N.W.
Washington, D. C. 20006
(202) 452-8444

ATTACHMENT B

MEMORANDUM

June 27, 1977

RE: DIESEL FUEL AND GASOLINE CONSERVATION ACT OF 1977

On June 15, 1977, Senator J. Bennett Johnston, Jr. of Louisiana introduced S. 1699, entitled, "Diesel Fuel and Gasoline Conservation Act of 1977." This bill was co-sponsored by Senators Bumpers, McClure, and Stone. The purpose of S. 1699 is to help facilitate maximum energy conservation in product distribution due to the nation's acute energy shortage and to reduce the cost of that distribution. Energy conservation, in the form of reduction of unnecessary diesel fuel and gasoline waste, and increased efficiency in distribution of products, which can be obtained by removal of ill-advised regulatory barriers and which may result in cost savings to ultimate consumers, should carry a high priority.

^{1/}
For the above reasons the Food Marketing Institute, The National American Wholesale Grocers' Association, the Cooperative Food Distributors of America, and others, are strongly in support of this proposed legislation. The operative language of S. 1699 contains the following language:

^{1/} A trade association representing approximately 950 independent retailers, food chains, and food wholesalers.

It shall not be unlawful for a seller of goods, wares or merchandise pursuant to a uniform zone delivered pricing system to grant backhaul allowances to a buyer where the backhaul function is actually performed by the buyer or an authorized carrier serving the buyer, where the allowance is no greater than the actual savings in delivery costs to the seller and where the allowances are available to all the seller's customers on a non-discriminatory basis.

The effect of this legislation will be to increase energy conservation by removing the limits imposed by current regulatory interpretations of the Federal Trade Commission to cost-justified, non-discriminatory backhaul allowances. ^{2/} Since this legislation involves only transportation of a buyer's own products, the legislation would not affect regulations of the Interstate Commerce Commission or the status of common or contract carriers.

The current regulatory impediments to cost-justified backhaul allowances are causing an enormous waste of precious energy and distribution productivity by not encouraging economically efficient and fully productive use of motor carrier equipment. This bill would allow

^{2/} As used herein, the term "backhaul allowance" refers to a buyer or his authorized carrier making a delivery near the seller's warehouse, and then instead of returning empty, having his truck loaded at the seller's warehouse and "backhauling" the merchandise to the buyer's warehouse. A cost-justified allowance would be granted for this delivery function performance. The backhaul allowance granted to each buyer would be computed by means of the same formula so that no discrimination would occur as to any buyer regardless of his geographic location.

a seller operating under a uniform zone delivered price system the^{3/} option of granting cost-justified backhaul allowances to buyers, and would result in substantial savings of fuel, more efficient distribution of products by permitting buyers to operate with full trucks, and decreased use of the national highway system. In fact, the Transportation Task Force^{4/} estimated in 1975 that removal of backhaul barriers would have the potential to reduce fuel consumption, within the food industry alone, by 100 million gallons annually. "Dead heading," or having trucks return

^{3/} This legislation would make it clear that a seller could grant a cost-justified backhaul allowance to a buyer in situations where the seller operates under a lawful zone delivered price system. The legality of zone delivered systems has been contested on a number of occasions. Where the courts have found that the zone price system under consideration is merely part of an industry-wide scheme to stabilize or fix prices, it has uniformly rejected its legality. See U.S. v. American Linseed Oil Co., 262 U.S. 371 (1923); Corn Products Refining Co. v. F.T.C., 324 U.S. 726 (1945); F.T.C. v. A. E. Staley Manufacturing Co., 324 U.S. 746 (1945); and F.T.C. v. Cement Institute, 333 U.S. 683 (1948). However, in the leading case on delivered zone prices, the Supreme Court in F.T.C. v. National Lead Co., 352 U.S. 419 (1957) construed the Federal Trade Commission's order under Section 5 as not prohibiting either independent delivered zone pricing per se or the practice of absorbing freight to foster competition. In addition, the court made it clear that the defense of good faith meeting of competition pursuant to Section 2(b) of the Robinson-Patman Act must be read into zone delivered price systems. Thus, in such a zone delivered price system every purchaser within the geographical zone is offered the same goods at the identical delivered price regardless of whether the seller's actual cost of delivery is the same or different. This is achieved by having the seller "average" his delivery costs and applying that average to each buyer's goods within the geographical zone.

^{4/} Transportation Task Force - Food Service Advisory Committee, Federal Energy Administration (1975).

empty, would be reduced by 500 million miles annually, and the overall reduction in the cost of food distribution would be approximately \$300 million annually. These cost savings could be rapidly reflected at the retail level.

Regulatory Barriers to Backhaul Allowances

This legislation has been necessitated by a series of regulatory interpretations issued by the Federal Trade Commission, ^{5/} dealing with ^{6/} interpretations of Section 2(a) of the Robinson-Patman Act. It is essential to recognize that this legislation will not in any way amend or modify the Robinson-Patman Act. Instead, by clarifying the legality of permitting cost-justified non-discriminatory backhaul allowances, it will serve to create tremendous new opportunities for eliminating empty truck movements and, in turn, conserve vital diesel and gasoline fuel resources. This clarification can be obtained by removing the regulatory impediments to backhaul caused by erroneous or at least questionable interpretations of the Robinson-Patman Act by the Federal Trade Commission.

^{5/} Advisory Opinion No. 147, issued October 24, 1967, 72 FTC 1050 (1967); Advisory Opinion No. 194, issued February 24, 1968, 73 FTC 1309 (1968); Advisory Opinion No. 198, issued March 5, 1968, 73 FTC 1312 (1968); clarifying opinion announced December 26, 1973, CCH Trade Reg. Rep. ¶20,498; clarifying opinion announced March 28, 1975, CCH Trade Reg. Rep. ¶20,850; and FTC news release dated October 8, 1975 to the Director of the Council on Wage and Price Stability.

^{6/} 15 U.S.C. 13(a).

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, provides,

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, ... and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. (15 U.S.C. 13(a))

Section 2(a) further provides,

That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery ... (emphasis added, *id.*)

Thus, for a violation to occur there must be an affirmative finding concerning each of the following elements:

- ^{7/}a) The person involved must be engaged in commerce; ^{8/}
- b) There must be either a direct or indirect discrimination in price between different purchasers;
- c) The commodities involved must be of like grade and quality; and
- d) The probable effect of such discrimination may be substantially to lessen competition or tend to create a monopoly.

^{7/} The word "person" as defined in the Clayton Act, 15 U.S.C. 12, includes corporations and associations.

^{8/} The word "commerce" refers to interstate commerce, 15 U.S.C. 12.

In addition, Section 2(a) contains a defense of utmost importance in the backhaul context. This defense provides, in part, that nothing contained in the Act shall prevent differentials which make only due allowance for differences in the cost of delivery. Thus, since this legislation allows only cost-justified and non-discriminatory backhaul allowances, it falls clearly within the scope of allowing differentials which make allowances for differences in the cost of delivery. Furthermore, this legislation provides that the backhaul allowance must be made available to all the seller's customers on a non-discriminatory basis.

The Federal Trade Commission in its advisory opinions and clarifying statements regarding backhaul allowances has never addressed the issue as to whether the elements of unavailability or competitive injury would be present in a backhaul allowance situation. Several court decisions have, however, indicated that a price difference is not discriminatory if the lower price is available to all customers similarly situated. Thus, in Mueller Co. v. Federal Trade Commission,^{9/} the Court upheld the Commission's prior determination of a violation of Section 2(a) stating:

Because we think the Commission's finding is based upon substantial evidence, it follows that it was warranted in concluding that §2(a) was violated by price discrimination in that the 'functional discount' was not available to all other jobbers or customers of petitioner as required by §2(d).
323 F.2d 46.

^{9/} 323 F.2d 44 (7th Cir. 1963), cert. den., 377 U.S. 923 (1964).

10/

In Federal Trade Commission v. Borden Company, the Supreme Court tacitly dealt with the availability and discrimination issue in a case involving an issue of "like grade or quality" of milk. In that case the court stated,

The Commission will determine, subject to judicial review, whether the differential under attack is discriminatory within the meaning of the Act, whether competition may be injured, and whether the differential is cost-justified or is offensive as a good-faith effort to meet the price of a competitor. 383 U.S. 646.

Thus, the Court points out that a "differential" cannot be "discriminatory" where it is available to all customers.

Other cases have also established that an allowance must be made available to competing customers. ^{11/} In a backhaul context, while a large food retailer may have his own private truck fleet for backhaul purposes a smaller retailer may utilize a food wholesaler that would obtain the cost-justified backhaul allowances and pass it on to that retailer. The Federal Trade Commission's advisory opinions have simply assumed ^{12/} that all the elements of a Section 2(a) violation were present.

^{10/} 383 U.S. 637 (1966).

^{11/} See, Vivano Macaroni Company, CCH Trade Reg. Rep. ¶18,246 (1968), affirmed, 411 F.2d 255 (3rd Cir. 1969); Tri-Valley Packing Association v. FTC, 390 U.S. 341 (1968); FTC v. Morton Salt Co., 334 U.S. 37 (1948).

^{12/} See Advisory Opinion No. 147, 72 FTC 1050 (1967). The element relating to a substantial lessening of competition is not necessarily present in many backhaul situations. The courts have clearly held that in Section 2(a) cases, even where price discrimination occurs between competing purchasers, it must have the probable effect of injuring competition. See Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922); FTC v. Morton Salt Co., 334 U.S. 37 (1948). Where, for example, the near buyers and the far buyers geographical areas of operation do not overlap, then there would be no likelihood of lessening of competition, since there is no competition. In situations where the near buyer and the far buyer have numerous outlets serviced by their respective warehouses and a few outlets overlap, again there would be no substantial lessening of competition, but at most a de minimis impact.

Moreover, the Commission has never issued an opinion in a litigated case involving backhaul allowances or even filed a complaint asserting a violation of Section 2(a) based on their having been granted. Thus, the Commission merely through its interpretations of the Robinson-Patman Act in its Advisory Opinions and clarifying statements has created a situation where manufacturers have been advised that the granting of backhaul allowances may violate Section 2(a). Nevertheless, this admonition has been sufficient to induce a number of sellers, particularly in the grocery industry, to refuse to discuss backhaul allowances with their customers.

The legality of granting cost-justified backhaul allowances was first questioned by the Federal Trade Commission in 1967. In Advisory Opinion No. ^{13/}147, the Federal Trade Commission advised a manufacturer of food products that it would probably be illegal to grant so-called "backhaul" allowances to customers who pick up their own purchases at the manufacturer's warehouse. This advisory opinion dealt with a manufacturer who sold products on a uniform zone delivered price basis, and who desired to initiate a program whereby customers could pick up products at the manufacturer's warehouse and be paid an allowance equal to the amount the manufacturer would otherwise pay a common carrier to deliver to the customer. The Commission concluded that implementation

^{13/} 72 FTC 1050 (1967).

of this proposal would probably violate the law. The Commission's reasoning was that in a delivered price system, the freight factor included within the price was not the actual freight to any given point, but an average of the freight to all customers within the delivered price zone. Thus, according to the Commission, an allowance from the zone price equal to the amount of actual freight would be inherently discriminatory.

^{14/}
In Advisory Opinion No. 194, the Commission set forth a hypothetical situation in which it advised a West Coast manufacturer of industrial parts that it would not be illegal to use either a conventional uniform delivered pricing system based on average cost factors or a uniform delivered pricing system which will be effected by granting so-called freight allowances to be deducted from the manufacturer's f. o. b. factory price.

However, the Commission cautioned,

"...that since this opinion deals in a projected manner with hypothetical figures chosen for illustrative purposes, the computations later to be made based upon actual cost factors must in practice achieve the result claimed in that each buyer will pay exactly the same net price including the freight. Any other result, the Commission stated, would be outside the scope of this opinion." (Id., Emphasis added)

^{15/}
In Advisory Opinion No. 198, the Commission rejected the request of a seller that operated with a uniform delivered price system to grant a

^{14/} 73 FTC 1309 (1968).

^{15/} 73 FTC 1312 (1968).

proposed 5% discount to all customers buying in truckload quantities.^{16/}

The Commission, in rejecting the request, noted that the alleged cost saving depended upon averaging the savings in freight rates and that the freight rates to nearby customers was considerably less than 5%.

The Commission's Advisory Opinion Nos. 147, 194 and 198 met with widespread criticism. Part of the reason for the criticism was that none of these Advisory Opinions discussed or explained the underlying^{17/} conclusion that a cost-justification defense, as provided for in the Robinson-Patman Act, would be unavailable. Following the three initial Advisory Opinions, the Commission has subsequently issued two "clarifying opinions"^{18/} and an FTC news release relative to the issue. The first clarifying opinion

^{16/} The manufacturer requesting the opinion was already subject to a cease and desist order prohibiting price discrimination under Section 2(a) of the amended Clayton Act.

^{17/} The proposed legislation will provide an option to the manufacturer to allow a buyer the opportunity to pick up his goods at the manufacturer's shipping point and receive as an allowance an amount no greater than the actual savings to the manufacturer in his shipping costs. In other words, if the manufacturer would have to expend 15 cents per unit to ship the goods to the buyer then the buyer would be allowed a 15 cents allowance to backhaul the goods to the buyer's warehouse. This backhaul allowance would be cost-justified since it is an amount no greater than the service which the manufacturer is now either directly performing himself, or indirectly performing by paying that amount to another carrier.

^{18/} Clarifying Opinion announced December 26, 1973, CCH Trade Reg. Rep. §20,498; Clarifying Opinion announced March 28, 1975, CCH Trade Reg. Rep. §20,850; and FTC news release dated October 24, 1975, pertaining to the Commission's letter dated October 8, 1975 to the Director of the Council on Wage and Price Stability.

released December 26, 1973 was the result of representations made by certain parties including the Cost of Living Council and the National Commission on Productivity. In that clarifying opinion the Commission asserted that questions regarding violations of Section 2(a) of the Robinson-Patman Act would probably not arise if sellers using valid uniform zone delivered prices, offer to all customers, on a non-discriminatory basis, the option of purchasing "at a true f.o.b. shipping point price."

The Commission's second clarifying opinion regarding backhaul allowances was announced on March 28, 1975 to Mark Silbergeld, an attorney for Consumers Union. In this second clarification the Commission noted that, "some confusion has arisen as a result of the term true f.o.b. shipping point price." The Commission concluded that no question of unlawful discrimination would arise so long as the f.o.b. price is (1) uniform and (2) available to all customers on a non-discriminatory basis. In addition, the Commission noted that there is no legal requirement that the alternative f.o.b. price be of any particular amount or computed in any particular way.

The Commission's most recent statement regarding backhaul allowances is contained in an FTC news release dated October 24, 1975. This release is a copy of a letter dated October 8, 1975 to Albert Rees, Director of the Council on Wage and Price Stability who had asked for a clarification of the Federal Trade Commission's interpretations on backhaul ^{19/} allowances. The Commission's letter stated that,

^{19/} The request for clarification of the FTC's interpretations of the backhaul allowance and removal of that agency's impediments to backhaul by Albert Rees, Director of the Council on Wage and Price Stability was also supported by the Federal Energy Administration. By letter dated August 15, 1975, Frank G. Zarb, (continued on page 12)

"if different backhaul customers purchase identical goods in identical quantities and according to exactly the same method of sale and delivery (i. e. by pick-up in their own trucks at the seller's shipping point) then, as the Commission see [sic] it, no cost differences to the seller, as contemplated under the cost justification provision of Section 2(a) of the Robinson-Patman Act, obtain. In particular, in such transactions, because no transportation of goods by the seller to affect delivery occurs, no delivery cost differentials arise such as would justify differences with respect to the f. o. b. price. Accordingly, f. o. b. price differences, in these circumstances, would not be cost-justified under Section 2(a) of the Robinson-Patman Act in the Commission's view." (Emphasis added)

Thus, the Commission's position as of October 1975 remains that backhaul allowances which would be equal to the actual freight cost of delivery to various customer's receiving points may violate Section 2(a) of the Robinson-Patman Act.^{20/} The only alternative for customers under the current

19/ (continued from page 11)

Administrator of the FEA asked the FTC to clarify its interpretation of the legality of actual cost-justified backhaul operations. The FEA stated that it felt that, "this action would make a meaningful contribution to reducing fuel consumption in the freight transportation sector." The FEA continued that, "... the potential for fuel conservation which could result from encouraging shippers to permit private truck backhauling on an expanded basis and recommended that FTC issue a statement that Section 2(a) of the Robinson-Patman Act permits actual cost backhaul allowance. The FEA agrees with this recommendation and requests that you give positive consideration to it as soon as possible."

20/ Challenges to payments of freight allowances have been brought by private parties under Section 2(d) and 2(e) of the Robinson-Patman Act. However, the courts in both American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951); and Chicago Spring Products Co. v. U.S. Steel Corp., 254 F. Supp. (1966) have held that freight allowances and rebates are not actionable under Sections 2(d) and 2(e) of the Robinson-Patman Act and that such practices are actionable, if at all, only as "price discrimination" under Section 2(a), with the cost-justification defense available. Likewise, the Federal Trade Commission has previously held that freight rebates did not fall within Section 2(d) and 2(e). See, New England Confectionery Co., 46 FTC 1041, 1059-1061 (1949).

FTC position is to pick up goods at the seller's warehouse, where the seller offers to all customers, the option of purchasing f.o.b. the seller's shipping point. The f.o.b. price must be identical to all customers. Thus, the Commission appears to regard as discriminatory any price difference given to a purchaser of the same quality and quantity of product, in the form of an allowance if the allowance were equal to what the seller would actually save if he instead shipped the merchandise by his own fleet or by common carrier.

The Commission's advisory opinions and clarifying statements dealing with backhaul situations have been in conflict with a number of Federal Trade Commission consent orders and a recent Federal Trade Commission initial decision.^{21/} In 1974 the Commission accepted two consent orders which provided that the respondents for a period of ten years must give their customers the option of receiving a quotation and purchasing at f.o.b. prices. F.o.b. prices were defined so that they would not be set at artificial levels for the purposes of affecting purchases at the mill or distribution point. Thus, these consent orders allow customers the option of picking up at the seller's distribution point at a price that reflects actual transportation costs.

^{21/} International Paper Co., (FTC Docket No. C-2518, July 1, 1974, 84 FTC 9(1974); Vancouver Plywood Co., (FTC Docket No. C-2519, July 1, 1974, 84 FTC 17 (1974); Ideal Basic Industries, Inc., FTC Docket No. 9039 (December 1976); Boise Cascade Corp., et al., FTC Docket No. 8958 (1976).

22/ In Ideal Basic Industries, Inc., the Commission accepted a consent order which provided that the respondent would for a period of ten years allow the customer the option of obtaining a point of origin price, where the seller also offers a delivered price. The term "point of origin price" was defined as being no greater than the delivered price offered the customer less the actual transportation costs which would be incurred by the seller if the sale were made on a delivered basis. Thus, the Commission accepted an order in Ideal which allows the customer the option of picking up at the seller's distribution point at the delivered price less the actual cost of transportation.

In a November 1976 initial decision the administrative law judge in a litigated case, Boise Cascade Corp.,^{23/} involving the softwood plywood industry, entered as a part of a proposed Order, the following proposed relief:

IT IS FURTHER ORDERED, that when a delivered price is offered by a respondent to a customer for the purchase of softwood plywood in quantities of at least a truckload, that respondent shall also allow such customer the option of obtaining a point of origin price and of arranging or furnishing transportation from the mill from which shipment would have been made had the delivered price been accepted.^{24/} (emphasis added)

^{22/} FTC Docket No. 9039 (December 1976).

^{23/} FTC Docket No. 8958.

^{24/} Proposed Order, ¶3.

The Order defined the term "point of origin price" as follows:

-- a price set by a respondent for a purchase by a customer at a mill or distribution point from which a delivered price is quoted to the customer. The "point of origin price" shall be no greater than the delivered price offered to the customer less the actual transportation costs which would have been incurred by the seller if the sale were made on a delivered price basis. (emphasis added)

Thus, in Docket No. 8958 the administrative law judge has entered a proposed order which also provides that when a delivered price is offered by the seller to a customer, then the respondent shall also allow such customer the option of obtaining a point of origin price. The point of origin price will be no greater than the delivered price less actual transportation costs which would have been incurred by the seller if the sale were made on a delivered price basis. In other words, the Order has provided for a cost-justified delivery allowance at the customer's option based upon the actual transportation costs which would have been incurred by the seller.

The relief provided in the two 1974 consent orders, Ideal, and Boise Cascade, allow backhaul allowances equal to the actual transportation costs which would have been incurred by the seller. These decisions are in obvious conflict with the Commission's advisory opinions, but are similar to the interpretations which the Diesel Fuel and Gasoline Conservation Act of 1977 would provide on an across the board basis to all buyers purchasing under a delivered zone price system.

The Commission's advisory interpretations dealing with non-discriminatory backhaul allowances have also been criticized recently by the United States Department of Justice in its 1976 Report on the Robinson-Patman Act.

That report discusses the inefficient and costly distribution patterns that, according to the Department, the Act encourages. The report points out:

Inefficiency in distribution also results from the Act's restraints on 'backhaul allowances' in the food and other industries. 25/

The report went on to state that,

The available evidence indicates that the threat of Robinson-Patman violations plays a not insignificant part in the decision of manufacturers to refrain from offering backhaul allowances and in the lessening of the potential savings from such programs. 26/

Yale Brozen, a professor at the University of Chicago, in a foreward to 27/ an analysis of the Robinson-Patman Act, discusses a number of "absurdities" resulting from the application of the Robinson-Patman Act by the Federal Trade Commission. His prime example of a barrier to efficiency created by a federal agency to efficient use of energy in distribution of products, is the FTC's interpretations regarding backhaul allowances. According to Professor Brozen, the Commission's actions,

...made it uneconomic for buyers to fill their trucks on otherwise empty backhauls with the goods to be delivered to them by suppliers' trucks. 28/

25/ United States Department of Justice Report on the Robinson-Patman Act, p. 88

26/ Id. at p. 91.

27/ The Robinson-Patman Act, Federal Regulation of Price Differences, by Richard A. Posner (1976).

28/ Id. at foreward, p. iii.

As a consequence, suppliers unnecessarily burned millions of gallons of gasoline and diesel fuel delivering goods that could have been hauled by buyers' trucks passing suppliers' warehouses empty on the way back from deliveries. 29/

Professor Brozen concludes that,

Nevertheless, large wastes remain because backhaul allowances cannot be proportioned to the delivery costs saved by suppliers when customers pick up their own goods. 30/

A proportional backhaul allowance would do no more, at most, than maintain the current discrimination inherent in uniform delivered prices. It would have the advantage, however, of eliminating some of the wastes inherent in a uniform delivered price system. 31/

Earlier this year, in a Clinton, Massachusetts press conference,

President Carter responded to a question by saying:

In the energy considerations, it's obviously a gross waste to have trucks required to haul a load a long distance and then, because of unnecessary constraints by the Government bureaucracy, have to come all the way back home empty. I think that we need to do away with that particular requirement, at least.

Thus, the President recognizes an important adverse effect of some present federal rules, regulations, and interpretations which have impeded full use of backhauls.

29/ Id. at foreward, p. iv.

30/ Id.

31/ Id. at foreward, p. v.

In summary, the Commission's interpretations regarding cost-justified backhaul allowances in effect, deprives buyers of the economic incentive to use their equipment to conserve diesel and gasoline fuel and maximize efficiency. The "Diesel Fuel and Gasoline Conservation Act of 1977" would remove the impediments to backhaul by making it clear that so long as a backhaul allowance is available to all the seller's customers on a non-discriminatory basis, and no greater than the actual savings to the seller, then the allowance is permissible. Backhaul allowance opportunities would be available to all buyers. Whereas larger buyers may have their own vehicles, other buyers are affiliated with wholesalers who have vehicles, either owned or under contract, which transport merchandise and perform the backhaul function. Thus, no discrimination or competitive injury would result from enactment of the proposed legislation.

This clarification will supply the needed incentive to both sellers and buyers to make more productive use of their respective delivery systems. Instead of having millions of gallons of fuel wasted on millions of miles of empty truck movements, more companies will avail themselves of the opportunity to load empty trucks at the seller's warehouse and backhaul the merchandise. These substantial energy savings and cost benefits can be made available now by merely removing the existing regulatory impediments created by the Federal Trade Commission's interpretation concerning backhaul allowances.

FOOD MARKETING INSTITUTE,
Washington, D.C., July 21, 1977.

Re S. 1699 "Diesel Fuel and Gasoline Conservation Act of 1977."

Hon. J. BENNETT JOHNSTON,
U.S. Senate, Washington, D.C.

DEAR SENATOR JOHNSTON: At the hearing you chaired on June 27, 1977, Mr. Owen Johnson, then of the Federal Trade Commission, presented his individual views on the captioned bill. He offered the suggestion that the allowances be in a uniform amount within a delivered price zone and that the offering of such an allowance be made mandatory. You asked that I comment thereon and this letter is submitted in response to your request.

Fundamentally, what Mr. Johnson suggests is that the present interpretation of the FTC regarding backhaul be given legislative sanction. Under his proposal, the backhaul allowance must be uniform to all customers; *i.e.*, the allowance could not be larger for more distant customers even though the cost of transportation performed by them—and therefore the savings to the seller—would be greater than for nearby customers.

The proposal for a uniform allowance would not offer adequate economic incentive to distributors so as to encourage the maximum utilization of backhaul opportunities. Sellers would inevitably establish a uniform allowance rate at a level substantially lower than the actual freight rate to more distant buyers and probably below the average cost of delivery to all buyers within the seller's zone. As a result, only those buyers closest to the seller's distribution center would be in a position to take advantage of the uniform allowance option. Additionally, the proposal for a uniform allowance would lead to inequitable results since more distant buyers would be subsidizing the allowances offered to nearby customers.

By contrast, S. 1699 would encourage the use of backhaul in providing for an allowance up to a level that would be cost justified based on the actual cost saving to the seller in not having to deliver merchandise to the buyer. Under the non-discriminatory application of the cost formula, each buyer would have incentive to accept the backhaul alternative. There is, moreover, no inequity presented by S. 1699 since in no event would the allowance exceed the actual cost savings to the seller and no buyer would subsidize any other buyer on the basis of location.

An additional aspect of Mr. Johnson's proposal is that the allowance alternative be made mandatory. FMI does not believe that it would be appropriate that any term of sale such as the offering of backhaul allowances be mandatory, but that the matter should be left to negotiation between buyer and seller. Of course, if a seller grants a backhaul option to any buyer, he must grant it to all buyers on a non-discriminatory basis.

I hope this letter is helpful, and if I can be of any further assistance please contact me.

Sincerely,

ROBERT O. ADERS,
President.

[News From Food Marketing Institute]

GROCERS URGE LAW TO SAVE 100 MILLION GALLONS OF FUEL

Washington, D.C., June 27—Food Marketing Institute today called on Congress to seize an opportunity to reduce food costs by up to \$330 million and to save 100 million gallons of scarce fuel every year.

In testimony delivered in support of Senate Bill 1699, "The Diesel Fuel and Gasoline Conservation Act of 1977," FMI President Robert O. Aders explained that unnecessary governmental restrictions now force grocery trucks to travel up to 500 million miles annually carrying nothing but air.

"I think the American people have had it with practices and rules that do nothing but add costs to their food bill, or their fuel bill or their housing bill," Aders said. "It's time for government and industry to take some action on the side of efficiency and common sense."

The bill, sponsored by Senator J. Bennett Johnston (D-La.) provides that trucks returning empty from making a delivery may stop and pick up merchandise the purchaser has bought that would otherwise have to be delivered by

someone else. Testimony in favor of the bill which would permit increased backhauling was given to the Energy Conservation and Regulation Subcommittee of the Senate Committee on Energy and Natural Resources.

Aders called advisory opinions issued by the Federal Trade Commission on backhaul confusing and a basic cause of fuel waste and added food transportation costs. He said that historically these opinions "have cast doubt on the legality of backhaul allowances" by suppliers and discouraged suppliers from granting allowances to purchasers who want to truck their own merchandise by backhauling.

Under the new legislation an economic incentive through allowances by suppliers to buyers would be provided on a non-discriminatory basis to all buyers, large and small, and would amount to no more than the costs actually saved by the supplier who backhauls.

Aders pointed out that S. 1699 will *not* "in any way amend or modify the Robinson-Patman Act." Also, since the bill involves only transportation of a buyer's own products, it will not affect regulations of the Interstate Commerce Commission or the status of a common or contract carrier.

Aders added, "all S. 1699 will do is clarify that it is not illegal to permit cost-justified, non-discriminatory backhaul allowances. This important clarification will create tremendous opportunities for eliminating grocery truck dead-heading and conserving vital fuel resources.

In view of our nationwide energy crisis, we in the food industry consider it to be our obligation to maximize the efficiency of food distribution in order to conserve fuel and reduce distribution costs," he said.

"Adoption of S. 1699 will supply the needed incentive to both sellers and buyers to make more productive use of their respective delivery systems. Substantial energy and cost benefits can be made available by S. 1699, and we urge its passage," Aders stated.

Food Marketing Institute, a non-profit organization, conducts programs in research, education and public affairs on behalf of its more than 850 member companies and the customers they serve. FMI members are food retailers and wholesalers, including food chains, independent grocers, voluntary wholesalers and cooperative wholesalers. Members come from the U.S., Canada and about 30 foreign countries.

STATEMENT OF DAVID WYNDALL SMITH, PRESIDENT, WYNDALL'S ENTERPRISES, INC.,
OWENSBORO, KY.

My name is David Wyndall Smith and I am President of Wyndall's Enterprises, Inc. I am here today to give my strong support for S. 1699.

Wyndall's is a small, independent retail food company located in Owensboro, Kentucky. It owns and operates seven retail food stores located in Hopkinsville, Franklin, Bowling Green and Owensboro, Kentucky. We have been in business for 39 years. Our first store opened in 1938 and since that time we have expanded to our present total of seven stores. During the entire time we have been in business, we have bought our goods from food wholesalers because, being a small food retailer, it is more economical to buy from wholesalers than to buy direct. Over the years we have dealt with a number of food wholesalers and event today, while we buy most of our dry groceries from one wholesaler, we deal with others for fill-in dry grocery inventory requirements and with other produce and meat wholesalers.

We support this bill for a number of reasons. First, it will conserve energy. The energy crisis affects us in many ways. We are individually affected as consumers of energy to operate our cars and to heat our homes. As a company, we are affected because of our energy requirements in running our vehicles and in operating our stores in terms of space heating and cooling and in operating the machinery in the stores to keep perishable items cool and frozen foods frozen. We fully realize that energy must be conserved wherever possible to assure sufficient supply to operate as a seller of food to the public. This bill offers a meaningful and excellent opportunity to save fuel and it should therefore be made into law.

Second, we foresee the bill resulting in cost savings in food distribution. For the most part, these savings will initially be realized by our wholesalers who will be able to increase backhauling and make their distribution operations more efficient and less wasteful. We favor programs which reduce distribution

costs because we believe it could positively help us either by receiving some pass-through of cost savings from the wholesaler or because their cost savings can offset other unavoidable cost increases.

There is no more competitive business that I know of than the food business and I firmly believe that any reduction in distribution costs will ultimately be passed on to the consumer.

For these reasons, we support this bill. We see it as benefiting us as a company and as benefiting the public in general.

Senator JOHNSTON. Mr. Peck.

STATEMENT OF GERALD E. PECK, PRESIDENT, NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION, NEW YORK, N.Y.

Mr. PECK. Mr. Chairman, Senators, good morning. I represent the National-American Wholesale Grocers' Association, a group of wholesalers who service retail grocery stores and also food service outlets such as hospitals, restaurants, and hotels. Half of our membership of wholesalers are small, by definition of the Small Business Administration.

Ninety-seven percent of the 151,000 small retail stores in the country depend on wholesalers for supply and on the food service side, there are about half a million outlets, and 99 percent of those outlets depend on wholesalers for their supply.

We have a major commitment to small operators. We have had a major commitment to Robinson-Patman since its inception. If we had to make a choice this morning, Mr. Chairman, between supporting Robinson-Patman and S. 1699, we would not hesitate to stay with Robinson-Patman.

We are advised by counsel there is no problem, and we can be very comfortable in continuing our Robinson-Patman support and our support of backhaul for the last 15 years.

Mr. Johnson, in his testimony, alluded to the fact, if backhaul opportunities were increased, the probability is the major chains would be those people taking advantage of it and the small wholesalers would not.

We are here to suggest that is not the case. We represent small wholesalers. We have small wholesalers with us in the room. They are very anxious to have this opportunity.

A wholesaler that has one truck on the road has the opportunity to backhaul. Backhaul is not a new institution. It is an established part of our transportation system.

S. 1699 is not designed to open up that opportunity as has been suggested. It is designed to decide what happens to the actual savings in a uniform delivery price system.

The question is really whether the distributor who performs the service should realize the benefit of the saving or whether the seller should keep the money himself.

My contention is the distributor who supplies the service should be the one who receives the benefit. The benefit is not related to the price of the merchandise, but rather to the delivery service. I think that is a distinction that causes some of the ambiguity in the uniform delivery price system.

We have tried to do some analysis on this. We contend that the reflection of actual cost savings is the only way to keep equitability in the competitive system.

The averaging or other proposals that have been made, I think, would not accomplish that. S. 1699 assures the actual cost savings can be reflected if the supplier or the seller chooses to do that. It does not require him to do it, and we support that voluntary basis because we believe every seller should have the right to determine their own pricing structure.

The point is we will not have the opportunity to save the energy that is our objective this morning unless we can backhaul, and we cannot backhaul unless it is economically viable.

We believe S. 1699 will clarify the situation to the extent it is more available than it has been in the past. We have tried to increase our backhaul very vigorously over the years, and the results have not been very good.

We now have about 15 percent of the merchandise coming into our warehouses backhauled. At the time, 63 percent of the merchandise coming into our warehouses is carried by truckers.

Over the last 10 years, truckers have been able to increase their share twice as much as we have been able to increase our backhaul.

We suggest backhaul does not represent a major threat to the trucking industry. We are encouraged also by the fact consumers support backhaul and that is very natural. They are the ultimate beneficiaries of any savings that might be made in costs, and we think it is very fortunate the backhaul system will save millions of dollars a year. It is also going to save a good deal of energy. Thank you.

Senator JOHNSTON. Thank you very much, Mr. Peck.

[The prepared statement of Mr. Peck follows:]

STATEMENT OF GERALD E. PECK, PRESIDENT, NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION, NEW YORK, N.Y.

Good morning, I am Jerry Peck, President of National-American Wholesale Grocers' Association. We're known as NAWGA and I'll use that term. I appreciate the opportunity to speak in support of Senate Bill 1699, "Diesel Fuel and Gasoline Conservation Act of 1977."

NAWGA members are wholesale grocery distributors serving grocery retailers and foodservice outlets such as schools, hospitals and restaurants. Half of our members are small wholesalers by Small Business Administration standards.

The retail and foodservice customers of wholesalers include both large and small operators. Nearly half of the 32,700 supermarkets in our country are supplied by wholesalers. Of the 151,000 smaller retail grocery stores, 97 percent are supplied by wholesalers. There are 550,000 foodservice outlets and over 99 percent of them utilize wholesaler services. 81 percent of them are small outlets as defined by minimum wage regulations.

We are deeply committed to small operators and to Robinson-Patman. We have supported the Act since the day of its passage. We have also argued for backhaul for over fifteen years. If it came to a choice between Robinson-Patman or S. 1699, we would stay with Robinson-Patman. Fortunately, we don't have to choose. NAWGA counsel has researched both Robinson-Patman and backhaul considerations for many years. Specifically in conjunction with S. 1699, they advise us that there is no conflict or danger of chipping away at Robinson-Patman protection.

As recently as September 24, 1975, our support of the Robinson-Patman Act was reaffirmed. I was specifically instructed by our Board of Governors to

respond to the Justice Department indicating that NAWGA continues to endorse the basic purpose of preservation of competition for which the Robinson-Patman Act was enacted.

Backhaul benefits accrue to independent grocery retailers and foodservice outlets, through their wholesaler, in lower cost of merchandise or delivery service.

The energy saving potential through backhaul comes from using one truck trip to provide the service that would otherwise require two truck trips. In many instances a loaded truck leaves our warehouse for a customer delivery at the same time a truck leaves our supplier's depot with merchandise for delivery to us. The trucks pass each other on the way, make their deliveries then pass each other again as they return empty. Our truck could pick up the merchandise ready for delivery to us on the way back to our warehouse.

S. 1699 is not a bill to introduce or permit backhaul. Backhaul is an established transport system. S. 1699 refers only to what happens to actual cost savings in uniform delivered or zone price backhaul transactions.

The question is whether backhaul savings should go to the distributor who provides the backhaul or to the company selling the product. Distributors pay freight costs regardless of who delivers the product. Therefore, we contend that distributors who backhaul should pay that freight cost to themselves. That's exactly the same as saying that the actual backhaul cost savings should be given to the distributor through some adjustment to the uniform delivered or zone price of the merchandise.

S. 1699 assures manufacturers of their right to credit the distributor with actual cost savings but does not require them to do so. We approve making it voluntary because we support sellers' right to choose their own pricing system so long as it is not discriminatory.

It is significant to this hearing that distributors cannot backhaul unless their costs are covered and unless distributors can backhaul the grocery transportation system cannot achieve the potential energy savings. S. 1699 encourages actual cost savings to cover distributor costs and thereby it encourages energy savings.

Backhaul benefits are available to wholesalers of all sizes because they all use trucks for delivery. They can all use energy and cost by picking up previously ordered merchandise on their return trip rather than having it delivered on a duplicate run by another truck. There are some economy of scale differences between large and small wholesalers in utilizing backhaul. These are not related to S. 1699 clearances, but to manufacturer rules regarding minimum size of order or size of pallets.

A primary economic benefit of backhaul is reduced cost of merchandise. Ten years ago, it cost 9 cents to deliver a case of merchandise. Today it's 16 cents. Delivery cost per mile has increased from 59 cents to \$1.16. Savings through backhaul has made it possible to absorb much of that increase.

Other backhaul benefits cited in a 1965 NAWGA backhaul position paper include:

- (1) Better utilization of equipment and manpower in distributors' truck fleet.
- (2) Reduced inventory investment through more precise timing of merchandise receipt.
- (3) Reduction in lost sales from out-of-stock conditions.
- (4) Reduction in warehousing costs through balancing work loads for warehouse crews.

These productivity improvements are still valid. They occur because backhaul allows the distributor to control scheduling and handling of merchandise. When backhauling, the wholesaler takes possession and assumes liability for merchandise before, instead of after, it is delivered to the distribution center. This affects damage and sanitation and refrigeration control as well as productivity.

30 percent of merchandise purchased by grocery wholesalers is FOB priced and 70 percent is delivered or zone priced. The FOB portion has long been available on a backhaul basis, but only 46 percent of it is actually backhauled. This is because the terms or type of items or size of items or location of the supplier's depot or other factors do not provide needed economies. The point is that not every backhaul possibility is justified today, even where zone pricing questions do not exist. S. 1699 can encourage reflection of actual cost savings thereby encouraging backhaul and consequent energy savings.

Over the past ten years, the portion of merchandise backhauled to our warehouses increased from 12 percent to 15 percent. During these same ten years the portion of merchandise delivered to our warehouses by common carrier trucks increased from 57 percent to 63 percent. Common carrier truck tonnage has grown twice as much as backhaul. We don't see backhaul as any more of a threat to carriers in the future than it was in the past.

We are encouraged by actions of grocery distributors in energy conservation. Reduction of energy usage ranges up to 15 percent. Our association has conducted energy audits and sponsored energy information bulletins, seminars and research. We have an energy management manual for distribution centers and truck fleets nearly ready for publication.

We are encouraged that support for backhaul includes consumer groups. Consumers are the ultimate beneficiaries of any distributor savings in cost. It is fortunate that a system that can save millions of dollars annually carries the added incentive of energy saving.

Thank you!

Senator JOHNSTON. Next we have Thomas Rothwell.

**STATEMENT OF THOMAS A. ROTHWELL, COUNSEL, ON BEHALF OF
NATIONAL SMALL BUSINESS ASSOCIATION, INDEPENDENT
BAKERS ASSOCIATION, AND THE NATIONAL INDEPENDENT
DAIRIES ASSOCIATION, WASHINGTON, D.C.**

Mr. ROTHWELL. Thank you, Mr. Chairman. My name is Thomas A. Rothwell. I appear here testifying on behalf of National Small Business Association, Independent Bakers Association, and the National Independent Dairies Association.

It looks as if I am the first industry witness to take a position squarely in opposition to S. 1699, and, Mr. Chairman, I therefore will welcome the fight, any interruptions, or questions. Last October my client, National Small Business Association, and several other organizations visited with Presidential candidates and asked these candidates to commit themselves in support of the Robinson-Patman Act.

We have a letter dated October 1976 from President Carter which announces his firm commitment of the principles of Robinson-Patman and his personal reassurance that Robinson-Patman will be once again enforced if he becomes President, and we are counting on that commitment.

Also, Mr. Chairman, I would like to offer that, not only that letter for the record [not received], but also an excerpt from a report before the ad hoc subcommittee of the House Small Business Committee which was published last fall, the so-called Gonzalez Committee report. Pages 111 through 114 of that report deal directly with this backhaul problems, and I have the excerpts here. May I be permitted to offer this for the record, in addition to my statement.

Now, I have heard a lot of conflicting and confusing statements, and let's quote simply and directly. What is the law and how would the law be changed if S. 1699 is a successful Senate bill.

The law today permits backhaul allowances. It permits its own delivered prices. The f.o.b. mill price can be less than the zone-delivered price. There is no question about that.

All that is at issue here is that should the buyers who back their trucks up to the platform of the seller, should they all pay the same

price, given Senator Metzenbaum's caveat about allowance for quantity? Or, should they be given an allowance based on how far they are from their own plant?

The FTC does not allow that today. The buyers do not have the option of going to the seller asking for an f.o.b. price, in which is factored an element relating to their distance from the plant.

That is not lawful today. If 1699 becomes law, Senator, that will be lawful. The small business community, a portion for which I speak, feels this does a terrible thing to the Robinson-Patman Act principles of antitrust discrimination.

Let me explain why. It's all well and good for the proponents of the measure from industry to say that since the seller is saving that cost, that cost ought to be passed on to the buyer.

In theory and superficially, this sounds like a most equitable and fair thing, but in practice it is not.

The seller has got a cost saving involved in loading a truck at his platform that is almost impossible to calculate. We are dealing with incremental or marginal costs. This measure would operate in favor of the large chainstore operation that has a fleet of trucks on the road, and who are making deliveries in the vicinity of sellers' plants.

What would happen is that they would incur an incremental cost, in a very minor amount, and they would get, as their reward, the fully distributed costs of the seller.

I would be surprised if this committee did not hear some very loud protests from sellers about that arrangement.

Let me give you an example. Supposing we have a seller and he decides under the present law, for a truckload of his product in the shipping situation, he can offer \$200 off. He can offer an allowance of \$200.

The buyer, the A. & P store, the Kroger store, the Jewel Tea store, the National T store, you name it, they are all in effect before this committee. They say that is worth \$500 because if you shipped it common carrier, that is what it would cost, or perhaps they would use some other measure. It would take an army of accountants; it would take months of investigation to try to pinpoint what exactly was the cost savings.

Mr. Johnson of the Federal Trade Commission referred to this. What we fear and what we are confident of, there would be phantom costs factored into the equations so as to give what is tantamount to a price discrimination to the large purchaser who can afford to have a truck empty in the vicinity for making a backhaul.

That is the real world economics of the situation. Our people feel the present Federal Trade Commission is eminently correct as to their current interpretation of the matter. Anyone who shows up at that platform for a price quotation should get the same price.

Senator METZENBAUM. Mr. Rothwell, wouldn't that violate the specific language of the proposed law which provides that the allowance can be no greater than the actual savings in delivery costs to the seller? What you are saying is you pick the figure out of the air, and it seems to me the actual savings language, certainly we can always violate laws, but wouldn't the burden of proof be on the seller as well as the buyer to prove it was the actual savings rather than just to pick up some phantom figure?

Mr. ROTHWELL. Under the Robinson-Patman Act, the burden of proof seems to always be on some third party who does not have access to the data. To take up the major thrust of your question—

Senator METZENBAUM. Let me ask, on the burden of proof, aren't there two remedies under Robinson-Patman? Isn't one remedy before the FTC, and isn't the other one a private remedy in court?

Mr. ROTHWELL. Yes. In each case, you are dealing with a third party. The FTC is not knowledgeable going in, in reference to the cost factors of the buyer or the seller.

Certainly, a third party plaintiff, if they can qualify under the restrictive rules, which are very stringent in the transaction, and that is why there are not too many of these cases litigated successfully, because of the difficulties of a third party with this burden of proof, establishing the fact of discrimination.

Senator METZENBAUM. As I see the law, and I don't want to practice law in this room, but it seems to me the individual maintaining the Robinson-Patman Act violation would only have to show there was discrimination, and then I think the manufacturer, who would be the defendant, would have the burden of proof to show the allowance was no greater than the savings of delivery cost.

It seems to me the way the language is drafted, it would shift the burden of proof to the defendant in the exception aspect.

Mr. ROTHWELL. If 1699 becomes law, the difference in price at the shipping platform will no longer be discriminatory, within the legal meaning of that word.

In other words, it would be discrimination in fact, but not discrimination in law.

That is what S. 1699 proposes to do. In reference to that burden of proof, I go back to the point I tried to make in my 10-page statement, Senator. That is an almost impossible task, to figure what the actual cost is.

Certainly, the seller who uses some kind of accounting formula to average zone-delivered price, and charges that price to all customers, and he adds that delivery factor in to all customers within the zone, regardless of their location, and as Mr. Johnson pointed out, that inherently involves phantom freight. So, the near-in purchaser is in effect paying part of the more remote purchaser's cost of delivery.

That is the situation today. No one wants to change that, other than the Federal Trade Commission that has always avoided giving this situation its seal of approval, because of the inherent discrimination in pricing involved in zone-delivered pricing.

But, this does something else. This takes some accounting costs on a fully distributed basis, the sellers' costs, and makes them available to the buyer, despite the fact the buyer's costs would be incremental. The difference is going to be substantial, Senator, and that is what these people are doing here. They want that extra money. It has nothing to do with energy saving. It has to do with profit.

This point is made in my statement, Senator. We all know the food industry and the abuses therein was one of the strong motivating factors for congressional action in the first instance, in enacting the Robinson-Patman Act.

It would be ironic indeed, if under the Trojan horse of energy savings, that this Congress should permit this kind of violent disturbance of the statute in the name of the food industry. It would truly be an irony of history.

Senator JOHNSTON. How do you propose to get rid of that prohibition against backhaul?

Mr. ROTHWELL. There is no prohibition against backhaul, Senator. That is the option of the seller. Many of them provide both a uniform zone delivered price and a special f.o.b. mill price. So, backhaul is perfectly available today.

There are other ways to attack this problem, of course. I somewhat sympathize with Mr. Johnson of the FTC. The Robinson-Patman Act is truly not the culprit here. It is more the Interstate Commerce Commission in its regulations that make for difficulty.

However, let me suggest if energy saving is that much of a concern, and I certainly agree it is of paramount, overriding national significance, it would be honorable, more honest and less injurious to competition, if a subsidy were given to those people who engage in backhaul.

I have no objection to that. It would be a direct drain on the Treasury, and let them get that, but don't let them transfer these costs around and take advantage of a truck fleet operator-seller, who has got a delivery zone, especially when dealing with a middle-sized seller or resource.

The National Independent Dairies Association, for example, they have about 150 independent dairy members out of a possible 700 but there isn't one of those people who could stand up under the buying pressure of an A. & P., a Safeway, a Jewel Tea.

Right now, they have the protection of the FTC's sensible interpretation. They say, sure, we have a cost for delivery at your stores or, if you want to come pick it up at the plant, we have a cost or a price for that, too. But to subject these people to the kinds of business survival pressures that would be involved if S. 1699 becomes law is really a chilling thing, Mr. Chairman.

Senator DOMENICI. I assume your hypothetical seller has f.o.b. prices at his dock, but also this hypothetical seller sometimes delivers to a delivery point. Is that correct?

Mr. ROTHWELL. He has both his zone-delivered price and his f.o.b. mill price.

Senator DOMENICI. The f.o.b. price, under the present law, is the same for anybody?

Mr. ROTHWELL. It is the same for everybody. I think the simplest way to explain this is, if I go into the store and buy a gallon of milk and you are in line behind me, when you get in, when you step up and they charge you a nickle less, I turn around to the clerk and I say, how come Senator Domenici pays a nickel less than I do? The clerk says, because he lives 19 blocks further away than you do. That is precisely what this bill would do.

Senator JOHNSTON. Thank you, Mr. Rothwell.

[The prepared statement of Mr. Rothwell follows:]

STATEMENT OF THOMAS A. ROTHWELL, COUNSEL, ON BEHALF OF NATIONAL SMALL BUSINESS ASSOCIATION, INDEPENDENT BAKERS ASSOCIATION, AND THE NATIONAL INDEPENDENT DAIRIES ASSOCIATION

Mr. Chairman, my name is Thomas A. Rothwell, a partner in the Washington law firm Rothwell, Cappello & Berndtson. I appear here as counsel to National Small Business Association, National Independent Dairies Association, and also submit this statement on behalf of the Independent Bakers Association. The National Small Business Association represents approximately 50,000 small business firms. Its membership is most diverse, involving about 1,000 out of the approximately 1,200 Standard Industrial Classifications.

We are grateful to this Committee for the opportunity to offer testimony on S. 1699. The organizations for whom I speak this morning are opposed to S. 1699 for the reason that it substantially weakens and modifies the Robinson-Patman Act, both in terms of its interpretation and its basic principles of mandating equality of treatment in the marketplace as between the large and the small.

Discrimination in price, preferred treatment for the favored few, the powerful concerns who have the economic muscle to demand and receive price concessions, rebates, special allowances and services are problems that have been with us longer than the antitrust laws themselves. Such preferential practices have in the past been the very bricks and mortar of which monopoly power has been created and sustained.

In 1914 Congress made an early effort to outlaw price discrimination; this effort was ineffectual. In 1936, Congress made another such effort, this time more successfully, by enacting Robinson-Patman. Few laws have engendered more enduring controversy than the Robinson-Patman Act of 1936, and, of course, one industry that has played an extremely prominent role in demonstrating the absolute necessity for an anti price discrimination law has been the food industry.

S. 1699 is a measure sought by the national supermarket chains, the great and powerful buyers in that industry. S. 1699 would provide a bonanza of price discrimination and preferential allowances to the national and regional food chain stores. The effect and operation of S. 1699 would impact other industries, of course, but the measure has its origin and most obvious application in reference to the chain grocery store business—the supermarkets.

The problems to which S. 1699 is addressed antedate our current energy concerns by decades. This same proposal was formally advanced to the FTC by the food supermarkets in 1967, resulting in FTC Advisory Opinion No. 147, dated October 24, 1967. It was raised again in 1972 and 1973 before the Cost of Living Council, the Department of Transportation and the Commerce Department, resulting in an additional FTC statement dated December 26, 1973. However, in 1977 the energy conserving aspects of the matter provide yet another opportunity for the large national food chains to again plead their cause.

Grocery manufacturers, both large and small, typically sell their products on a uniform zone delivered price basis. Under this system, the seller absorbs the varying delivery costs in selling to a widely dispersed group of customers. There is initially an inherent price discrimination involved in such a system, as the proximate customers pay more than the actual delivery costs experienced by the seller, while the more remote customers are paying less than the true delivery costs. Under this system, one geographic class is, in effect, subsidizing the physical distribution costs of another geographic class of customers. No doubt this helps explain why the FTC has avoided giving an across-the-board *carte blanche* approval to uniform zone delivered pricing systems. Litigated cases on this subject have invariably been focused on collusive action by competitors, employing the uniform zone delivered pricing approach to engage in such anti competitive practices as area price discrimination, the creation of market entry barriers and other matters not germane to the problem at hand.

The FTC, in its Advisory Opinion No. 147, and the up-dating thereof, took the position that the seller could have, in addition to the uniform zone delivered price, the option of a true f.o.b. mill price, which price could be lower than the uniform zone delivered price, and by whatever margin the seller found appropriate. This f.o.b. platform price had to be made available on equal and non-discriminatory terms to all buyers, regardless of who they were or where they were from.

It developed that that price differential, f.o.b. platform v. zone delivered, was not sufficiently attractive from the point of view of the buyer. The buyers argue that they should receive an allowance equal to the seller's cost in delivering to them, on an individual basis. Thus, each buyer would pay a different f.o.b. platform price, depending on the distance between the shipping platform of the seller and the buyer's place of business. The concept of equality of price becomes a casualty under this approach.

Let us consider the position of the buyer, should S. 1699 become law. He has an empty truck in the vicinity and will incur but minor *incremental* cost in backhauling a load from a supplier's platform. His reward, however, will be the fully distributed shipping cost, as if the shipment had been made by common carrier, a substantially higher dollar amount. This difference between the marginal or incremental actual cost experience of the buyer with an empty truck in the vicinity, and the standard shipping cost such as levied by a common carrier, is a phantom cost—it exists in theory only. But the difference will, over time, represent millions of windfall, bonanza profits to be realized by the buyer and for which, needless to say, the public will finally pay in the form of higher prices.

Also, it is palpable that this extra-profit opportunity will exist and benefit the large, for the most part, rather than the small. The "empty truck in the vicinity," the "need for a truckload quantity," which are preconditions to such transactions, describe large-scale enterprise almost exclusively. One might even suspect that large buyers would plan for and schedule such fortuitous events, since the buyer would be receiving compensation for phantom costs—meaning costs never incurred.

We hold no brief for the large grocery manufacturers. They could readily adapt, and I'm certain in a most ingenious manner. Uniform zone delivered pricing systems might be in for an overhaul as our captains of the food industry devise means to shift their additional costs to others, should S. 1699 become law. Experience strongly suggests that the candidates for such cost shifting would be the smaller-scale enterprises in the system, as well as consumers. And it will be an irony of history if the very industry whose abuses gave rise to the Robinson-Patman Act, is also the industry within which the practical effectiveness of the Act is first destroyed.

Turning now to our practical, energy concerned backhaul dilemma, let us all agree that backhauls are permitted, and even encouraged and rewarded as the situation exists today. The proponents of S. 1699 are all potential entrants into the backhaul business; they just want more money—that's what S. 1699 is all about.

The only data on potential energy savings available has been that promulgated by the major food chains, the sponsors of S. 1699. Further, such data was collected, analyzed and distributed for the very purpose at hand. These factors suggest that a low index of credibility and reliability be afforded claims based on such data.

Additionally, any statistics relating to the energy-saving potentials forthcoming by virtue of awarding discriminatory backhaul allowances and arising from increased efficiency in the utilization of the buyer's trucks is just half of the picture. The gains in efficiency of fuel utilization on the part of the buyer inevitably will give rise to a correlative decrease in fuel utilization efficiency from the point of view of the seller. His trucks will be making more trips on a "half-empty" basis. The theoretical way to avoid this would be for the seller to cease deliveries of his goods altogether, which of course cannot occur since there will always be some smaller buyers who must rely on the seller's delivery facilities. To compel such smaller units to have recourse to common carriers only would be to effect a brutally punitive additional discrimination.

What about fronthaul? Sending a near-empty truck to the vicinity, which is energy wasting, to take advantage of an available and favorable discrimination in price may emerge as a standard industry practice. In addition, how is the allowance to be computed when the empty truck is loaded, and then runs its delivery route in reverse, arriving back at the buyer's warehouse empty? Are there to be any controls at all on this obvious opportunity to take an unfair advantage?

Just last Thursday, June 23, 1977, the Chairman of the Senate Subcommittee on Antitrust and Monopoly made a statement on the need to assess the competitive effects of energy conserving plans and proposals as follows:

"In addition to asking how the plan will affect competition, we will also be asking how competition or its absence will affect the plan. We will be asking whether the plan assumes the existence of competition in industries where it in fact does not exist, and whether private monopoly power might not frustrate certain objectives of the administration's proposals.

"During recent oversight hearings on antitrust enforcement, this Subcommittee came across indications that competitive considerations were not adequately analyzed by the Administration in its development of the energy plan. For example, Attorney General Bell testified that he was permitted to examine the energy plan only hours before its publication. Neither the Antitrust Division nor the Federal Trade Commission were consulted in the development of specific proposals.

"More recently, in preparing for these hearings the Subcommittee staff found that little thought is being given to energy competition policy. A routine request to FEA for studies and documents relating to competitive issues produced no evidence that the questions had ever been given any serious attention in those quarters. Apparently no analysis of competitive issues existed."

In determining who gets the lowest price by way of the largest backhaul allowance, the proponents of S. 1699 focus on the location of the buyer's place of business as the critical measure. The greater this distance, the lower the purchase price seems to be the formula implicit in S. 1699. Yet geographic location, proximity, has always been a normal and natural competitive consideration. It seems irrational to provide an economic reward and stimulus for remoteness as such. Proponents of S. 1699 respond by asking for a rebate in the sum of "what it would have cost the seller to deliver." Quite aside from the very real complexities and difficulties of determining the amount of such costs, this resolution comports oddly with the rationale offered for the bill to the effect that "buyers' trucks are returning empty from the vicinity of the seller's warehouse." Should not the critical factor be the proximity of the buyer's empty trucks, rather than the remoteness of the buyer's place of business?

The real world economic basis of S. 1699 would operate to reward remoteness and punish proximity, from the point of view of the buyer. Only buyers of the same quantities located at the same distance from the supplier's warehouse would be treated equally under this scheme. More overt and incongruous discrimination in price is hard to imagine. The fact that the bill recites in its finale "and where the allowance are available to all the seller's customers on a non-discriminatory basis" is a meaningless ploy under the circumstances. The bill would in fact discriminate in price in favor of buyers (a) large enough to have truck fleets, and (b) who have delivery routes in the vicinity of a seller's plant.

The possibility of sellers, under large-buyer pressure or otherwise, manipulating their delivery systems and costs to favor large customers cannot be ignored. It is difficult to predict how much fuel energy will be saved, if any. But it is certain that industry will respond by taking maximum advantage of the profit-making opportunity for the favored few that S. 1699 would create.

The sponsors of this bill go to great lengths to disclaim any intent to materially affect the Robinson-Patman Act. It would be most reassuring to members of the Small Business community if that disclaimer appeared in the text of S. 1699. A simple sentence added to the bill's text would suffice. Our suggestion is:

"Nothing contained herein shall be construed or taken to affect or in any way change or repeal any provision of the Robinson-Patman Act."

Last year an Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act and Related Matters, of the House Small Business Committee issued a Report covering several months of hearings. House Report No. 94-1738, September 30, 1976. This is commonly known as the Gonzalez Ad Hoc Subcommittee Report. On pages 111 to 114 of that Report appears a discussion of Backhaul and the Robinson-Patman Act. The discussion found therein is most enlightening, and we request the Chairman's permission to incorporate these pages into the Record of these Hearings.

S. 1699 in its title and intent is in furtherance of a policy that we all support, energy savings. However, the impact of this measure on normal competitive processes, on other laws, and especially as to small business should not be ignored.

This important proposal requires a full consideration of the economic impact it would have on antitrust policies and a realistic appraisal of its implications and consequences. Among other things, what is needed is reliable and accurate information on the amount of energy that would be saved, the impact of the measure as to all classes of buyers, and the extent to which other important policy areas are impacted.

We have been authorized to state that in addition to the National Small Business Association, the Independent Bakers Association, and the National Independent Dairies Association, both the Automotive Warehouse Distributors Association and the National Beer Wholesalers Association of America, Inc., believe that the Robinson-Patman Act should not be weakened or emasculated in any form and we believe that in the consideration of S. 1699, Congressional intent should be established that weakening the Robinson-Patman Act is not the purpose of this bill.

Because of the shortness of time many other associations want to go on record regarding S. 1699, and we request that the record be kept open at this point for inclusion of their positions regarding S. 1699.

[Excerpt from House Report No. 94-1738]

RECENT EFFORTS TO AMEND OR REPEAL THE ROBINSON-PATMAN ACT

A REPORT OF THE AD HOC SUBCOMMITTEE ON ANTITRUST, THE ROBINSON-PATMAN ACT, AND RELATED MATTERS OF THE COMMITTEE ON SMALL BUSINESS, HOUSE OF REPRESENTATIVES

* * * * *

Reply to the argument that the Robinson-Patman Act prohibits backhaul

Opponents of the Robinson-Patman Act have made arguments that the Act prohibits sellers of food and other merchandise from permitting buyers to send their trucks to the sellers' loading platforms to pick up loads in the trucks that would be returning empty their backhaul run. This argument reached a crescendo in late 1973 when the fuel crisis arose, it was then said that the Robinson-Patman Act and the Federal Trade Commission precluded savings in vital fuels and contributed to inflation by preventing, in many instances, buyers from effecting loaded trucks on backhaul.

All of such arguments pointed to Advisory Opinion No. 147 of the Federal Trade Commission,¹⁹ dated October 24, 1967. There the Federal Trade Commission, in response to a shipper of food items, provided advice that if the seller in his use of a delivered pricing formula permitted customers to pick up items at the sellers' loading platforms and then varied his allowances according to the delivered pricing formula, questions might arise as to whether these differences in the net prices paid would violate provisions of the Robinson-Patman Act. Thereafter, the sellers chose to neither eliminate their delivered pricing formula nor permit buyers to load trucks at the sellers' platforms. Thereupon, representatives of the largest and the most powerful food chain retailing store corporations organized a campaign of criticism against the Robinson-Patman Act and the Federal Trade Commission alleging the prevention of savings on transportation of food and savings of vital fuel for transportation.

Leaders of this campaign urged the Federal Trade Commission and other high Government officials to persuade the Federal Trade Commission to discard its advisory opinion that discriminatory pricing practices which could result from the plans these campaigners for the big food retail chain store organizations had in mind would or could lead to violation of law.

The following colloquy took place at the Ad Hoc Subcommittee hearing²⁰ between its Special Counsel and Bartley T. Garvey, Esquire, of the Federal Trade Commission:

Among the arguments that were raised by Mr. Ginsburg and Mr. Feldman in their communication was that there would be a saving in fuel and a saving in transportation services if the Commission should abandon its position that it had stated in Advisory Opinion 147, wasn't it?

¹⁹ See Special Subcommittee on Small Business and the Robinson-Patman Act, hearings (91st Cong., 2d sess., 1970) Vol. 3 Appendix, pages 135-136.

²⁰ Hearings, pt. 2, pp. 192-195.

Mr. GARVEY. I believe that is included in the letter, yes, sir.

Mr. MACINTYRE. Now in connection with their urging, they went to the Cost of Living Council and to the Commerce Department, that is, Mr. Dent, and also to the Department of Transportation for assistance, didn't they?

Mr. GARVEY. Well, I don't know of that of my own knowledge. There are references to the Cost of Living Council and to certain other Government agencies. As to who went to who, I have no recollection out from this letter.

Mr. MACINTYRE. Attached to this document and letter of January 31, 1973, to which we have already made reference, there is an attachment known as SMR logistics committee. Do you recall seeing that as a part of that letter?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. That was a committee formed to help prepare for the arguments and present the arguments on behalf of the people who were moving for the Commission to abandon its advisory opinion, wasn't it?

Mr. GARVEY. It is a committee known as the SMI Logistics Committee and it is my understanding that SMI means Super Marketing Institute or something of that nature.

Mr. MACINTYRE. But the committee was arranged for the purpose of preparing arguments and presenting them on behalf of those urging that the Commission abandon that advisory opinion 147, wasn't it?

Mr. GARVEY. I think that is suggested from this letter.

Mr. MACINTYRE. On this logistics committee, there was a representative from Kroger Food Stores?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. From Jewel Food Stores?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. From the Great Atlantic & Pacific Tea Co.?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. From the Stop & Shop Cos.?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. And Mr. Louis Fox was a member of it, wasn't he, of the Associated Wholesale Grocers?

Mr. GARVEY. Yes.

Mr. MACINTYRE. The Bohack Corp., in the second column? The Flemming Foods, Luck Stores, Allied Supermarkets?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. Do you know what the total sales of those were in Fortune's Fifty Largest Merchandisers for 1975?

Mr. GARVEY. No; I would not know that but I imagine it would be extremely substantial.

Mr. MACINTYRE. Following this, what did the Commission do?

Mr. GARVEY. Following the receipt of this particular letter?

Mr. MACINTYRE. This and other letters from the Cost of Living Council and other agencies of the Government.

Mr. GARVEY. My understanding of what the Commission did is somewhat limited as it was handled in the General Counsel's Office.

I was not in the General Counsel's office at that time. But from a review of the file it would appear that the Commission prior to the receipt of this letter had already considered the problem of backhaul and whether or not advisory opinion 147 should or should not be rescinded and continued to consider it throughout the year 1973.

Mr. MACINTYRE. But on December 26, 1973, it did issue a clarifying statement on this, didn't it?

Mr. GARVEY. Yes, sir, it did.

Mr. MACINTYRE. Let me read a sentence from that and ask if you remember. This is in the press release covering it.

"In its clarifying statement the Commission expressed the view that questions probably would not arise under the laws administered if sellers using valid, uniform, zone delivered pricing systems offered to all customers on a non-discriminatory basis in lieu of a delivered price the option of purchasing at a true f.o.b. shipping point price."

Mr. GARVEY. Yes, sir; I remember that statement.

Mr. MACINTYRE. In your judgment that is the substance of the Commission's clarifying statement as issued on December 26, 1973, regarding this?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. That did not end the controversy, did it?

Mr. GARVEY. No, sir, it did not. There were considerable questions and discussions raised after that.

Mr. MACINTYRE. Mr. Lewis Engman sent this letter to the Secretary of Commerce, Mr. Dent. Do you recall that?

Mr. GARVEY. I am not sure I recall that.

There were a large number of letters of that nature.

Mr. MACINTYRE. But, the argument continued and the Commission issued a further statement to Mr. Albert Rees of the Cost of Living Council on October 9, 1973, didn't it?

Mr. GARVEY. That is correct. It also issued a statement in March of 1975.

Mr. MACINTYRE. I have here what purports to be a copy of the letter of October 9, 1975, to the Honorable Albert Rees, Director of the Council on Wage and Price Stability where the Commission has suggested its clarification and its meaning and it says this in the last paragraph. Do you recall the correspondence that led up to this?

"You further recommend that the Commission shall adopt a policy—to each customer. On such a policy, your letter urges can be based on the premise that the Robinson-Patman Act does not mandate uniformity as to f.o.b. prices because that act permits a seller to offer different prices where justified by different costs."

Mr. MACINTYRE. Do you remember that statement?

Mr. GARVEY. Yes.

Mr. MACINTYRE. He wanted the Commission to approve a plan that would permit these large backhaul customers to pick up their goods and to give them any cost savings that they, themselves, could effect beyond what the uniform price would be, nondiscriminatory price would be at the shipping point. Isn't that a way of stating it?

Mr. GARVEY. What he was saying was that in his view, the distance that a customer was from the shipping point could reflect the amount of discount that he would get from a uniform delivered price in his interpretation of the Robinson-Patman Act.

Mr. MACINTYRE. Well—

Mr. GARVEY. I have that section of Dr. Rees' letter before me at the moment if you would like me to read it.

Mr. MACINTYRE. All right.

Mr. GARVEY. I quote the March 19 letter—that reference is to the Commission's previous statement.

"Requires that the f.o.b. price offered to all f.o.b. customers be 'uniform,' that is, be the same dollar amount in each case. It does not permit the seller to offer backhaul allowances that vary in accordance with the cost of transportation to each customer. This requirement of uniformity places a substantial restraint upon the development of backhauling—a restraint not mandated by the Robinson-Patman Act, which permits the seller to offer different prices when justified by different costs."

Mr. MACINTYRE. But the Commission said it would approve and in effect was approving a nondiscriminatory pickup price for any backhauler who wanted to pick it up and without any thought of anybody violating a law in doing so?

Mr. GARVEY. That is correct.

Mr. MACINTYRE. This would permit backhauls by all customers on that basis?

Mr. GARVEY. Yes, sir.

Mr. MACINTYRE. Equality?

Mr. GARVEY. That is correct.

From the foregoing it is seen that neither the Robinson-Patman Act nor the Federal Trade Commission prevents sellers from permitting customers to load their empty trucks at the sellers' loading platforms for backhaul runs provided that the price charged all customers is on the basis of equality and is non-discriminatory. Of course, that would not provide for a seller to allow a big buyer a large amount off that price to cover the buyer's cost of transporting the truck load of merchandise from the seller's platform to the buyer's place of business, and at the same time give a less or no allowance from the platform price to a small buyer whose truck was loaded at the same platform, but which traveled a shorter distance to the buyer's place of business. After all, after the buyers purchase the merchandise and load it on their trucks at the sellers' loading platforms, the amount of cost involved and incurred by each buyer in handling, transporting and in reselling that merchandise do not

appear to be matters that would justify sellers to discriminate in the price they charge the buyers for the merchandise at their loading platforms.

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Senator JOHNSTON. Mr. Bolger.

**STATEMENT OF ROBERT J. BOLGER, PRESIDENT, NATIONAL
ASSOCIATION OF CHAIN DRUG STORES, ARLINGTON, VA.**

Mr. BOLGER. My name is Robert J. Bolger. I am president of the National Association of Chain Drug Stores.

Our association represents more than 200 chain drug corporations and has a second tier membership of approximately 400 member companies.

Our members operate approximately 12,000 chain drug units. I would like to point out to the subcommittee the membership of our association, 200 corporations, approximately 50 percent of them operate 4 to 25 stores; approximately one-third of them operate 4 to 10 stores; and is the largest growing segment of our membership.

We support S. 1699 for reasons—I haven't heard too much today—to effect energy savings. I have two profiles from my member companies with respect to energy saving with respect to backhaul, and I will provide them to the committee.

I would be very pleased for the subcommittee to survey all of my membership to provide you with these type of profiles if they would be worthwhile to the subcommittee.

Approximately 75 of our members operate warehouses, have their own trucking fleets, or at least fleet operations. We have been attempting for the last several years to try to get into backhauling, especially with our largest sellers. We have found most marketing sales executives from the manufacturers plead Robinson-Patman for the inability to provide backhauling to our members.

I would like to emphasize again that chain drug member companies operating from 4 to 25 stores comprise 50 percent of our memberships. We have surveyed them. They are strongly in favor of backhauling.

We believe there are savings to the consumer. As one of the panel members brought up earlier, I think that is an important factor. We think that a tremendous saving would be achieved in the energy area, one that is so strongly needed.

I have submitted my statement. It is a short one, and I would like to also say I have with me today Mr. Allan Lisse, who is director of distribution for Drug Fair here in Washington who will answer any technical questions you might have.

He is also a member of the National Conference of Physical Distribution Managers. We certainly thank you for the opportunity to make a statement.

[The prepared statement of Mr. Bolger follows:]

**STATEMENT OF ROBERT J. BOLGER, PRESIDENT, NATIONAL ASSOCIATION OF CHAIN
DRUG STORES, ARLINGTON, VA.**

Mr. Chairman, distinguished members of this Subcommittee on Energy Conservation and Regulations, my name is Robert J. Bolger and I am president of the National Association of Chain Drug Stores, Inc. (NACDS).

We appreciate the opportunity to appear before this Subcommittee and to present our views on legislation (S.1699) the Diesel Fuel and Gasoline Conservation Act of 1977. With me this morning is Mr. Allan Lisse, Director of Product Distribution-Inventory Control for Drug Fair, Inc. and he is also a member of the National Conference of Physical Distribution Management. Mr. Lisse is responsible for overseeing Drug Fair's distribution program and is prepared to answer any questions that the Subcommittee might have as to the effect of this proposal on his company's operation following our statement.

For the Subcommittee's background, let me explain that NACDS is a national trade association with a two-tier membership structure. We represent the management of more than 200 corporations which operate in excess of 10,000 drug stores and 1,500 leased pharmacy departments throughout the United States. Our chain drug members range in size from four-store operations to companies with over 800 retail outlets.

Sales-wise, our industry accounts for approximately \$12 billion in total sales. This is about 65 percent of all sales in drug stores and one-third of all prescription drug sales in this country. Additionally, NACDS also has 350 associate members who are the major suppliers of goods and services to the chain drug industry. In this regard, NACDS is speaking from the perspective of the needs of manufacturers, retail pharmacies and our chain drug warehousing operations.

Unequivocally, NACDS on behalf of our chain drug membership, is in support of this proposal which has been introduced by Senator Johnston. In fact, our endorsement of S. 1699 corresponds with this industry's longstanding track record of striving to be as competitive and efficient as possible in the delivery of quality goods and services to the consuming public at the lowest possible prices.

In essence, the elimination of unnecessary costs in a chain drug operation will result in greater savings for the company, greater profits for shareholders and ultimately, lower prices to the consumers who shop in our stores. While I have been stressing lower prices for consumer goods, permit me to say that the chain drug industry, as a key member of the nation's health care delivery system, is also committed to providing quality pharmaceutical products and services at the lowest possible prices.

It may interest the Subcommittee to know that our small chain members not only make up a majority of our chain drug ranks, but they are also the fastest growing segment in our Association.

Before I move on, I would like to elaborate just a bit further on this key point. Our small chain drug members, those with four to twenty-five stores, as well as many independent pharmacies, have found numerous methods in which to be more competitive in the marketplace, such as cooperative buying groups, co-op advertising, utilizing a centrally located warehousing facility and placing a strong emphasis on highly personalized service.

Because of these characteristics, smaller pharmacies are very successful and are expanding at a rapid pace. In this regard, I believe that this group of drug stores will continue to grow and will find ways in which to benefit from backhauling allowances through their wholesalers.

Focusing on operating costs, perhaps one of the greatest opportunities with regard to potential savings for the chain drug industry is a more efficient and cost conscious distribution system. Of our 200 corporate members, we estimate that nearly 175 companies now have warehousing facilities and utilize their own trucking fleets or have leased private carriers. Currently, backhauling is allowed but there are no real incentives or allowances permitted based upon the Federal Trade Commission's (FTC) most recent interpretation of backhauling which was issued in 1975.

In our view, this bill that is now under consideration would address the issue of backhauling, clarify the matter, and would help to encourage a more efficient movement of goods through the distribution system in a most equitable manner.

As provided in the measure, a supplier would be permitted to grant backhaul allowances to retailers, pursuant to a uniform zone delivery pricing system, provided that the allowance is no greater than the actual savings in delivery costs to the seller and that such allowances by the supplier are available to all retailers on a non-discriminatory basis.

NACDS believes that the thrust of this bill is a very practical approach toward reducing transportation costs. Certainly this legislation makes sense

because a buyer would be reimbursed for actual transportation costs as the allowances are predicated on miles traveled while backhauling goods. Incidentally, we see a valuable by-product under S. 1699—namely the opportunity to improve supplier-retailer relations which NACDS is always working to enhance. In this regard, we believe that the bill will help to open the door for more communication and coordination between manufacturers and chain drug members.

Far more important than the delivery cost savings that will be realized under this measure, NACDS wishes to emphasize the gains that can be made in fuel conservation since many deadhead runs back to the warehouse would be avoided. In light of America's future energy needs and the urgency to develop a strong national energy conservation program which will stress increasing fuel supplies while eliminating waste, NACDS feels that this bill would be an important step in the right direction.

In retrospect, the 1973 Oil Embargo is a grim reminder that America can no longer tolerate fuel waste. Instead, this country's number one priority, for decades to come, must be energy savings. Thus, the chain drug industry is in favor of S. 1699 because the measure encourages efficiency, promotes energy conservation, lessens the burden of unnecessary regulatory intervention in the marketplace while generating important savings to consumers in these times of threatening inflationary pressures.

For the chain drug industry, this legislation, if enacted, will mean a new opportunity to provide consumers goods at lower prices provided that we can become more efficient. NACDS firmly believes that S. 1699 will enable us to do so.

We hope that the Subcommittee will approve the Diesel Fuel and Gasoline Conservation Act of 1977 and we appreciate the opportunity to comment on this important piece of legislation.

COMPANY PROFILE: SNYDERS DRUG STORES, INC./RED OWL, MINNEAPOLIS, MINN.

This firm has both drug store outlets and supermarkets.

(1) 39 drug stores.

(2) 370 food stores.

Located in six mid-western states.

Total miles traveled in trucking: 10 million miles.

(1) 8 million miles for store deliveries.

(2) 4 million miles to stores.

(3) 4 million miles from stores back to the warehouse: (a) 60 percent of the 4 million miles back to the warehouse involves "deadheading". (b) 2.4 million miles of travel in which trucks are operating without any cargo.

Total annual consumption of fuel:

(1) 2.5 million gallons of No. 2 Diesel.

(2) Cost of this fuel is \$1.25 million.

(3) Snyders/Red Owl Trucks average 5.09 miles per gallon.

(4) 480,000 gallons of fuel are being used for non-productive purposes.

DRUG FAIR MILEAGE ANALYSIS—1977

	Miles	Fuel consumption ¹ diesel gallons
Total annual miles	975,000	177,270
Empty annual miles	487,500	88,635
Empty miles possible backhaul	370,500	67,400
Empty miles now used for backhaul	26,000	4,700 ²
Net empty miles	344,500	62,700
Estimate of additional savings if billed passed	26,000	4,700

¹ Fuel consumption based on 5.5 mi/gal.

² Percent.

Senator JOHNSTON. Thank you very much.

Mr. Rothwell, I do not understand why it would be discriminatory and anticompetitive if actual costs of delivery were granted as a

backhaul allowance. Are you saying the actual cost of delivery would be filled with phantom costs?

Mr. ROTHWELL. Mr. Chairman, I think it costs 50 cents to ride the Metro, although they will no longer accept 50 cents.

I was pointing out to the chairman by way of analogy it costs 50 cents to ride the Metro. If I choose to walk, does Metro save 50 cents? That is the problem, incremental costs.

The seller delivers to buyer *a*, and he incurs an incremental cost. He has his fleet bought, has salaried truck drivers there; he has mechanics, his investment, and so forth. The fully distributed cost is a very different figure than incremental costs.

The incremental costs are relatively insignificant. The amount of money that seller would save by delivering to buyer *a* at the platform, as opposed to going out to buyer *a*'s place of business and delivering to buyer *a*'s warehouse is something accountants and auditors could fight about for 50 years.

But, there is a margin that would represent a discrimination in favor of those who have (a) a truck fleet on the road, empty trucks in the vicinity, and, of course, stores in the vicinity to which they could deliver.

Senator JOHNSTON. What do you think about Mr. Johnson's proposal?

Mr. ROTHWELL. I think Mr. Johnson misreads the intent of S. 1699, and I certainly do not agree with him that 1699 would not change the present FTC interpretation, that everybody at the loading platform pays the same price. That is the present FTC interpretation.

In my opinion, 1699 would change it radically and that is its intent.

Senator METZENBAUM. I wanted to find out from Mr. Aders, on the Johnson proposal, there are two parts to it. One is the first sentence that provides the seller must offer a backhaul allowance. The second provision provides that the allowance must be made available to all sellers on a nondiscriminatory basis and shall not be less than the amount of the actual transportation costs of delivering the goods.

Then, it goes on to actually define the transportation costs. Do you have a position as to whether or not the first part or the second part or both parts would be acceptable to the industry?

Mr. ADERS. I have heard this for the first time this morning. My immediate reaction, and I think my studied judgment would be the same. I don't think it would be fair. I think the seller should be free to choose their own method of pricing. It would not work to the advantage of either the manufacturer or the buyer to mandate, as Mr. Johnson suggests.

On the practical level, I don't think his formula for determining costs is practical either. The averaging of costs in granting the average costs regardless of the position of the buyer geographically within the zone doesn't give enough incentive to the distant buyer to incur the costs, and I don't think it gives recognition to the realities of the cost situation.

I think it also would tend to give an unearned subsidy to the nearby purchaser. It, in effect, would discriminate in this way, in the outlying towns, in favor of the cities where most of the distribution—

Senator METZENBAUM. To make it mandatory would do that?

Mr. ADERS. I am saying there are two thrusts to Mr. Johnson's suggestion. One is mandate and the second, average cost. S. 1699 is permissive which it should be and also permits up to actual cost passthrough.

That is the one we favor and think it is fairest, and in fact is the only method which will accomplish the purpose of increasing productive backhaul and, in turn, saving fuel and reducing costs.

Senator METZENBAUM. Will you show me where that comes in?

Mr. ADERS. I don't have his testimony. I was listening to him describe it.

Senator METZENBAUM. The language that Mr. Johnson proposes says:

Such allowance shall be made available to all the seller's customers on a nondiscriminatory basis and shall be no less than the amount of the actual transportation cost involved in the delivery of the goods. The actual transportation cost shall be the cost that the seller incurs in delivering the goods either by operating his own transportation equipment or by payment to a contract or common carrier.

Mr. ADERS. I did not hear you saying anything about average. I have not seen that testimony, but I heard Mr. Johnson talk about it. That was an implicit part of his recommendation.

Senator METZENBAUM. I guess Mr. Johnson, who referred in his testimony to the ambiguity in 1699, had left us with some more ambiguity.

Mr. ADERS. I don't think 1699 is ambiguous, but I think the testimony is.

Senator HANSEN. I am sorry I had to be absent for some of the testimony given by some of the witnesses, but we have heard some of the people who would like to have the hearing record kept open, and I ask unanimous consent that the record be kept open. Would 30 days be possible? One person we heard from hoped it would be possible.

Senator JOHNSTON. Why don't we make it 3 weeks, so we can get it in before the August recess?

Senator HANSEN. Fine, Mr. Chairman. With that opportunity then to submit questions in writing to panel members and also to afford interested persons an opportunity to make known their observations, I have no questions.

Senator JOHNSTON. We are going to try to make this part of the conversation package which will be reported to the floor before August. Why don't we reduce that to 2 weeks, say July 15. Would that be time enough?

Senator HANSEN. As far as I am concerned, I will try to cooperate, and I think the people who asked for an opportunity to be heard will probably be accommodated by that.

Senator JOHNSTON. All right. Additional testimony is to be submitted by July 15.

Senator DOMENICI. Mr. Rothwell, I am not terribly familiar with this bill, but your testimony with reference to changing the f.o.b. ruling which now exists under Robinson-Patman impresses me.

I think we are looking for something, but I don't know that this bill is the right way. Let me ask you this.

I have been somewhat familiar with the fact we have a national problem in backhauling that seems to be only somewhat related to this issue, but is a much broader national issue that has to do with present licensing and rules under ICC. Just generally, am I correct, and, if so, what is this ruling that keeps going through my head?

Mr. ROTHWELL. You have the ICC and its common carrier regulations, the grandfather clause. Certain trucks are permitted to carry only certain commodities from point *a* to point *b*, but not to point *c* and so forth.

You get all of these anachronistic regulations and procedures and an affirmative effort to stamp out competition as it emerges.

There are some people who have put together brokering situations if a situation says, if anybody is here with an empty truck in Chicago going to New York, we have some radios which are not time sensitive. We would like to get them to New York at an attractive price. The ICC will not permit this.

Senator DOMENICI. So we have empty trucks on the highways. They are in Florida and cannot haul vegetables back. It is not related to this issue, is it?

Mr. ROTHWELL. It is related to the empty truck issue and the energy issue.

If S. 1699 becomes law, which I fervently hope that it does not, that is somewhat less than 2 percent of the problem.

We are focusing on a very narrow thing in response to what has been. As set out in my statement, over a 10-year effort on the part of large buyers of groceries, to effect this change, obviously would be to their economic advantage, very substantial economic advantage.

Senator DOMENICI. Did I hear you say that you did not favor a situation where a store further away from the point of origin would necessarily have paid more for transportation than one closer? What is wrong with that? Isn't that part of the cost, if you have to go 200 miles instead of 50, from the f.o.b. site?

Mr. ADERS. I am glad for the chance to clear up that misunderstanding. I said I thought it would be fair to give the distant purchaser a greater allowance for picking up and taking back the product than the nearby purchaser.

Senator DOMENICI. Does the present situation deny that realistic goal?

Mr. ADERS. That is the problem we are addressing, Senator.

Senator DOMENICI. Does it or doesn't it? Without S. 1699?

Mr. ADERS. The current position of the FTC does not permit the full realization of that cost saving through a backhaul allowance. S. 1699 corrects that.

Senator JOHNSTON. You say the problem is in calculating what that savings in delivery cost is, and the big chains, who have advantage of size, who have their trucks, have their people employed, the mechanics and all of that, that their actual additional costs would be very small. But, to calculate that, by going to the marketplace, by ICC rules or whatever, would result in a large price differential and because of this it would, in effect, be a subsidy to these large chains. Is that a fair statement?

Mr. ROTHWELL. Yes; except for one thing. I misspoke myself. It is the seller who already has the fleet of trucks. He has incurred the cost of putting those in place. His accountants have to distribute those costs over a great many transactions, but whatever numbers you come up with are artificial.

Senator JOHNSTON. They are artificial because the incremental price is small?

Mr. ROTHWELL. That is exactly right.

Senator JOHNSTON. Let me follow up on this. If that is so, isn't that really a part of an efficient operation? Isn't that just a reflection of the fact that because he is larger and he has more mechanics, more trucks, that sort of thing, that he is more efficient?

Mr. ROTHWELL. Senator, I am afraid our ideas are not joining. I am talking about the seller's savings and costs, not the buyers.

The seller's—he has got his whole package of money downwind. How much does he save by failing to deliver out there at point *a* because the fellow buying from point *a* is at the shipping platform. You get into a lot of argument about that, but it is a very small amount of money as compared to that fully distributed cost.

In other words, if S. 1699 becomes law, from the point of view of the buyer, backhauling will probably become the most profitable part of the operation because that is a true price discrimination.

The empty truck—now, I have read the record, including your remarks, Senator Johnston, as the matter was introduced on June 15. You talk about a seller with an empty truck in the vicinity. Why shouldn't he run by Procter & Gamble and pick up a load of soap?

That sounds great, but just think about it for a moment. The buyer has already assumed the cost of returning that empty truck to the point of origin. How much extra cost is he going to suffer, is he going to incur, by running by P. & G. and picking up a truckload of detergent? The answer is very little extra is it going to cost him, but what is he going to get as his reward? He is going to get some phantom cost figure that is factored into the seller's equation, and our concern is about that margin, Senator. That is gross price discrimination.

As you stop and think about it and analyze it, it tears a fat hole into the whole basic theory of Robinson-Patman.

Senator JOHNSTON. But what about these empty trucks? That is a waste of fuel. How would you get to that problem?

Mr. ROTHWELL. I view the obsolete procedures and the bureaucratic tangling of the Interstate Commerce Commission as being the chief villain of the empty truck syndrome.

I think if the ICC would permit freight bureaus to spring up competitively to pick up that empty truck in Florida, in Miami, and have them bring back a load on an ad hoc basis, I think we would have a lot more fuel efficiency.

But, we have to build a profit into it, and the ICC not only will not permit a profit, they won't permit the business to exist.

Senator JOHNSTON. In the first draft of this bill, I included language that would prohibit any kind of practice by any Federal bureau or commission or anything else that would encourage wasteful practices or not permit backhaul.

It was designed to get at the ICC. We took that out because we thought that was too much for this bill at this time.

I personally do not reject that approach for later on. Do you think it could be done by an act of Congress?

Mr. ROTHWELL. I think the large buyers, with a truck in the vicinity, are somewhat shortsighted in not using the f.o.b. option available to them. Today the reason they are not doing it is because it is not sufficiently profitable.

Senator JOHNSTON. The f.o.b. option is on an average delivered price?

Mr. ROTHWELL. It is whatever is set by the seller. Usually the seller cannot afford to set that f.o.b. option at a price higher than his concept of delivering to the nearest purchaser.

That is generally what the economics of the situation is. As long as the Congress and the ICC permits its own delivered pricings so there can be cost average, and there is no economic disincentive because of location—right now, zone delivery pricing favors the purchaser. He wants to be more favored under S. 1699, and we say that does too much to violate the principles of Robinson-Patman. That is basically where we are.

Senator JOHNSTON. Would any of the panel members like to answer that?

Mr. ADERS. I think Mr. Daleiden could answer that.

**STATEMENT OF FRANCIS P. DALEIDEN, VICE PRESIDENT, TRAF-
FIC AND TRANSPORTATION, JEWEL FOOD STORES, MELROSE
PARK, ILL.**

Mr. DALEIDEN. My principal role in my company is managing traffic and transportation operations which is my sole occupation. I would like, first of all, to correct one misstatement which came from Mr. Rothwell. Mr. Rothwell indicated quite clearly he felt we have the option of purchasing f.o.b. plant or taking a delivered price.

This is only true in some circumstances. A large number of our major suppliers, among them Procter & Gamble, have chosen not to grant an f.o.b. plant option of any kind.

There are many other suppliers of that type. Hence, we are faced with a situation where we are dealing with those very large numbers of suppliers who control large quantities of the product we buy who have no option whatsoever to backhaul.

In those cases where we are given a kind of option under the current interpretations, we are offered, normally, a backhaul allowance which is the equivalent of the cost of delivery to the closest customer.

For example, a major bleach supplier in Chicago will offer an allowance of 22 cents a hundredweight, which is below the cartage rate in the Chicago area. By contrast, a distributor, a wholesaler, or a chainstore group located in a city as close as Champaign, Ill., which is 133 miles from Chicago would incur a common carrier cost of almost 60 cents per hundredweight to have that product delivered.

That is the kind of inequity we are seeking to have erased. We are seeking as well to have the opportunity to pick up from those suppliers who have interpreted the advisory opinions to mean they are not to offer any kind of f.o.b. price at all.

Now, as far as the determination of the cost savings, that is very readily determinable. The sellers, first of all, normally do not operate large truck fleets. The sellers we are working with, the Procter & Gambles, those types of people, typically are large users of the contract carrier, irregular common carrier, or regular route common carrier.

That is the type of trucking service we are talking about or possibly a rail service.

Those rates are published. They are readily available to anyone who chooses to look for them. They are quoted on demand by any of the carriers offering those types of services.

There is no cost accounting mystery about it at all. That is a cloud I would like to have dispelled rather promptly. I will not drag out my comments. I will furnish my statement and will be happy to respond to any questions about it.

I will simply summarize by saying, we not only operate large supermarket types of stores, but we have operations which serve as wholesalers to small businesses. Our Eisner food stores in Champaign, Ill., serve some 53 agency stores which are extremely small businesses, the smallest being in the neighborhood of \$6,000 to \$7,000 a week in retail sales.

Our fees to those stores are directly based on the cost of delivery and distribution and various other handling aspects.

Any cost reduction available to this type of activity is passed on through those fees.

We think that is a direct benefit to the small businesses which are being served.

Senator JOHNSTON. What you are saying is there is no inherent advantage for large business over small business under this bill?

Mr. DALEIDEN. There certainly is not, Mr. Chairman.

Senator JOHNSTON. Is it possible for both the seller and the buyer to come out ahead if the backhaul allowance offered by the seller is a percentage, say 80 percent of the actual cost of delivery, saved the seller? Wouldn't this eliminate the problem of phantom freight?

Mr. ROTHWELL. I think I would be forced to give a quick answer to that, Mr. Chairman. I think the circumstances case to case vary so much, I would like to adopt his testimony in reference to Jewel Tea and Procter & Gamble. You are dealing with bargaining unequals there.

The people I speak for cannot stand up against Jewel Tea. They do offer the f.o.b. option, but they try to offer one that is not too sacrificial. They are being asked by S. 1699 to, in a sense, provide almost a rubber yardstick, if you will, to measure. I am afraid history and experience indicates what would happen.

In your response to your question, I would like to ask if I could respond to this by letter, Mr. Chairman, prior to the record being closed.

Senator JOHNSTON. Yes; you certainly may.

Senator DOMENICI. Mr. Rothwell, in response to the Chairman, you gave an example of a truck that had already charged what it was going to charge one seller and was now going to another f.o.b. point in the area to pick up some more commodities. If I heard correctly,

you were saying the second episode would have no bearing upon the first freight rate, and, therefore, you were wondering who gets the benefit of this bargain if it works out.

My question is, is the first transaction regulated by law or would not the marketplace eventually adjust itself since, if they made more money on the second haul than they planned, they would begin to cut the price on the first one? Would that not inure to the consumer?

Mr. ROTHWELL. I think I have misstated. I think I agree with you in terms of your hypothetical, but what I was trying to project was the basis for the bill—let's say Safeway has a truck. It is a buyer. It delivers to its individual stores and makes the last dropoff. It has a truck in the vicinity, you see. It runs over, not to Procter & Gamble, but to some other seller, picks up a truckload of merchandise, takes it back to the warehouse or perhaps delivers it to the stores on the way back, sort of a reverse routing for the driver.

What you have is an incremental cost experience for the buyer, Safeway, that bears little relationship to the cost this bill would permit the seller to give to the buyer as compensation, you see.

Senator DOMENICI. I understand that. I assume you did not mean what I understood you to say. The marketplace might very well adjust on both hauls, if indeed they are free agents.

Mr. ROTHWELL. The marketplace, as conditioned by the rules of the game today—we don't want that jungle back where power and so forth counts.

Senator DOMENICI. I understand. Would not a requirement that the Procter & Gambles of this world have an f.o.b. price solve some of Jewel's problems?

Mr. DALEIDEN. Senator Domenici, it would help. We don't feel suppliers should be compelled to do this however. This would place, we think, the practice in a framework that would make it difficult for both of us to work within. We would rather see it be voluntary. You are quite right, however, if they were compelled to offer a suitable f.o.b. dock price, that would help the situation, but it would not resolve it.

We think it would create a climate that would make it more difficult for all of us to work in.

Senator HANSEN. Your last response prompts me to ask if a company, say Procter & Gamble, has a zone-delivered price and an f.o.b. price as well, would not the zone-delivered price be subject to some recomputation. If people are picking up goods at the freight dock, it would seem to me as though a zone-delivered price would have to contemplate or reflect the experience a seller had.

I should think we would get into a situation where if these rates were subject to review by a regulatory board or something like that, it could be a moving fluid situation. Am I stating something that seems fair to you?

Mr. DALEIDEN. Any pricing structure is a fluid situation. I would prefer to cogitate on your question and respond to it later if you don't mind.

Mr. ROTHWELL. I was admiring your phraseology of the question. Certainly the f.o.b. pricing and the difference between the f.o.b. price and the uniform zone delivery price are reciprocal in their terms of

cost. In effect, if you move one and where it comes—it is always a question of experience.

Senator JOHNSTON. Thank you very much, gentlemen. You have been an excellent panel. We would invite any further comments by letter to us by July 15. Some of you may want to take a look at Mr. Johnson's proposition. He has a draft of a statute on the back of his statement and you may want to respond to that.

Or, if there is some third alternative you would like to promote for the benefit of this hearing today, we would like to hear from you.

[The prepared statement of Mr. Daleiden follows:]

STATEMENT OF FRANCIS P. DALEIDEN, VICE PRESIDENT, TRAFFIC AND TRANSPORTATION, JEWEL FOOD STORES, MELROSE PARK, ILL.

I am Francis P. Daleiden, Vice President for Traffic and Transportation Jewel Food Stores Division, Jewel Companies, Inc. In addition, I serve Jewel Companies, Inc. as General Traffic Manager. Jewel Companies, Inc. is a diversified retailer consisting of nine operating divisions and subsidiaries, four of whom are supermarket operators: Buttrey Food Stores, Great Falls, Montana; Eisner Food Stores, Champaign, Illinois; Star Market Company, Cambridge, Massachusetts; Jewel Food Stores, Melrose Park, Illinois.

I am testifying today in support of Senate Bill 1699. This is essentially a bill to conserve energy and to encourage greater back haul productivity by making legally permissible the expanded use of back haul by the buyers of merchandise.

Jewel Food Stores operates 239 supermarket type stores in Illinois, Indiana, Michigan, Iowa and Wisconsin located in an area which extends to Kalamazoo, Michigan on the east; Kankakee, Illinois on the south; and Milwaukee, Wisconsin on the north; Davenport, Iowa on the west. We deliver product to these stores utilizing a private truck fleet which currently consists of 299 truck-tractors and 732 trailers. Some 285 of these trailers are equipped with mechanical refrigeration units to handle special needs for the proper protection of such perishable products as fresh fruits and vegetables, dairy products and frozen foods.

Our very substantial interest in this subject stems from the fact that our delivery operations, after transporting product to our stores from distribution centers in the Chicago area, are unnecessarily compelled to return empty to the origin distribution center because back hauls of our own product are not offered at all or are offered at back haul allowances which are so low as to not compensate us for necessary expenses involved in making the back haul.

As a private carrier we are, of course, permitted to transport only our own merchandise. We are foreclosed from seeking to transport the goods of others as a for hire carrier would to fill his otherwise empty back hauls. We are not asking for authority to transport the goods of others on a for hire basis, but are simply seeking a clarification of the law to permit our uniform zone delivered price suppliers to grant back haul allowances for the goods we are purchasing on the same basis as our suppliers now incur transportation costs for those goods when utilizing a for hire carrier or delivering the product in their own vehicles.

The situation we are currently faced with in respect to those goods sold on a uniform delivery price basis is affected by and in large measure stems from supplier interpretations of FTC Advisory Opinion No. 147. Essentially what this has meant for us is that suppliers operating under a uniform delivery price system will either not grant back haul allowances to us at all due to an alleged inability to operate suitably under the guidelines set out in Advisory Opinion 147 and subsequent modifications of it, or will grant back haul allowances based solely on the cost of transportation to their closest group of major customers. This typically will result in back haul allowances being offered at an extremely low level, typically the equivalent of their local cartage rates, and not at all representative of the actual freight costs they incur to points farther out in the pricing zone.

As an example, a bleach supplier operating under the current guidelines offers a back haul allowance of 22 cents per cwt for pick up of their product

at a Chicago area plant. This offer makes it marginally attractive for a Chicago area retailer or wholesaler to participate in a back haul program. Under current FTC guidelines that same back haul allowance of 22 cents per cwt would also be offered to a retailer based in Champaign, Illinois—133 miles from Chicago—even though the common motor carrier rate from Chicago to Champaign is almost 60 cents per cwt. The retailer or wholesaler based in Champaign, Illinois, who must, as a part of its business, make deliveries in or near Chicago, is precluded from participating in this back haul program because the supplier is not permitted to offer him a *cost-justified* allowance which will properly compensate that retailer or wholesaler for transportation based on length of haul. The result, all too frequently, is an empty return trip utilizing close to the same amount of fuel and operating expenses which would have been incurred with a full return load.

Other uniform zone suppliers, recognizing the inequities of this type of situation, have taken the alternative approach of simply not providing any arrangements for back hauls. Unfortunately those who have chosen this course of action include some of the major suppliers to the grocery industry, with the result that a large portion of the product we buy is not available for back haul at all under current circumstances.

This artificial shrinking of back haul opportunities has created and will continue to cause a serious waste of precious fuel and truck capacity, not to mention detracting from badly needed productivity improvements.

To emphasize the magnitude of this energy waste, you should know that our Jewel Food Stores truck fleet travels almost 9.5 million miles a year and in the process, consumes 2.5 million gallons of diesel fuel and gasoline. In operating this delivery fleet, we know there are existing situations where we are returning empty to our distribution centers after making store deliveries very close to suppliers plants or distribution centers while their carriers are delivering product to our distribution centers and returning empty—YES, you hear that correctly—empty trucks virtually passing one another while we have a pressing need nationwide to conserve fuel!

Nationwide studies indicate that restrictions on private carriers result in their trucks traveling empty about 30–40 percent of the time. We do only slightly better than that nationwide estimate and then only because we work awfully hard at operating as efficiently as possible. Even assuming only 25 percent empty miles, however, our Jewel Food Stores operation alone has the capacity for another 2.3 million annual miles of transportation service theoretically capable of saving 575,000 gallons of fuel.

While we do not propose to review the transportation operations of each of our operating divisions today, we do wish to briefly review with you the operations of our Eisner Food Stores Division to demonstrate the special problems of smaller more rural chains.

Eisner Food Stores Division of Jewel Companies is headquartered in Champaign, Illinois and operates major distribution facilities at that location. From that location, Eisner serves 34 corporate stores and 53 agency stores in central Illinois and Indiana. These agency stores are independently owned small businesses whose product is furnished by Eisner Food Stores as a wholesaler in such quantity and for such product lines as they may choose to buy from Eisner. These agency stores interestingly range from approximately \$7,000 per week in retail sales up to a maximum of about \$75,000 in retail sales, with the entire group averaging less than \$20,000 a week in retail sales. These agency stores are in such towns in Illinois as Hoopeston, Cerro Gordo, Arcola, Bement, Moroa and Monticello, helping to serve the food needs of these primarily agricultural communities.

The delivery system serving these agency stores as well as the Eisner corporate stores is provided by an irregular route motor carrier engaged on a round trip and weekly basis to provide dedicated transportation services for Eisner.

This delivery service, even though contracted far from a certified common carrier, is accordingly also subject to the same need for back haul to fill what would otherwise be empty return trips from the Eisner corporate and agency stores.

This particular operation utilizes 29 truck-tractors and 111 trailers traveling almost 2,700,000 miles annually and utilizing about 550,000 gallons of diesel fuel annually. Their situation, located farther from supplier locations in dense

metropolitan areas such as Chicago, is such that they unavoidably have an even higher empty return ratio than our Jewel Food Stores operations. We accordingly anticipate that the bill herein supported will be of vital help in providing back haul operations for an operation in a dense metropolitan area, but likely even more so for an operation such as that of the Eisner Food Stores. pattern.

Thus the small agency stores served by Eisner Food Stores stand to gain on a comparable basis to a large retail store simply because the fee of the wholesaler serving them is largely dependent upon the very level of distribution expenses we are working to reduce by improving back haul opportunities.

In summary, we have examined this bill as it would affect those of our operations which have heavy concentrations in dense metropolitan areas as well as those which operate in more rural areas. We have those of our operations which are served totally by private trucking operations as well as those served by dedicated for hire motor carrier operations. After this examination, it is clear that the type of back haul assistance provided by this bill will greatly increase back haul opportunities for all of these various divisions and operations with the result that large amounts of fuel will be saved and very significant productivity increases in distribution will be realized. We believe that these benefits will not only benefit our company, but will benefit the general public.

We heartily support Senate Bill 1699 and urge your favorable consideration of it.

Senator JOHNSTON. Let me ask each of you to summarize, if you can do so, within 5 minutes. Perhaps we will have some time for questioning.

**STATEMENT OF ROCCO Q. LOPARDO, CHAIRMAN OF THE BOARD,
PRIVATE CARRIER CONFERENCE, INC., WASHINGTON, D.C.**

Mr. LOPARDO. My name is Rocky Lopardo, and I am chairman of the board of the Private Carrier Conference. I represent 5,000 members. We are in support of S. 1699. I might add we are 1 of 13 members of the American Trucking Association and, in this particular case, we are taking independent action.

I would like to quote statistics. I think it is important to note we have about 23½ million trucks on the road and 22½ are private carriers. This information is published by American Trucking Trends. I would like to say fuel conservation is an important issue.

All of us in the private carrier industry have spent many, many thousands of dollars to add air shields to our cabs so we can deflect the wind and get better fuel consumption.

We schedule deliveries to our warehouses and to our stores or our place of business so we can have less idle motor time.

We do everything possible to keep our trucks running properly and efficiently and help save fuel.

I might also add, and I think it is important at this point, to stress that private carriers, and many of us are in the food business, are private carriers because we have to be.

Service and economic conditions dictate in these situations that we deliver to our own place of business, as common carriers cannot properly compete, and providing an incentive to eliminate empty backhaul is very, very important to us.

We feel that support of S. 1699, and it would only be redundant to review it, would simply clarify the position for those suppliers who are willing to negotiate a rate, but cannot do so because the FTC law is ambiguous.

In this respect, Mr. Chairman, we wholeheartedly support S. 1699.

I would like to say it is like motherhood and apple pie, but you are on the right track. You are saving fuel. You are saving expenses which will ultimately be passed on to the consumer, and I think this is what it is all about.

Thank you.

[The prepared statement of Mr. Lopardo follows:]

STATEMENT OF ROCCO Q. LOPARDO, CHAIRMAN OF THE BOARD, PRIVATE CARRIER CONFERENCE, INC.

Mr. Chairman and Members of the Subcommittee, my name is Rocky Lopardo and I appear before you today in support of S. 1699 in my capacity as past President and current Chairman of the Board of Directors of the Private Carrier Conference. PCC has more than 5,000 private carrier members representing every American industry including the food industry of which my company, Grand Union, is a part. Private carriers are non-transportation companies which utilize trucks to carry their own goods to their own customers and, on return, to pick up from vendors incoming supplies and products for their own business use. These companies are members of the Private Carrier Conference, an affiliate of the American Trucking Associations. PCC, as a separate trade association, however, is completely independent in the formation and implementation of its policy directives. By special directive of the Board of Directors of the Private Carrier Conference, I have been asked to state our support for S. 1699 which we think will contribute to a partial resolution of the empty backhaul problems, which have faced some private carriers for many years.

In many ways, non-ICC regulated private carriers, contrary to what otherwise might be the general impression, comprise a substantial, perhaps the most substantial segment, of the entire trucking industry which also includes the ICC regulated public carriers. ATA's publication, "American Trucking Trends, 1975", points out that there were over 23.5 million trucks registered in the United States as of 1974, the latest statistical year. Of this 23.5 million vehicles, 22.5 million vehicles were private. This exceeds 95 percent of all vehicles on the highways in the United States. What does this represent in terms of the number of private carriers? There have been various estimates by the ICC and the Department of Transportation ranging from a low of 85,000 to a high of 115,000 interstate private carriers. The 1972 Census of Transportation estimated that on a total intercity ton mile basis, including all freight commodities, non-ICC regulated private and exempt motor carriers accounted for 57.9 percent of total intercity ton miles by truck. It has been conceded by the Interstate Commerce Commission that the bulk of intercity motor traffic is, therefore, not economically regulated trucking, but non-regulated trucking.

Significantly, private and other forms of non-regulated truck transportation now constitute the largest share, revenue basis, of intercity freight. A recent Summary of National Transportation Statistics released by the Department of Transportation in its Annual Report, June 1976, indicates that some \$26.1 billion was expended for unregulated intercity trucking while some \$22.7 billion was expended for regulated intercity trucking. What do all these figures really add up to? In my view, they show that the private carrier, by any measure you want to use, is a very substantial part of the trucking industry and may now in 1977 very well be the backbone of the trucking industry in the United States.

Now to our backhaul problems. Private carriers cannot trip lease their drivers and vehicles when they have an empty backhaul to regulated carriers. Private carrier corporations cannot haul on a compensated basis for related corporations when such transportation would eliminate empty backhauls. These are ICC created restrictions. Finally, and as is the focus of S. 1699, private carriers do not have sufficient economic incentive to utilize empty backhaul capacity to pick up goods which they have purchased from their vendors for return haul to their plants and warehouses. Thus, while S. 1699 will not resolve all backhaul problems, this legislation will, nevertheless, address a significant empty backhaul problem which has in no way been created by any ICC restriction.

As a matter of ICC transportation law, private carriers have a legal right to haul their purchased goods to fill out otherwise empty backhauls. However, as a matter of Federal Trade Commission interpretation, this practice—in terms of adequate compensation or incentive for such hauling—has been open to question since 1967 when the FTC first raised an informal objection to the matter of a seller granting “backhaul allowances” from a uniform average zone delivered pricing system. Over the years, the Federal Trade Commission has tried to “clarify” this 1967 interpretation by emphasizing that, if a seller chooses to, it may also establish an f.o.b. origin price and sell to a company having its own trucks so as to permit these companies to pick up their own goods and achieve a transportation savings from having purchased the goods f.o.b. dock. This, however, has not worked out as a resolution of the problem. Many vendors seem reluctant to establish f.o.b. origin prices when they have already established a uniform zone delivered pricing system. Other vendors establish f.o.b. dock prices too high to induce private carriage pickups. Still others, notwithstanding the FTC warnings, grant “backhaul allowances” off the uniform zone delivered price which are insufficient and do not represent what the actual common carrier freight rate would be for the total distance a given product is moved or what their costs for their own private carriage movements are. S. 1699, accordingly, provides a remedy by allowing the seller with such a pricing system to give his buyer who has a private fleet of trucks the equivalent of the common carrier rate for the actual distance from the seller to the buyer as an incentive to utilize empty private truck backhaul capacity. Also if the seller would otherwise deliver the goods in its own private fleet, this seller would be able under S. 1699 to allow its buyer the actual cost of the seller's private truck transportation.

Private carriers, therefore, see this bill in terms of incentive. If sellers are allowed to give a transportation allowance which is the equivalent of the actual price of transportation by regulated common carriers or their actual private carriage costs, depending on how the goods would have been moved, private carrier buyers will utilize their vehicles to pick up the goods that they buy to haul to their home destination. Most importantly, this means the goods can be bought without this seller applied zone delivered transportation cost element. This dollar savings, achieved by encouraging the buyer private carrier to haul his own goods back from his vendor, will directly benefit consumers by allowing the private carrier, who is after all in a non-transportation primary business, to pass along savings so achieved in the pricing of the end product involved. I need not emphasize how important this is to the food industry. This of course has a direct relation to increased productivity in a time of inflation.

There is also a very real fuel conservation factor. Where regulated carriers would otherwise deliver the goods, the utilization of empty private carriage backhauls would greatly improve the utilization of private carrier fleets by putting the expenditure of their backhaul fuel to a good economic purpose, namely, hauling fully loaded trucks. It would also either reduce the expenditure of fuel by regulated carriers or permit them, as they are in a unique position to do, to solicit the traffic of other shippers who have no private fleet backhaul capacity. Moreover, and of particular relevance to the food industry, direct fuel expenditure would be reduced in those cases where sellers have their own private fleets and use them to deliver their own products with resulting empty backhauls of their own. S. 1699 would encourage such sellers to give allowances to buyers up to the equivalent of their actual delivery costs so as to eliminate this seller's private carriage movement and allow a balanced private carriage movement in the buyer's fleet.

At this point it is important to stress that private carriers are private carriers because they have to be. Service and economic conditions dictate private carriage in certain situations where common carriage cannot compete in the marketplace. This is true notwithstanding the empty backhauls that exist among some private carriers. Providing an incentive to eliminate some of these empty backhauls would not increase the number of private carriers, but it would increase the effectiveness of the utilization of the equipment of the private carriers.

Although this empty backhaul problem affects many industries, it is particularly acute in the food industry of which my company, The Grand Union Company, is a member. I can personally testify to the assistance which passage

of S. 1699 would be to my company, to the food industry overall, and to many other industries that of necessity rely heavily on private carriage transportation. S. 1699 removes confusion and doubt which has existed since 1967 as to the application and meaning of advisory opinions of the Federal Trade Commission. The Private Carrier Conference, therefore, endorses this legislation.

Senator JOHNSTON. Next, Mr. McMorris.

STATEMENT OF DONN D. McMORRIS, VICE CHAIRMAN, AMERICAN TRUCKING ASSOCIATIONS, INC., WASHINGTON, D.C., ACCOMPANIED BY LANA BATTS, ASSISTANT DIRECTOR, DEPARTMENT OF ECONOMICS, AMERICAN TRUCKING ASSOCIATION

Mr. McMorris. Mr. Chairman, members of the subcommittee, my name is Donn D. McMorris. I am vice chairman of American Trucking Associations, Inc., 1616 P Street NW., Washington, D.C. 20036.

I have with me Ms. Lana Batts from the American Trucking Association also. She is assistant director of the department of economics.

ATA is the national trade association of the motor carrier industry, representing all types of motor carriers, with affiliated associations in every State and the District of Columbia.

Of the 13 affiliated national conferences of specialized types of motor carriers, the Private Carrier Conference does not agree with the ATA position and has made its position known to the subcommittee.

My personal involvement in the trucking industry spans some 40 years. I am chairman of the NW Transport Service, Inc., headquartered in Denver, Colo. NW Transport is a general freight motor common carrier operating in the States of Colorado, Idaho, Nebraska, Utah, and Wyoming.

I welcome this opportunity to address S. 1699, Diesel Fuel and Gasoline Conservation Act of 1977.

The proposal is misleading insofar as it being offered to save 100 million gallons of fuel a year. Our research indicates the figures have little basis in fact and my detailed testimony sets forth our bases for making such a statement.

More important, whatever little savings will accrue to certain grocery chains will be at the expense of regulated carriers, in most instances.

A great many of our carriers transport food commodities. Since there is a finite amount of freight to be moved, switching freight from one carrier to another does not, in itself, achieve fuel conservation.

In fact, over the long run, we believe it can be shown the for-hire carrier with his efficient freight distribution and consolidation operations, not to mention the regular service he is obligated to perform, is the more efficient carrier in terms of fuel consumption.

The regulated carriers provide the highest level of transportation service found anywhere in the world.

This high level of service has been achieved because the regulated carriers have been obligated to provide services without discrimination or undue preference or prejudice to individuals, businesses, or localities.

The regulated motor carriers meet their obligation to serve the general public by balancing their operations multidirectionally to minimize empty miles and time.

Passage of legislation like S. 1699 will only tend to unbalance this complex network of freight distribution performed by regulated motor carriers.

The fact is the proposal for broadened customer backhauls will be utilized by only a few of the giants in the food industry.

Small firms simply cannot afford to have trucks away from their base and primary source of business and take extra time and distance involved in backhauling.

What appears to be sought is a competitive advantage and not a reduction in fuel usage. It is a case of possible discriminatory legislation favoring the large food chain over the smaller businessman.

Conservation of fuel is a prime goal of the motor carrier industry. I am chairman of the ATA Energy Committee which was created and dedicated to fuel conservation.

My full statement which is being presented to you this morning includes a pamphlet which will indicate our efforts and goals.

Not mentioned in my statement, but something which I feel your subcommittee should have is ATA's recent statement on the President's energy proposals. Reading of that statement will indicate the depths of our concern and the sincerity of our commitment to fuel conservation.

The proposed legislation under consideration today, in our estimation, is not one which will produce a real fuel savings.

Thank you.

Senator JOHNSTON. Is our trucking system so rigid that, if an increase in backhauling were to occur, trucks supposed to fronthaul those cargoes would be sent out anyway with no change in operation?

Mr. McMORRIS. I am not sure I understand your question. Would you try that on me again?

Senator JOHNSTON. I am asking, is our trucking system so rigid that if this bill were to pass, the trucks who were supposed to fronthaul those cargoes would be sent out empty anyway with no change in operations?

Are you saying this bill would result in no change in operation?

Mr. McMORRIS. This bill would result in some changes in operations, but I might point out we are hearing a lot of conversation about truckload traffic, and there is a distinction between truckload traffic and the less than truckload traffic.

Many of the changes would occur in the less than truckload traffic. Many routes are served by the common carrier industry today on a daily basis regardless of the amount of traffic. They also pick up traffic on those routes and any loss of traffic on those peddled routes will not be replaced.

Mr. LOPARDO. We are far from rigid. We have been backhauling for many years with those companies who are willing to provide backhaul allowances. It has had very little serious adverse effect on the for-hire trucking industry. We only use the number of trucks required to perform the service and that would be true of any efficient trucking operation.

Senator HANSEN. Mr. Chairman, if this question has been asked, I apologize. In your statement, Mr. McMorris, you make the charge that there won't be any significant amount of fuel saved. Then you go on to say the reason you reached that conclusion, I gather, is the study, from which such a conclusion might be extrapolated was never intended to address the issue of fuel savings; that all trucks on the highway, whether they are half-ton pickup trucks to the biggest that may be running, are counted by concluding a number of trucks will have to make fewer trips, but figuring on the basis of the larger truck, some savings of \$330 million per year have been reached.

Do I understand you essentially to be making this sort of charge?

Mr. McMORRIS. I charge the alleged savings are not backed up by fact in any possible manner. In the studies the ICC has made and has previously been referred to here this morning does not support it in any manner, these facts or allegations, facts of savings and, as a matter of fact, no one knows exactly what that number is.

I haven't heard any numbers here today, other than some wild numbers taken out of the air.

Senator HANSEN. I think, Mr. Chairman, everyone would agree with you that if there is a way we can save fuel, that is a laudable objective and desirable goal, but on the other hand, I need not say to you we want to examine the other ramifications of this legislation, and to make certain we do not unwittingly damage those segments we already agree are important in our national life and should be preserved.

Let me compliment you on the objective that I know has prompted your introducing the bill and express appreciation for the opportunity to hear from some experts to enable us to make a judgment.

Mr. McMORRIS. I heard remarks a moment ago concerning the fact a truck might go into a place like Florida with general commodities, regulated commodities, and he could not return with produce.

I am sure none of us is trying to be an expert on ICC law at the present time, but that situation just plainly does not exist. If you go in with general commodities into a territory and you wish to return with agricultural produce, food products that have not been processed, you can haul those freely in interstate commerce today.

It is the commodity going down that is regulated.

Senator DOMENICI. Perhaps I used the wrong example when I made that statement. I am not an expert on it either, but I assume backhauling nationally is a problem aside from that which we are attempting to cure here.

Mr. McMORRIS. It is 3 percent and that is what the ICC study reflects. We all know there are consuming areas and producing areas as relates to balance.

I am sure we can all understand all of the grocery trucks that go into our bedroom areas to unload a load of groceries to a chain grocery or otherwise are not going to find in the immediate area a load to go back to their warehouse with. I find it difficult to believe we are going to materially reduce their empty mileage with the passage of this bill.

[The prepared statement of Mr. McMorris follows:]

STATEMENT OF DONN D. McMORRIS, VICE CHAIRMAN, AMERICAN TRUCKING ASSOCIATION, INC.

Mr. Chairman, and members of the Subcommittee: My name is Donn D. McMorris and I am Vice Chairman of American Trucking Associations, Inc., 1616 P Street, N.W., Washington, D.C. 20036. ATA is the national trade association of the motor carrier industry, representing all types of motor carriers, with affiliated associates in every State and District of Columbia.

Before I begin my testimony, I would like to note that one of thirteen affiliated national conferences of specialized types of motor carriage—namely, the Private Carrier Conference—does not agree with the ATA position and, I believe, will make its position known to this Subcommittee.

My personal involvement in the trucking industry spans some 40 years. I am Chairman of NW Transport Service, Inc. headquartered in Denver, Colorado. NW Transport is a general freight motor common carrier operating in the States of Colorado, Idaho, Nebraska, Utah and Wyoming.

I welcome this opportunity to address S. 1699, "Diesel Fuel and Gasoline Conservation Act of 1977." As this Subcommittee undoubtedly has come to realize, fuel, its use and conservation are very complex and sometimes controversial subjects not given to simplistic solutions. As a major industry of this nation, the trucking industry regulated by the Interstate Commerce Commission is just as concerned as you are about the future energy needs of the country. Our whole existence depends on an adequate supply of fuel. Therefore, we very much want to help achieve a national approach to fuel conservation. Toward this goal, ATA has created an Energy Committee, of which I am serving as its Chairman. A little later on I will explain the function and duties of this very important ATA Committee, but first I would like to explain a little about the motor carrier industry.

The regulated motor carrier industry is primarily made up of small businesses. Of some 16,000 regulated carriers, almost 13,000 have annual operating revenues of less than \$500 thousand. Even the largest motor carriers are small businesses when compared with the economic corporate giants which are becoming so prevalent in America today. And yet this widely diverse industry has managed to provide the highest level of transportation service found anywhere in the world. Moreover, this high level of service has been achieved because the regulated carriers have been obligated to provide services without discrimination or undue preference or prejudice to individuals, businesses, or localities. And finally, it is important to realize that the regulated motor carrier industry is a very important segment of the only transportation system in the world still controlled and operated in the private sector.

Regulated motor carriers meet their obligations to serve the general public by balancing their operations multi-directionally to minimize empty miles and time. I say "multi-directionally" because few for-hire operations are made up of two-way directional flows—a front haul and a back haul. Freight movements, by nature, are unbalanced at any given point in terms of weight, volume, equipment requirements and time.

Passage of legislation like S. 1699 will only tend to unbalance this complex network of freight distribution performed by regulated motor carriers. This bill would perhaps solve, to a very limited extent, a backhaul problem for a small segment of the transportation community, but at the expense of the overall transportation community. There is only so much traffic to be moved. More freight will not be created by this provision of the bill. If the buyer is given the opportunity to haul property from his seller's place of business to his own, he would do so by taking the movement away from either the seller or the common or contract carrier providing the transportation service for the seller. This means emptying one truck to fill another. There would more than likely still be an empty truck movement. The regulated carriers' balance of multi-directional movements would be adversely tampered with.

Of primary importance to this Subcommittee is that a valid case cannot be made that any significant amount of fuel will be saved by the provisions of S. 1699. Consider, for example, the charge "that 30-40 percent of the trucks used in the food distribution industry are presently hauling nothing but air." This estimate originally made by the National Commission on Productivity in

1973,¹ and based on a book by Dr. Gordon Bloom in 1972.² Dr. Bloom's original estimate was taken from the Truck Weight Study sponsored by the Federal Highway Administration (FHWA) as reported in Table HT-1 of *Highway Statistics*, which reports the percentage of trucks carrying loads. Unfortunately, Dr. Bloom is guilty of using a study for a purpose for which it was never designed. Truck Weight Studies conducted by FHWA are done on a continuing basis and cover all types of trucks—for the smallest pickup utilized for personal use to the largest twin trailer combination. It is merely a truck counting and weighing study and not a backhaul study. Nor is it a commodity study but merely records certain body types as being empty or loaded. And finally, the study covers movements conducted only in the daylight hours of summer.

Recognizing the inherent defects in this study, the Interstate Commerce Commission in conjunction with the Productivity Commission, the Department of Transportation, and the Federal Energy Administration, conducted a much more valid study last year to determine the amount of empty truck miles. The results of that study show that only 20.4 percent of all truck miles in 1976 were empty.³ The study concluded that traffic imbalances are the foremost cause of empty truck miles. The second cause for emptiness is the use of specialized equipment such as tank trucks and auto carriers. The study also found that empty trucks passing empty trucks happened only three percent of the time.

We have also read that the Federal Energy Administration has estimated "conservatively" that 100 million gallons of fuel could be saved with enactment of this bill. This just isn't true. The estimate was made by the members of the Food Industry Advisory Committee and was never endorsed by FEA. In fact, the FEA, in a letter, dated August 15, 1975, to the Federal Trade Commission,⁴ remarked that the figure was "somewhat overstated." "Somewhat overstated" is too mild a word when one reviews the genesis of the estimate. It is based on no hard data. No objective study was undertaken. It is merely based on a series of unsupportable assumptions. For example, the Food Industry Advisory Committee assumes that 75 percent of all their inbound truck tonnage originates in areas served by distributors' fleet. This means that one must assume that 75 percent of the nation's food processing and distribution facilities are located near retail store outlets. In our highly suburban environment, this is a highly unlikely assumption.⁵

The Federal Energy Administration in a response to a question posed by its own Food Industry Advisory Committee as to why it wasn't seeking a change in fair zone pricing systems, said on October 19, 1976:

It is felt that energy conservation potentials in this area are smaller relative to other areas which would produce greater returns as a result of Federal regulatory or policy actions.

Among the other areas with greater potential in fuel saving in the trucking industry, the FEA listed the encouragement of intermodal freight operations, and increased truck weights and sizes.⁶

Moreover, a recent study by the Federal Energy Administration entitled, "Potential Fuel Conservation Measures by Motor Carriers in the Intercity Freight Market,"⁷ did not address the issue of the type of backhauls under

¹ "Productivity in the Food Industry," a report by the staff of the National Commission on Productivity, 1973.

² Gordon F. Bloom, *Productivity in the Food Industry* (Cambridge: MIT Press, 1972).

³ "Empty/Loaded Truck Miles on Interstate Highways During 1976," Bureau of Economics and Bureau of Operations, Interstate Commerce Commission, April 1977.

⁴ Letter from Frank G. Zarb, Administrator, Federal Energy Administration to Lewis A. Engman, Chairman, Federal Trade Commission, Aug. 15, 1975.

⁵ The rounding to the largest 100 million also renders the figure highly suspect. I am reminded of the estimate made by the Environmental Protection Agency that elimination of gateway restrictions by the Interstate Commerce Commission would reduce fuel consumption by 300 million gallons. Subsequent evidence based on hard data, showed that, in fact, only 21 million gallons had been saved. Could this be another case of highly inflated figures aimed at achieving a policy change in the name of energy conservation?

⁶ Statement read by E. W. Gregory, Transportation Program, FEA, to the Food Industry Advisory Committee, Oct. 19, 1976.

⁷ "Potential Fuel Conservation Measures by Motor Carriers in Intercity Freight Market," prepared by Charles River Associates for the Federal Energy Administration, March 1977.

consideration in the instant bil. Only areas offering valid saving potential were considered in the study.

Our studied conclusion is that data simply do not exist to allow even a cursory estimation of the minimal fuel savings to be obtained. But whatever is to be gained by one segment of the food industry will hurt those regulated carriers which must serve the entire shipping public.

The fact is that the proposal for broadened customer backhauls will be utilized by only a few of the "giants" in the food industry. Most firms *simply* cannot afford to have trucks away from their base and primary source of business and extra time and distance involved in backhauling. What appears to be sought is a competitive advantage, and not a reduction in fuel usage.

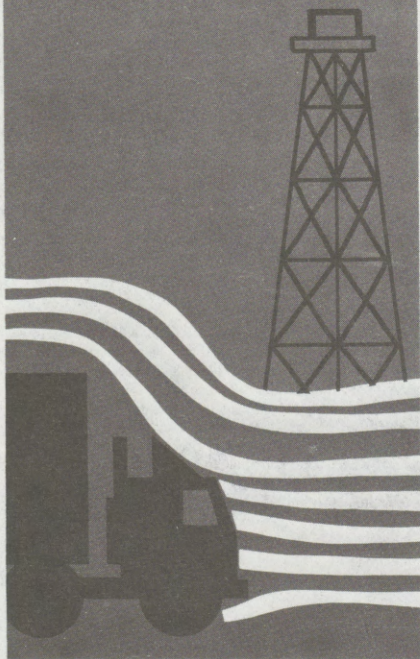
In conclusion, ATA believes that the present regulated motor carrier system offers the greatest potential for the minimum amount empty mileage for all carriers. As I stated at the beginning of my remarks, the energy crisis does not offer any easy solutions.

The Interstate Commerce Commission is presently assisting motor carriers in maximizing their full hauling capacity, and reducing, to the fullest extent possible and practicable, the amount of empty truck mileage. It has in the last few years eliminated circuitous gateways, encouraged more direct routing for carriers, considered operational feasibility in granting operating authority, and acted wherever it could to save fuel and reduce energy consumption. Also the Commission has authorized the innovative approaches of motor-for-motor substituted service and convenience interlining. With specific regard to empty backhauls, it has increased its consideration of such problems in determining whether to grant or deny applications for motor carrier authority. The ICC has also undertaken an ongoing study of the empty backhaul situation with a view of alleviating the problem where it can.

Conservation of fuel by the motor carrier industry is happening today. These efforts are under the direction of the ATA Energy Committee and include such areas as (1) technological improvements, (2) operating efficiencies, and (3) liberalized size and weight restrictions. Included with this statement are two pamphlets, one entitled "The Fuel You Save Today Will Be Your Fuel Supply Tomorrow" and the other, "The Fuel We Save May Heat Your Home." These two pamphlets will give you a quick review of some of the meaningful efforts of the motor carrier industry toward fuel saving.

In closing, the regulated motor carrier industry is willing and anxious to work with you and the staff of this Subcommittee to address these areas of proven fuel savings for all carriers, and not efforts which will merely give unfair competitive advantages to a select few in the name of fuel conservation. For all of the foregoing reasons, we respectfully request that S. 1699 not be recommended by the Subcommittee for enactment into law.

THE FUEL YOU SAVE TODAY WILL BE YOUR FUEL SUPPLY TOMORROW



The 1970s will be a watershed decade for the trucking industry. In many respects, the fuel-sufficient environment we knew in the post-World War II period ended abruptly with the Arab oil embargo of 1973-74. The ensuing energy crisis coincided with a peak in domestic oil production and the startling realization that our supply of fossil fuels is running low at a dangerously rapid rate.

The trucking industry was caught as much off-guard as the general public, but we are learning quickly that every step we take to conserve this finite energy supply will prolong the life of our industry, which is solely dependent on petroleum to power its vehicles.

Fuel-saving devices once deemed too expensive to be practical are now paying for themselves as the price of diesel increases steeply, almost doubling in the four-year period 1972-76 from 30 cents a gallon to 52 cents a gallon.

Support for the 55 mph speed limit is growing as test after test confirms the fuel-savings of the lower speeds, and many companies now police their own drivers, clocking their speeds with "highway patrol" type radar guns. In fact, a recent National Highway Traffic Safety Administration survey showed that only trucks, of all vehicles on the highways, averaged less than 55 mph.

More trucks are being built with speed governors, engines are being set at lower rpm's and motor carriers are opting for the "fuel-saver" packages offered by manufacturers. The Department of Transportation estimates that the sale of fuel-saving equipment on new trucks increased by 400 per cent in only one year, between 1975 and 1976.

Intercity motor carriers of property, including regulated for-hire carriers, private carriers and non-regulated for-hire carriers, consumed approximately 10.1 billion gallons of fuel in 1976, less than 3.8 per cent of all petroleum used in the United States. This remarkably small percentage is less than one-seventh the amount of fuel used by private automobiles.

Nonetheless, motor carriers are continuing to develop ways to stretch out the fuel supply, because when it goes, so do we. Any equipment or practice that conserves even the smallest amount of fuel should be adopted. We should lose no opportunity to convince the public of the need to conserve fuel and of the trucking industry's efforts to do so. We should continue to seek an increase in state weight and length limits and we should bolster driver training efforts to instill energy-saving attitudes in our drivers. For the fuel we save today means a delivery tomorrow.

There are many ways in which the trucking industry, individual companies and auxiliary industries such as truck and tire manufacturers can save energy. Even individual drivers have an impact on the fuel-use statistics. Many of the possibilities presented here will achieve only minimal fuel savings when used alone, but the overall savings will increase as each opportunity is taken.

The public relations efforts outlined below, while not fuel-savers in their own right, are essential if the public is to understand the monumental conservation effort undertaken by the trucking industry. In particular, the federal and state governments must be made aware that the industry is doing what it can to cut back on its already small share of U.S. oil consumption.

WHAT THE INDUSTRY CAN DO

1. Work to increase size and weight limits in the 14 states that do not allow truck gross weights to reach the federal 80,000-pound maximum and in the 20 states that do not permit twin trailers of 65 feet or more. (Eight states do not allow either 65-foot twin trailers or 80,000 pound trucks.) It is estimated that fuel savings would reach 239.2 million gallons a year if these states' laws could be brought in line with the federal weight standard and the 65-foot length limit.

2. Promote practices such as the motor-for-motor substituted service presently approved for certain Midwest carriers. Under this plan, one carrier whose tractors would return to Point B empty after delivering a load to Point A, could arrange to transport to Point B the trailers of another carrier who had more trailers at Point A than he had tractors to haul them. The great advantage of this process is that it reduces the number of empty miles.

3. Establish a fuel-efficiency committee to review industry fuel conservation efforts and coordinate data collection and information sharing by trucking companies, suppliers and the government.

4. Encourage the reduction of unnecessary automobile traffic to slow down depletion of the available fuel supply.

5. Encourage the development of solar energy, wind energy, hydroelectric energy and, where safe, nuclear energy. Wherever possible, encourage industries and homeowners who depend on fuel oil — essentially the same product as diesel — to convert to other energy sources and free the supply of liquid fuel for transportation.

6. Increase institutional advertising to convince the

public of the importance of trucking's role in delivering 75 per cent of the goods they use every day, and to dispel the image of the gas-guzzling, road-hogging, emission-spitting truck.

7. Publicize the conclusions of the recent National Highway Traffic Safety Administration study which found that cars and buses speed on U.S. highways more than trucks do. The NHTSA "55 MPH Fact Book," based on data collected in 1975, reports that passenger cars averaged 56.2 mph, buses, 55.4 mph, and trucks, 54.8 mph. ATA Chairman Robert H. Shertz has made a point of mentioning these findings in speeches delivered all over the country.

8. Prepare industry fuel-conservation exhibits for state conventions of motor carriers and related industries. Trucking companies and their associations should also develop programs for presentation to PTAs, church groups, schools and other civic organizations.

9. Increase the number of scholarships sponsored by motor carriers, particularly for the study of fuel-efficiency in truck engines, bodies, practices and procedures.

WHAT THE MOTOR CARRIER CAN DO

1. Name a fuel staff or director to coordinate conservation efforts. Many companies experience management problems when a fuel-conservation plan creates conflicts between different departments. Budgeting problems often occur, for example, when new radial tires take a big chunk out of the maintenance director's budget to cut down on the fuel costs incurred by the operations director's department.

2. Install as many fuel-saving devices on your equipment as possible. Radial tires, air defectors, fan clutches and low-rpm, high-torque rise engines have been shown to cut back fuel use by as much as 25 per cent. Some trucks, particularly tankers, can also take advantage of lightweight metal construction, which increased the fuel-efficiency of one motor fuel delivery fleet by 7.5 per cent. In addition, truck manufacturers are experimenting with aerodynamic design and further improvements in engines and transmissions.

For a basic three-axle \$42,000 tractor, the cost of a fuel-saving engine-transmission-fan clutch combination adds only around \$500; radial tires add around \$216; an airshield \$200. So, for an outlay of \$1,000 per truck, a company can conservatively expect to save 10 per cent of its fuel costs.

According to Department of Transportation esti-

mates, a truck traveling 100,000 miles at 4.5 miles per gallon uses \$11,000 in fuel. A 10 per cent reduction in fuel use would save \$1,100 every 100,000 miles.

3. Keep vehicle speed down to 55 mph or lower through the use of speed governors, driver training, and speed monitoring. This not only saves fuel, it saves money. One company estimates that a fuel-saving of one-tenth of a mile per gallon translates to a cost saving of \$700,000 a year.

4. Use recapped tires rather than new tires, except on steering axles. It takes 20 gallons of oil products to manufacture a new truck tire. A recap tire requires only four gallons. The difference could go into diesel fuel. In other words, every recap you buy today means 16 gallons of diesel for your use tomorrow.

5. Re-examine engine maintenance procedures. Be sure that all truck engines are properly and regularly tuned and seek ways to cut back on fuel use. One possibility is to double the time between oil changes. One company has successfully reduced its use of oil by changing crankcase oil every 30,000-50,000 miles rather than at the 10,000-20,000 mile intervals of the past. This kind of experimentation requires careful monitoring to guard against equipment damage or wear, however.

One company has been using oil testing kits to determine when crankcase oil needs changing. The kits, which use chemicals to test the condition of the oil, enable the company to get along with far fewer oil changes than would be required if oil changes were performed according to a rigid schedule.

6. Recycle crankcase oil. One large carrier has found it both profitable and fuel-efficient to collect the oil discarded in truck oil changes, filter it through a device that costs less than \$1,000, and add the filtered product to the company's diesel supply on a 1:10 ratio.

7. Install bulk fuel storage facilities. These would enable the carrier to purchase large supplies of diesel fuel during periods of high production for use during the critically low periods when most refinery storage facilities are given over to home heating oil for use during the winter. The carrier would then be assured of a constant fuel supply, at least for close-in deliveries.

Caution: Carriers should be aware of the U.S. Environmental Protection Agency's oil pollution regulations in Section 40, Code of Federal Regulations.

8. Coordinate fuel conservation efforts with the labor unions and institute driver training programs to encourage drivers to develop techniques that will achieve maximum fuel efficiency.

WHAT THE DRIVER CAN DO

1. Drive within the speed limit. Most trucks can handle 55 mph easily in top gear. The evidence is conclusive that slower speeds save fuel.

2. Avoid unnecessary engine idling. An idling truck engine uses about one-half gallon of diesel or one gallon of gasoline an hour. A miniscule amount? Yes, but it adds up. Drivers have been known to leave their engines running for weeks at a time to avoid having difficulty starting them in cold weather. But that's the exception. Most engines will remain warm for over three hours, even in the winter, and would not be difficult to start after a meal break.

Many cities are requiring trucks and buses to shut off their engines after several minutes of idling time, and the trend seems to be toward further restrictions.

3. Avoid fast starts and stops and irregular speeds.

4. Don't accelerate on a grade. That only wastes fuel, and does not pick up much speed.

5. Keep tire pressure at the proper level. This not only saves fuel, it saves tires.

6. Use the CB Radio to determine areas of traffic congestion and be prepared to find alternate routes to bypass them. Idling in traffic wastes fuel and time.

7. Minimize use of air conditioners, and reduce pre-cooling time for refrigerated trailers.

8. Take care that your driving habits and the appearance of your truck project a good image for the motor carrier industry. Nobody will go to bat for a noisy, dirty, speeding, tailgating hunk of steel.

CUT FUEL USE NOW OR PAY LATER

Energy use in the United States increased by 4.8 per cent in 1976, including a 4.2 per cent rise in petroleum consumption for transportation. During same period, U.S. oil production declined between four and six per cent, representing a steady rate of decline for the recent past. Simple arithmetic tells us these divergent trends cannot continue for very long without totally depleting the available fuel supply. Even massive imports of foreign crude will not reverse these trends.

But the motor carrier industry can help make the finite supply of petroleum last as long as possible. The only way to accomplish this is to reduce consumption by trucks and encourage others to reduce their fuel consumption to the absolute minimum. If we don't take these steps, the inevitable pressures of supply and demand will force a reduction upon us.

Senator JOHNSTON. Thank you very much, gentlemen. The record will be kept open to July 15, 1977.

The hearing is adjourned.

[Whereupon, at 10:03 a.m., the hearing was adjourned.]

APPENDIXES

APPENDIX I

Responses to Questions From the Federal Energy Administration and the Federal Trade Commission

FEDERAL ENERGY ADMINISTRATION,
OFFICE OF THE ASSISTANT ADMINISTRATOR,
Washington, D.C., July 19, 1977.

HON. J. BENNETT JOHNSTON,
Chairman, Subcommittee on Energy Conservation and Regulation, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in reply to the July 7, 1977 memorandum from Grenville Garside, Staff Director, Senate Committee on Energy and Natural Resources, asking several questions concerning the Federal Energy Administration (FEA) statement presented by Paul A. London on S. 1699 on June 27, 1977. Following are your questions and responses to them:

1. "You seem concerned that increased back-hauling might result in some regulated carriers traveling empty on the front haul because their cargoes were being backhauled by other trucks. Is the trucking system that rigid? Couldn't these carriers find other cargoes or cut back on their scheduling or even, as a last resort, drop routes?"

Response. No, the system is not too rigid, but there is inertia in it. The carriers to which reference was made are those regulated route carriers with less-than-truckload (LTL) shipments who are required by the certificates to serve a broad range of shippers. Loss of a partial load could result eventually in removal of a truck from the highway. However, in the interim, the common carrier could be expected to continue the run with a smaller load because other shippers require the service or replacement traffic is being sought. Until enough partial loads are lost to permit consolidating traffic on fewer runs there would be little or no energy conserved.

2. "Earlier this year President Carter said the following in a press conference in Clinton, Massachusetts:

"In the energy considerations, it's obviously a gross waste to have trucks required to haul a load a long distance and then, because of unnecessary constraints by the government bureaucracy, have to come all the way back home empty. I think that we need to do away with that particular requirement, at least."

"Obviously, the President was referring to the general array of restrictions on backhauling, but does the Office of Management and Budget concur with the FEA position in S. 1699?"

Response. Yes, concurrence in the FEA position on S. 1699 was obtained from the Office of Management and Budget.

3. "You pointed out that in August of 1975 the FEA urged the FTC to give positive consideration to a proposal to interpret the Robinson-Patman Act along the lines of what S. 1699 now proposes. As you said, the FEA believed then that the potential energy savings were great enough to warrant such an action. Since then, has the FEA uncovered any new evidence to support the argument put forth that where backhauling occurs the fronthaul carrier whose cargo is displaced by backhauling would run empty, therefore no energy savings would result?"

Response. No. In most cases where a contract carrier's entire load is displaced by backhauling, we would expect the trip not to be run at all. We are

not aware of any new evidence that would lead us to believe that carriers would maintain empty runs for a significant length of time. The major uncertainty revolves around the response of regulating route carriers to losses of partial loads, as we discussed in the answer to question number 1.

In addition to responding to your questions we are returning the transcript with corrections indicated on pages 5 and 6.

If you have further questions, we will be happy to answer them.

Sincerely,

PAUL CYR,

Acting Associate Administrator for Congressional and Intergovernmental Affairs.

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, D.C., July 12, 1977.

HON. J. BENNETT JOHNSTON,
Chairman, Subcommittee on Energy Conservation and Regulation, U. S. Senate.

DEAR BENNETT: During recent hearings on the "Diesel Fuel and Gasoline Conservation Act of 1977" I ask that the record be kept open until July 15 for additional statements or questions.

I would like to submit the following questions to the Federal Energy Administration and ask that the questions and answers be included in the record of the hearings if the answers are returned in time.

Kind regards,

Sincerely,

CLIFFORD P. HANSEN,
U.S. Senate.

Enclosure.¹

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, D.C., July 13, 1977.

MR. PAUL LONDON,
Deputy Assistant Administrator for Conservation and Environment, Federal Energy Administration, Washington, D.C.

DEAR MR. LONDON: During the hearing on June 21, 1977 on the "Diesel Fuel and Gasoline Conservation Act of 1977" I asked that the record be kept open until July 15 for additional statements or questions.

I would like to submit the attached list of questions to the Federal Energy Administration and ask that they be included in the record of the hearing if the answers are returned on time.

Yours very truly,

J. BENNETT JOHNSTON,
Chairman, Subcommittee on Energy Conservation and Regulation.

QUESTIONS TO FEA

We have reviewed a copy of the data submitted to the FEA in May 1975 by the Transportation Task Force of the Food Industry Advisory Committee. This data indicates that modification of Section 2(a) of the Robinson-Patman Act to permit cost-justified backhaul allowances would result in a savings of 100 million gallons of fuel and a reduction of \$300 million in distribution costs in the grocery industry. We would appreciate your answers to the following questions regarding the data submitted:

1. Does the backhaul data used assume complete elimination of miles currently driven by for-hire carriers? Is this a valid assumption? If not, can you provide data as to the number, or percentage, of miles transferred to buyers' trucks that would be duplicated by for-hire carriers required to maintain service between established origins and destinations?

¹ NOTE.—The questions submitted by Senator Hansen and the answers are contained in the letter of July 20, 1977 from Martin Seneca, Jr., of FEA to Senator J. Bennett Johnston. On July 13, 1977, Senator Johnston submitted Senator Hansen's questions to the FEA as requested.

2. The backhaul examples use averages to project fuel savings, with no weighting for relative supplier volume. Does this technique tend to produce substantial error in the estimated totals?

3. The data assume that 75 percent of truck delivery tonnage would be a reasonable objective for backhauls. What is the basis for this 75 percent figure? How reliable is it?

4. What data is available to substantiate the differences in transportation costs between for-hire carriers and private carriers?

5. Do the estimated fuel and cost savings figures consider the offsetting losses that would be incurred by regulated motor carriers? If not, what would be the approximate amount of such offsetting losses? Would such potential losses cause the regulated carriers to raise their prices, thus forcing sellers to make corresponding increases in their zone delivered prices too all customers?

6. What is the estimated amount of (a) lost wages and (b) increase in unemployment among workers in the regulated transportation industry that would result from the reduced number of miles driven by regulated motor carriers?

7. Do the estimated fuel and cost savings figures consider the increased costs to sellers resulting from reduced efficiencies in their private trucking operations and from disruption to their warehousing operations caused by a substantially increased number of unscheduled customer pickups? If not, what is the approximate cost of such increased costs to sellers?

FEDERAL ENERGY ADMINISTRATION,
OFFICE OF THE ASSISTANT ADMINISTRATOR,
Washington, D.C., July 20, 1977.

Hon. J. BENNETT JOHNSTON,
Chairman, Subcommittee on Energy Conservation and Regulation, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your July 13, 1977, letter with questions regarding the Federal Energy Administration's (FEA) Food Industry Advisory Committee (FIAC) report on the energy conservation potential of cost-justified backhauling by private motor carriers. Your questions and the FEA answers to them are enclosed with this letter.

Our answers to your questions, Mr. Chairman, reflect the same problem expressed by Mr. Paul London, Deputy Assistant Administrator for Conservation Policy in his June 27 testimony before your Subcommittee. That is, the data are not available which would allow us to make a detailed, precise evaluation of the subject.

We have reviewed your questions and our answers with persons who participated in developing the FIAC report. They are providing additional details in support of their findings that I will also send you.

If you have further questions, we shall be happy to answer them.

Sincerely,

MARTIN E. SENECA, JR.,
Acting Assistant Administrator, Conservation.

Enclosure.

QUESTIONS AND ANSWERS CONCERNING FEA FOOD INDUSTRY ADVISORY COMMITTEE, MAY 14, 1975, REPORT ON COST-JUSTIFIED BACKHAULING

Question 1. Does the backhaul data used assume complete elimination of miles currently driven by for-hire carriers? Is this a valid assumption? If not, can you provide data as to the number, or percentage, of miles transferred to buyers' trucks that would be duplicated by for-hire carriers required to maintain service between established origins and destinations?

Answer 1. No, the analysis assumes that all freight originating outside the area served by a private truck fleet, and some originating within the service area, would probably continue to be moved by for-hire carriers. Since the private carrier's primary mission is to serve a company's retail or wholesale outlets, it is unlikely that it will choose to expand its backhauling activities beyond those levels that do not impair its ability to meet the main objective. The Federal Energy Administration (FEA) is not aware of data that estab-

lishes the number, or percentage, of miles that would be duplicated by for-hire trucks required to maintain freight to be transferred to private trucks. The lack of such data was referred to in Mr. London's June 20, 1977 statement on S. 1699 to the Subcommittee on Energy Conservation and Regulation.

Question 2. The backhaul examples use averages to project fuel savings, with no weighting for relative supplier volume. Does this technique tend to produce substantial error in the estimated totals?

Answer 2. While the use of averages always carries with it the possibility of errors in estimates, there is no reason to believe that more disaggregated estimates of the measure's long-term impacts within the economic sector analyzed by the FEA's Food Industry Advisory Committee (FIAC) would have produced significantly different results.

Question 3. The data assume that 75 percent of truck delivery tonnage would be a reasonable objective for backhauls. What is the basis for this 75 percent figure? How reliable is it?

Answer 3. The assumption that 75 percent of truck delivery tonnage is a reasonable objective for backhaul traffic is an estimate based upon the experience of the persons who developed the FIAC analysis.

Question 4. What data is available to substantiate the differences in transportation costs between for-hire carriers and private carriers?

Answer 4. Significant data on for-hire carrier costs can be obtained from financial operating statements submitted periodically to the Interstate Commerce Commission (ICC) and from rate proposals filed with the ICC by common carriers of general freight. However, private carrier data are generally held by the parent businesses to be private information. Representative private carrier transportation cost data that would enable meaningful comparisons to be made with transportation costs of for-hire carriers would be extremely difficult to obtain.

Question 5. Do the estimated fuel and cost savings figures consider the offsetting losses that would be incurred by regulated motor carriers? If not, what would be the approximate amount of such offsetting losses? Would such potential losses cause the regulated carriers to raise their prices, thus forcing sellers to make corresponding increases in their zone delivered prices to all customers?

Answer 5. The FIAC reports it did consider offsetting losses that would be incurred by for-hire carriers in determining fuel and cost savings which would result from permitting cost-justified backhauling by private carriers. However, we are not aware of the data that would permit detailed analysis of this problem.

Question 6. What is the estimated amount of (a) lost wages and (b) increase in unemployment among workers in the regulated transportation industry that would result from the reduced number of miles driven by regulated motor carriers?

Answer 6. FEA does not have information concerning estimates of lost wages and unemployment increases that may result from permitting cost-justified backhauling. To the extent that runs are discontinued, there would be some impact on wages and employment in the for-hire carrier industry. However, these impacts may be ameliorated by increased employment in less energy intensive operations.

Question 7. Do the estimated fuel and cost savings figures consider the increased costs to sellers resulting from reduced efficiencies in their private trucking operations and from disruption to their warehousing operations caused by a substantially increased number of unscheduled customer pickups? If not, what is the approximate cost of such increased costs to sellers?

Answer 7. No, the FIAC's fuel and cost savings do not consider increased costs to sellers. The analysis presumes there will be no significant changes in efficiencies in private trucking operations or warehouse operations and therefore no increase in costs to sellers. We do not have data that would permit an analysis of these factors, although we feel that increased employment opportunity in terminal management may be one appropriate outgrowth of a national program to reduce energy consumption in the transportation sectors.

FEDERAL ENERGY ADMINISTRATION,
OFFICE OF THE ASSISTANT ADMINISTRATOR,
Washington, D.C., July 27, 1977.

Hon. J. BENNETT JOHNSTON,
*Chairman, Subcommittee on Energy Conservation and Regulation, Committee
on Energy and Natural Resources, U.S. Senate, Washington, D.C.*

DEAR MR. CHAIRMAN: In my July 20, 1977 letter, which responded to your questions concerning the Federal Energy Administration (FEA) Food Industry Advisory Committee's (FIAC) May 1975 report on backhaul energy consumption, I mentioned that additional details were to be provided to us by personnel who developed the report for the FIAC. Enclosed is a copy of the information Mr. Louis Fox, Chairman of the FIAC's Transportation Task Force, sent FEA in response to your questions.

Sincerely,

MARTIN E. SENECA, JR.,
Acting Assistant Administrator, Conservation.

Enclosure.

To: Mr. E. W. Gregory, Office of Energy Conservation, Federal Energy Administration.

From: Mr. Louis Fox, Chairman, Food Transportation Task Force, FEA Food Industry Advisory Committee.

Subject: Questions regarding committee's estimates on backhauling savings.

Attached are answers to five of the seven questions you referred to me last Thursday. Because of the press of time, I did not have the time to prepare answers to questions 2 and 4. However, knowing that you needed the answers today, I am forwarding what I have.

The reason I wished to provide you with written answers is that the questions were complex and required detailed responses. However, the wording of some of the questions made biased assumptions with which I could not agree and felt I should address.

I think it important to make the point that the Committee did consider the problem of the transference of empty miles to other sectors of the trucking industry. At that time the Committee felt and I feel today that the impact on other trucking sectors would not be significant—certainly not within the accuracy range of our estimates. The other point is that although in absolute terms there is a significant potential energy savings and a very significant impact on the grocer's operating expenses and resulting cost savings that relative to the total number of truck miles and gallons of fuel consumed, the net revenues of truckers and employment in the industry, the impact is not severe.

Thank you for the opportunity to address these issues, and I hope that you find the answers helpful.

Question 1. (1) Does backhaul data used assume complete elimination of miles currently traveled by hired carriers? (2) Is this a valid assumption? (3) If not, can you provide data as to the number or percentage of miles transferred to buyer's trucks that would be duplicated by for-hire carriers required to maintain services between estimated origins and destinations?

Responses. (1) No. Some traffic, such as out of area, would not be backhauled. The Committee's estimates assumed that these miles now traveled by regular route common carriers would still be run. With respect to what is implied by the question, the number of displaced miles, it is felt that there are offsetting considerations which mitigate the impact of the displacement. These considerations are discussed in the third part of the question. (2) It is reasonable to assume that not all of the miles available for backhaul could be utilized. As to the estimates used, see answer to Question 3 below. (3) The opponents of S. 1699 claim that only a small portion of the Committee's estimated savings would be true savings because of the problem of transferred empty miles. On the other hand they offer no evidence that their slogan "your backhaul is my fronthaul" has any basis in fact or is a major problem in overcoming the inefficiencies that are now artificially built into the grocery distribution system.

On the other hand, the Committee has maintained that the instances where the start-up of a backhaul savings program would simply shift empty miles to regular route common carriers would not be significant. We offer the following considerations in support of that position.

(a) Of the total incoming grocery tonnage, only about 35 percent is delivered by regulated carriers (includes all types of regulated carriers). The balance is delivered by: rail, current backhaul programs, private carriers and non-regulated carriage.

(b) Of the 35 percent, not all is delivered by regular route common carriers. It is common knowledge that the major portion of the incoming tonnage delivered by regulated carriers is by contract carriers or irregular route carriers, not regular route carriers. Regular route carriers are the only ones which are "required to maintain services between estimated origins and destinations" in terms of what is implied by the question.

Although no statistics are available to the Committee it would not be unreasonable to assume that far less than half of the regulated deliveries are by regular route common carriers.

(c) It was felt that a portion of the regular route common carrier deliveries involved a return deadhead trip—i.e. the carrier had to return to his start point empty. This assumption has, in part, been supported by the recently completed ICC study on empty truck miles. Thus a certain portion of the regular route common carrier trips would be eliminated entirely as it is presumed that if there was not a load in either direction, even for this type of carrier, the run would not be made. In these cases no mile would be transferred and no offset to the Committee's estimates would be required.

It should be noted that the *elimination of regular route common carrier deliveries that involve an empty return would create additional energy savings*. These savings were not included in the Committee's estimates because of the controversy surrounding the ICC empty truck survey.

Since backhaul operations are, in the main, limited to a radius of 100 to 150 miles from the main distribution points and much of the mileage is not on the Interstate Highway System, the widely quoted figure in the ICC report of 20.4 percent for intercity, Interstate Highway System empty truck miles is probably not an appropriate figure to use in this case. A better estimator, again from the ICC report, is the percent of ICC authorized van empty truck miles for interstate traffic. That figure is 26 percent (as opposed to 10 percent for interstate).

Thus as many as one out of every five trips might be eliminated entirely with no offset required to the Committee's estimates (somewhere between the 10 percent and 26 percent).

(d) Of the remaining cases involving a regular route common carrier, a portion of these are delivering dedicated loads—i.e. the entire load is being delivered to one location. It was presumed that the elimination of the demand for these services would eliminate the need to maintain that service. While this begs the question as to whether that carrier would have to drive to the area to provide the reverse service, it is felt that that question is addressed by the following considerations. Certainly it cannot be assumed that the trips would be maintained by the same carrier in all cases.

(e) The above considerations reduced the magnitude of the shifted miles problem to a fraction of the 500 million miles saved—to an estimated range of between 100 and 150 million miles. The Committee felt that these miles could easily be absorbed by and offset by additional savings to the trucking industry. The result being that virtually no or at worst very little of the empty miles would be transferred or created as a result of a more extensive use of a backhaul savings program.

The reasons behind this conclusion were:

(1) *The growth of the trucking industry can easily absorb a large portion of the mileage.* ATA projects the growth of the common carrier business at about 5 percent per year. From estimated current levels of 42 billion miles driven by common carriers, that means that the industry is driving about 2.1 billion more miles per year. Thus the total backhaul impact on regular route common carriers represents only about 5 percent to 7 percent of the additional growth of the common carriers. (This assumes that all of the backhaul impact is realized in a single year—a most improbable assumption.)

(2) Using the ICC report estimates, of today's 42 billion miles driven by common carriers, perhaps as many 6 to 7 billion miles are empty miles. Thus the total backhaul impact on regular route common carriers might be only 1.5 percent to 2.5 percent of these empty miles. It can reasonably be presumed that a certain portion, and perhaps a significant portion, of the *backhaul savings could be absorbed by route adjustments*. This being the case, the backhaul savings program would at the same time eliminate empty miles now being driven by common carriers. The Committee, because of the unavailability of estimating parameters did not include these savings in their total savings calculations.

(3) Over the past decade, the common carriers have increased their share of the total incoming grocery tonnage by about 10 percent. This is over and above the increase in total tonnage moved for which they maintained their share of the traffic market. There is no reason to presume that common carriers will not continue to take additional market shares away from other transporters. Thus in addition to the growth in other than the grocery business, it was presumed (and the experience of the past two years has supported this assumption) that a portion of the backhaul savings will be offset by the common carrier's increased transportation market share within the industry.

Question 3. The data assumes that 75 percent of truck delivery tonnage 75 percent figure? (2) How reliable is it?

Response. (1) The figure was derived from a detailed traffic/transportation analysis of several firms in the industry and confirmed by a number of knowledgeable traffic managers with respect to the potential backhaul for their firms. (2) The experience over the two years since the estimates were made suggest that they, in so far as they represent a potential backhaul opportunity, may be responsible objectives for backhaul programs.

Goods are purchased either on a true f.o.b. mill price system, a zone delivered price system, or a variant f.o.b. price based upon the zone delivered price. Because the later price scheme in most cases does not provide an allowance sufficiently large to justify a backhaul, it can be assumed that the majority of goods now being backhauled are good that were sold on a true f.o.b. basis.

It is estimated that about 30 percent of the grocery goods sold are sold on a true f.o.b. basis. It is also estimated that about 20 percent of the incoming grocery tonnage is currently being backhauled. Using the assumption above that the majority of the goods being backhauled are those that were sold on a true f.o.b. basis, it follows that about 60 percent of the goods sold on a true f.o.b. basis are being backhauled. There is no indication that the full potential for backhauling f.o.b. priced goods has been reached.

It should be noted, however, that without a system of fully cost justified allowances to zone delivered prices, there is a significant limit to how much more backhaul savings can be realized. Without cost justified backhaul allowances on goods sold through a zone delivered price system, the greatest part of the tonnage will remain outside the reach of backhaul programs.

Question 5. (1) Do the estimated fuel and cost-savings figures consider the offsetting losses that would be incurred by regulated motor carriers? (2) If not, what would be the approximate amount of such off-setting losses? (3) Would such losses cause the regulated carriers to raise their prices? Thus forcing sellers to make corresponding increases in their zone delivered prices to the customers?

Responses. (1) Yes. The Committee, in arriving at its estimates of total savings to the nation of a more extensive use of backhaul savings programs did consider the potential off-setting losses to the regulated motor carriers and found that such losses would not be significant. (See answer to Question 1.)

(2) The losses, if any, would not be significant and would not change the amount of the total estimated savings. (3) Even if the total potential common carrier's portion of the miles to be saved through backhaul programs were transferred directly and fully into additional empty miles driven by common carrier (an assumption having little credibility) the impact on this segment of the trucking industry would be less than 00.6 percent (six-tenths of 1 percent) of their total revenues.

Thus there is no reason for us to believe that any losses would be significant enough to cause regulated carriers to increase their rates.

There is even less reason to believe that the sellers would increase their zone delivered prices as a result of backhaul programs. In fact there is more reason to believe that the attendant savings of backhauls would have an influence on prices in the opposite way.

Question 6. (1) What is the estimated amount of (a) lost wages, (b) increase in unemployment among workers in the regulated transportation industry that would result from reduced number of miles driven by regulated motor carriers?

Responses (1) (a) As pointed out in Question 1, the Committee did not feel that the increase in backhaul savings programs would result in any net transference of work lost to regular route common carriers. The same reasoning applies to other regulated carriers. Thus the impact on total wages is considered to be minimal.

Even if one assumes the static case, i.e. that common carriers will not be able to make any adjustments whatsoever to absorb the miles lost due to an increase in backhaul savings programs and assumes that there is no growth in the industry, the total wages involved is estimated to be in the range of between \$60 to \$75 billion. This is somewhere between 00.5 percent and 00.75 percent of the total wages within the common carrier industry. (Assumes all adjustments in one year)

(1) (b) None. This is a different question than asked in (a) above. By the nature of the question it is not possible to view the situation as static. Increases in unemployment occur over time and over this time there are several mitigating circumstances that reduce the impact of the backhaul programs.

(1) The increase in backhaul programs will require additional labor of the same type used by common carriers. Thus some of the off-setting employment and current unemployment would be drawn off by the private carriers.

(2) Over time, as pointed out in the answer to Question 1, adjustments would be made and any reductions in total miles driven would be absorbed into the system.

(3) The question presumes that an increase in backhaul savings programs would be instantaneous. This is not the case. As shown with the growth in f.o.b. related backhaul programs, the growth would be over a period of several years with the full potential not being realized for many years. Thus any shifts, as suggested by the question would occur gradually, allowing for whatever adjustments needed.

Question 7. (1) Do the estimated fuel and cost savings consider the increased cost to sellers resulting from: (a) reduced efficiencies in their private trucking operations, and (b) from disruptions to their warehousing operations caused by substantially increased number of unscheduled pick-ups? (2) If not, what is the approximate cost of such increased costs to sellers?

Response. (1) (a) A major use of private trucking operations in the grocery industry is in direct deliveries by manufacturers/processor to retail outlets. It is unlikely that, because of the specialized nature of such deliveries, S. 1699 will effect those operations. At any rate, the Advisory Committee's estimates assumed that no backhaul would take place in the direct delivery mode. Thus with respect to the estimates and with respect to backhauling supplanting direct deliveries, the approximate cost of such increased costs to the sellers is zero.

With respect to deliveries by private carriers to grocery warehouses, there are 3 responses.

(1) Private carriers account for only a very small percent of the total tonnage delivered to grocery warehouses. It is estimated that *they account for less than 4 percent of the total*. When it is also considered that only a portion of that 4 percent would be available for backhaul, the associated potential efficiency related cost increases, if any, get lost in rounding the estimates.

(2) Sellers generally use private carriage because there is no readily available alternative. They are not in the trucking business. For several reasons—specialized handling and equipment, small volume, etc.—this type of delivery is less likely to be taken up in backhaul. Thus the 75 percent used to reflect potential backhaul for all types of deliveries is not applicable to private carrier type deliveries. Thus the 4 percent that might be effected shrinks to a much lower figure, further reducing the impact on the final cost savings figures.

(3) The way the question is asked, it must be presumed that any of the questioned decrease in efficiency is due to the fact that the same number of

trucks would, being supplanted by backhaul, be driving fewer miles. This is an assumption not warranted by the conditions. In some cases they might, in others they might not. In answering the question each case would have to be examined to see what opportunity costs are associated with that particular delivery. Just as there is no reason to assume that such opportunity costs are zero, however, there is no reason to assume them to be greater than zero. Although it would be impossible, if not meaningless, to estimate national opportunity costs associated with the situation described, it would be reasonable to assume that at least some of the trucks now making deliveries could profitably be put to use elsewhere—thus further reducing the costs that must be offset against the Committee's estimates of backhaul cost savings.

(1) (b) To quote Mr. William Lindstrom, Vice President of Purex Corporation, a major grocery product manufacturer:

"Scheduling. Very important—and not nearly the hassle it would have been before the days of the computer. The computer's ability to forecast needs translates into our having each and every order in house 48 hours before pick-up time."

Grocery warehouse operations are, in the main, large and very sophisticated operations. Backhauls are now being run and there is no evidence that the incidence of unscheduled pick-ups, much less "not arrived on schedule" pick-ups are a problem. Most certainly they would be no greater than with other types of carriers.

Furthermore, most backhaul arrangements (60 percent according to a recent study of existing backhaul policy statements) require that an appointment for pick-up must be made in advance. It is presumed that those who don't have such a policy do not find unscheduled pick-ups a problem.

The presumption of the question that there would be "substantially increased number of unscheduled pick-ups" and that there is a cost to such pick-ups does not appear to be reasonable. The "approximate cost of such increased costs to the sellers" is approximately zero.

(2) For the reasons given above, it is felt that these increased costs which should be counted as an offset to the cost savings given by the Committee would either be zero or so small so as not to appear within the rounding of the final estimates.

FEDERAL TRADE COMMISSION,
BUREAU OF COMPETITION,
Washington, D.C., July 21, 1977.

MR. JAMES T. BRUCE,
Senate Committee on Energy and Natural Resources, Washington, D.C.

DEAR MR. BRUCE: This is in response to your Committee's letter of July 7, 1977, requesting answers to questions involving S. 1699, The Diesel Fuel and Gasoline Conservation Act of 1977. I am also attaching a corrected version of the June 27 testimony of former Bureau of Competition Director Owen M. Johnson, Jr.

1. Did all the commissioners have sufficient time to review S. 1699 and your testimony? If this Subcommittee were to write the commissioners individually and afford them more time to review S. 1699 and your substitute bill, do you think we would be able to obtain their views for the record?

The Commission first received the draft testimony on S. 1699 late in the afternoon of Friday, June 24. Two commissioners voted to authorize Mr. Johnson to deliver the proposed testimony on his own behalf. One commissioner did not object to Mr. Johnson's speaking in his own behalf, but disagreed in a written statement with the views expressed in the draft testimony. Two commissioners abstained, and it is probably fair to say the abstentions were due to a lack of opportunity to review the draft. We are in no position to know whether the individual commissioners would be willing to state their feelings about S. 1699.

2. You imply in your prepared statement that S. 1699 might give an advantage to some large buyers over others. Would you elaborate? Would your proposal eliminate this alleged advantage of the larger operations?

Large buyers are more likely to have their own fleets of trucks than smaller buyers. They would therefore be in a better position to take advantage of backhaul allowances. The substitute proposal offered by former Director Johnson

would, as I understand it, operate in a completely nondiscriminatory manner whatever the size of the buyer. This is because it provides for uniform f.o.b. prices to all buyers.

3. Does your proposed bill make the S. 1699 notion mandatory instead of permissive? Is that the thrust of your version?

The proposed substitute bill makes it mandatory that whenever a seller quotes a delivered price he be required to quote an f.o.b. price that is the same to all buyers. S. 1699 might arguably result in different f.o.b. prices to different buyers.

4. It is apparent from your statement that you would prefer much tougher and broader legislation than S. 1699. However, does that lead you to oppose S. 1699?

Mr. Johnson's opposition to S. 1699 was based on the fact that it may legalize different f.o.b. prices to competing buyers. When a buyer arrives at a seller's plant to pick up goods, the price he pays for the product should be the same as that quoted to other buyers since the seller incurs no different costs in servicing the different accounts. Mr. Johnson has also proposed an amendment to S. 1699 that would correct the perceived deficiency by changing the period at the end of the bill to a comma and adding the phrase "so as to result in uniform f.o.b. prices to all competing buyers."

5. Doesn't the uniform zone delivered pricing system create a discriminatory pricing system from an economic standpoint, if not from a legal standpoint, in that close-in customers are subsidizing distant customers?

Yes. The term applied to the subsidization paid by the close-in customer in a uniform zone delivered price system is "phantom freight."

6. Wouldn't the legislation you have proposed likely lead to the destruction of the zone pricing system?

Yes. As I understand it, that was Mr. Johnson's intention.

Yours truly,

ALFRED F. DOUGHERTY, JR.,
Director, Bureau of Competition.

Attachment.

FEDERAL TRADE COMMISSION,
BUREAU OF COMPETITION,
Washington, D.C., September 2, 1977.

HON. HOWARD METZENBAUM,
U.S. Senate, Washington, D.C.

DEAR SENATOR METZENBAUM: This letter responds to your request for the Bureau of Competition's comments on amendments you have proposed to S. 1699, the "Diesel Fuel and Gasoline Conservation Act of 1977."

On June 27, 1977, during testimony by then-Director of the Bureau of Competition, Owen M. Johnson, Jr., the Bureau expressed its opposition to S. 1699, chiefly because one result of the bill might be unfair discrimination in favor of large buyers to the detriment of small purchasers of goods. This opposition was predicated on the fact that the formula used to determine backhaul allowances involved the deduction of actual transportation costs from a uniform delivered price. This meant that the f.o.b. price resulting from the deduction discriminated in favor of truck-owning buyers at greater distances from the point of sale, to the detriment of closer (and probably smaller) firms. In some instances, the f.o.b. price to the favored buyer would be below a genuine f.o.b. price, while the price to the disfavored buyer would exceed a genuine f.o.b. price.

As I understand it, you would amend S. 1699 in three essential ways. First, you would base the backhaul allowance on the average, rather than the actual, cost of transportation. Second, you would prohibit backhaul allowances that resulted in a substantial lessening of competition, a tendency to monopoly or elimination of a competitor. Third, you would require the FTC to study the effects on competition resulting from the legislation after the passage of two years.

Basing backhaul allowances on the average cost of transportation means that the f.o.b. price would be the same to all buyers, thereby eliminating the main feature of S. 1699 the Bureau found objectionable. Your proposed alternative conforms with the requirements of the Robinson-Patman Act, eliminates phantom freight inherent in S. 1699, and involves no more difficulty in computation than does a determination of actual cost for a buyer that intends

to deliver to multiple points during its trip back to its home terminal. Common sense dictates, to our view, that at the seller's loading dock the cost to all buyers of the same item should be identical.

Assuring that backhaul allowances do not result in a lessening of competition, a tendency towards monopoly, or the elimination of a competitor is also an improvement over S. 1699. We would advise, however, the deletion of the language "or to eliminate a competitor." The two elements of lessening competition or tendency toward a monopoly would encompass elimination of a competitor, and the two traditional formulations you use have established legal meanings. Our experience has been that where new and unfamiliar terminology is added in this fashion, litigation inevitably results before true meaning of new terms emerges over time.

Finally, we are concerned about the requirement that the FTC report on the effects of the legislation. There clearly are obvious limitations on the type of study that could be conducted. To study the full effect on competition of the bill would involve the analysis of literally millions of commercial transactions during periods both before and after enactment of the bill. Such data would have to be subpoenaed and, in any event, it is doubtful that the conduct of such a study would be practicable given our limited resources. What can be done is to focus on the legislation's impact on small business through a detailed analysis of complaints and reports received by the Commission after the legislation goes into effect. Small businessmen would presumably report to the Commission any inequality being suffered. A periodic report to the Committee based upon any reported inequities and our analysis of those situations could be accomplished.

In offering the foregoing views on your proposed amendments, I wish to state that the Bureau of Competition is on record as preferring an alternative to S. 1699 that would make mandatory the quotation of a uniform non-discriminatory f.o.b. price any time a delivered price is quoted. Our position is based on our skepticism about delivered pricing systems in general. While the Bureau of Competition continues to prefer a mandatory f.o.b. price, we believe that S. 1699 with your amendments would offer an acceptable substitute.

We have appreciated the opportunity to work with your staff in connection with your efforts to improve the thrust of S. 1699 in facilitating the use of backhaul allowances while at the same time preserving fair competition in the marketplace.

Very truly yours,

ALFRED F. DOUGHERTY, Jr.,
Director, Bureau of Competition.

APPENDIX II

Additional Statements and Communications Submitted for the Record

STATEMENT OF THE ASSOCIATION OF GENERAL MERCHANDISE CHAINS

On behalf of the membership of the Association of General Merchandise Chains (AGMC), this statement is submitted in support of S. 1699, the Diesel and Gasoline Conservation Act of 1977.

AGMC represents chain store operators who own stores throughout the United States. Collectively its membership operates more than 18,000 stores. While some members operate hundreds of stores, the majority operate 50 stores or less. All members, regardless of size, either own or lease trucks to enable distribution of merchandise throughout the chain.

A common complaint of general merchandise retailers is that the Federal Trade Commission's interpretations of the Robinson-Patman Act as it applies to backhauling, severely restricts that practice. As a result, retail trucks which could pick up goods from suppliers in the course of making deliveries to stores in the retail chain, are forced to return to the retail warehouse empty. Vast amounts of fuel are wasted transporting air. The retailers point out that the waste is really double, because while their trucks must return to warehouses empty, suppliers must use trucks to deliver goods to the same warehouses.

It is undeniable that the FTC interpretations of the Robinson-Patman Act as they apply to backhauling, create economic waste. The fact that irreplaceable sources of energy are wasted is of particular concern given the increased need to conserve those resources.

It is the understanding of AGMC members that S. 1699 would remove the ambiguities regarding backhauling which result from the FTC interpretations of the Robinson-Patman Act. Its adoption would have the effect of enhancing opportunities for backhauling, albeit in a limited way, by permitting general merchandise retailers to backhaul from suppliers who use the uniform delivery zone pricing system. Although the effect of the bill is limited, substantial savings in energy resources would result.

While uniform delivered pricing systems are not generally used by general merchandise suppliers, the practice is common. When permitted under FTC interpretations of the Robinson-Patman Act, general merchandisers do backhaul from their suppliers. However, retailers cannot take full advantage of opportunities to backhaul because suppliers are cautious in authorizing the practice. They are cautious because they are uncertain about how the FTC interpretations might apply.

AGMC members also state that suppliers using uniform delivered pricing systems discourage opportunities for backhauling because they tend to use a minimum rather than a real average in arriving at average delivery costs. S. 1699 would eliminate the confusion created by the FTC interpretations. It would provide the incentive to suppliers to authorize backhaul allowances because those allowances would be made on an "actual cost of delivery" basis.

A survey of AGMC members was made to determine whether adoption of S. 1699, would work to the disadvantage of any member. The response was that because S. 1699 would require that backhaul allowances be made available to all buyers, if they were offered at all, no discrimination would result. They are unable to see how larger buyers would gain a discriminatory advantage, because under S. 1699 the supplier who gives backhaul allowances would be required to give an allowance to all which is equal to the actual cost of delivery. The smaller members hold the view that the energy saving advantage accruing to them would be proportionate to their size.

An examination of S. 1699 shows that the legislation does not weaken the operation of the Robinson-Patman Act. Under the act it is defensible to have differences in prices for different buyers so long as those differences are cost-justified. Giving an allowance for the actual cost of delivery is such a justification.

In addition to promoting the saving of energy resources, S. 1699 would also have the useful effect of eliminating both "phantom freight" charges which inflate costs for nearby buyers and the artificialities in pricing which result from the use of average delivery charges. These availing themselves to an offered backhaul allowance would simply receive an allowance equal to the actual cost to the seller if the seller were to deliver the goods. Those not availing themselves of the offer would end up paying the same actual cost.

S. 1699 would result in marked savings of energy. It would also clear up ambiguities caused by FTC interpretations regarding backhauling under delivered price systems. Therefore AGMC urges that the measure be adopted.

NATIONAL ASSOCIATION OF RETAIL GROCERS OF THE UNITED STATES,
Reston, Va., July 12, 1977.

Senator BENNETT JOHNSTON, Jr.,
Chairman, Energy and Natural Resources, Subcommittee on Energy Conservation and Regulation, U.S. Senate, Washington, D.C.

DEAR CHAIRMAN JOHNSTON JR.: The National Association of Retail Grocers of the United States, representing independent retail grocers in the United States since 1893, is pleased to announce support for passage of S. 1699. NARGUS members support increasing food distribution efficiency, reducing energy waste, and cutting down on the number of grocery trucks running empty.

NARGUS has long been an advocate of Robinson-Patman Act and fought to preserve the law many times in the last forty years. NARGUS believes S. 1699 is harmonious with Robinson-Patman Act. S. 1699 requires that backhaul allowance meet Robinson-Patman Act principles of being justified by savings in cost of delivery, and be available to all buyers on a non-discriminatory basis.

NARGUS respectfully requests that the enclosed statement of William E. Crook, President of Bill Crook's Foodtown Super Markets in Nashville, Tennessee and NARGUS be included in the subcommittee hearing record and that you insert the statement in the Congressional Record to inform other Senators that independent retail grocers support S. 1699.

Sincerely,

FRANK D. REGISTER,
Executive Director.

STATEMENT OF WILLIAM E. CROOK, PRESIDENT, NATIONAL ASSOCIATION OF RETAIL GROCERS OF THE UNITED STATES

THE BACKHAUL BILL—ENTITLED DIESEL FUEL AND GASOLINE CONSERVATION ACT OF 1977—S. 1699—ENDORSED BY INDEPENDENT RETAIL GROCERS

I. Description of association

The National Association of Retail Grocers of the United States (NARGUS) supports S. 1699—a bill to provide energy conservation by alleviating current and continuing fuel waste, to reduce empty vehicle movements, and to increase efficiency in transporting goods by motor carriers for the ultimate benefit of consumers.

NARGUS has represented independent retail grocers for over 80 years. The association has over 40,000 members in the United States. Its governing Board is composed entirely of local grocery store operators from some thirteen states. NARGUS members operate small stores and supermarkets. They purchase their merchandise from either an independent wholesaler, or through a retailer-owned cooperative. NARGUS' membership concern is directed entirely to preserving the viability of independent grocers whose business is normally concentrated in only one community.

II. NARGUS' efforts leading up to endorsement of S. 1699

NARGUS became a supporter of S. 1699 after public hearings were held on the bill by the Senate Energy Conservation Subcommittee. The association's study and consideration concerning the operation and effects of the measure were extensive and painstaking; so much so that it was not prepared to offer its views at the June 27, 1977 public hearing on S. 1699 by the Senate Energy Conservation and Regulation Subcommittee.

Before reaching a position endorsing S. 1699, the association had the benefit of the oral and written statements presented to the Senate Energy Subcommittee by eight witnesses, three of whom opposed the bill. Prior to its decision to support the bill, NARGUS gave careful consideration to arguments for and against the measure, particularly those alleging that the bill favors large chain distributors, and that the bill would undermine, weaken, and harm the Robinson-Patman Act. If either of these claims against S. 1699 were factual, or if there was even a reasonable probability of their accuracy, NARGUS would not only withhold its support of S. 1699, but would have actively opposed the proposed legislation. Prior to taking a position of S. 1699, the association examined the bill carefully to determine whether it would favor large buyers over smaller competitors and whether it would weaken the Robinson-Patman Act.

III. Why the consumer will benefit from backhaul legislation S. 1699

Removing artificial legal hurdles standing in the way of manufacturers and other sellers offering meaningful backhaul allowances under an effective customer pickup program has many benefits for consumers and members of the grocery industry generally.

The greatest benefit this legislation will provide is to encourage the elimination of wasteful costs of distribution. One example is described as "dead-heading" which occurs when distributors' trucks return from a trip empty. This causes waste of valuable resources, e.g., personnel, fuel, and equipment. The National Commission On Productivity And Work Quality estimated, in 1975, that the annual savings in food distribution costs through greater utilization of truck operating time amounts to approximately \$100 million.

The goal to be achieved is not just conserving energy by reducing waste of fuel, but also bringing about economies of operation for distributors and suppliers. Increasing productivity is a national need with substantial benefits for every citizen.

Aside from more efficient use of equipment and personnel, S. 1699 would also encourage better utilization of capital.

The National Commission On Productivity And Work Quality refers, for instance, to reduced inventory investment through more precise timing of merchandise receipt at warehouses of suppliers and distributors; reduction in lost sales from out-of-stock conditions; and less warehouse costs through balanced workweeks for warehouse crews by scheduling backhauled when other work requirements are at a minimum as potential savings available through backhaul.

S. 1699 offers sellers and buyers more flexibility in responding to changing economic conditions. The measure will be useful in meeting rising costs.

Better utilization of employee skills helps to maintain wages at fair levels. Labor also benefits from the legislation.

Backhaul allowances will stimulate both increased productivity and cost reduction. Consumers will benefit from the legislation.

IV. S. 1699 will not harm the Robinson-Patman Act

S. 1699 has a very narrow and limited application. It allows, but does not require, sellers to offer a meaningful cost-justified and non-discriminatory backhaul allowance only if and when the buyer provides transportation for his own products from the seller's distribution center. The bill applies only when the seller offers to sell the particular commodity to the buyer under a uniform zone delivered pricing system.

A seller or a buyer who, for any reason or for no reason, does not wish to participate in a transaction involving a backhaul allowance is not required to do so by S. 1699. The bill is permissive in nature. It is not mandatory, except that where seller and buyer agree to an allowance, it must be made available to all the seller's customers on a non-discriminatory basis, and the allowance must not exceed the actual savings in delivery costs to the seller.

The current legal barrier to granting a meaningful backhaul allowance, as provided in S. 1699, is based on a Federal Trade Commission legal interpretation issued in the form of an advisory opinion. The legal roadblock to backhaul allowances is *not* the result of any litigation adversely proceeding before the courts, or the Commission. Neither the courts nor the Commission has ruled that a backhaul allowance, as authorized under S. 1699, is prohibited under the Robinson-Patman Act. In over forty years, the Federal Trade Commission has not brought a complaint under the Robinson-Patman Act against a seller, or a buyer, for granting, or for receiving, a backhaul allowance which would be permitted under S. 1699.

Since, as the record shows, a backhaul allowance meeting all the conditions set forth in S. 1699 has never been the object of Federal Trade Commission enforcement proceeding since the Robinson-Patman Act first became law over forty years ago, there appears to be no rational basis for contending that the bill would weaken or undermine the Robinson-Patman Act.

A key requirement provided in the bill is that the backhaul allowance be made "available to all the seller's customers on a non-discriminatory basis." The allowance must also, according to the terms of the bill, be "no greater than the actual savings in delivery costs to the seller." Thus, in order to comply with the bill, a backhaul allowance must be non-discriminatory and cost-justified, both key elements of the Robinson-Patman Act long established method of operation to protect small business from harmful price discriminations.

NARGUS has carefully considered the arguments of S. 1699 opponents, as presented at the public hearing on the bill before the Senate Energy and Natural Resources Subcommittee on Energy Conservation and Regulation. The association has paid particular and close attention to statements alleging that the Robinson-Patman Act will be hurt by the bill.

NARGUS' strong and consistent support of the Robinson-Patman Act since its enactment is a matter of public record. Each time in the history of this law, the Act has been attacked in Congress through efforts to pass weakening legislation, the association has played a prominent part in its defense. Countless public testimonies attest to NARGUS' consistent support of the Robinson-Patman Act. The public record is so long and so uniform in demonstrating NARGUS' defense of the Robinson-Patman Act that it easily establishes the association's good faith in this matter. If S. 1699 would in any way cripple the Robinson-Patman Act, NARGUS would not hesitate to oppose the measure.

Because NARGUS is a supporter of the Robinson-Patman Act, it is important that the association not automatically, and without sound reason, oppose a legislative proposal affecting the application of the act. Following such a policy does a disservice both to the law and to those it seeks to protect. This concern is reason enough for the association's taking the added time required to weigh and consider the effects of S. 1699, and explains its inability to appear at the public hearing held on the legislation June 27, 1977 by the Senate Energy Conservation and Regulation Subcommittee.

NARGUS regards the arguments made against S. 1699 on the grounds of injuring small business and the Robinson-Patman Act unconvincing. Unsupported allegations are made that small business in general, and small grocers particularly, will be hurt by S. 1699. It has been said, for instance, that small grocers will be denied the benefit of backhaul allowances authorized under S. 1699 because many of them do not own or operate trucks.

The answer to this argument is that wholesale suppliers of grocers operate trucks, and the vast majority of grocery wholesalers, as well as the two national trade associations representing wholesale grocery distributors, support S. 1699. Backhauling by wholesalers will result in more efficient cost saving utilization of capital equipment and personnel. Retail grocers will benefit from economies of operation experienced by manufacturers and by wholesale suppliers operating a customer pick-up service. Whenever distribution cost savings can be effected in the highly competitive grocery industry, everyone gains, including retail grocers and their customers.

No effort should be spared to achieve greater operating efficiency in the distribution of grocery products to consumers. This is what S. 1699 is all about. There never was a greater need for this bill to hold down the harmful effects of inflationary price increases. It is fair and equitable to all businesses and will benefit the entire economy.

FOODSERVICE ORGANIZATION OF DISTRIBUTORS,
Washington, D.C., July 5, 1977.

Re S. 1699—backhaul legislation

Senator HENRY M. JACKSON,

Chairman, Energy and Natural Resources Committee, Washington, D.C.

DEAR SENATOR JACKSON: The Foodservice Organization of Distributors (F.O.O.D.), distributors to America's restaurants, hotels and schools, strongly urges you and your committee to support S. 1699, "The Diesel Fuel and Conservation Act of 1977," introduced by Senator Johnston.

This legislation would remove certain impediments to so called "backhauling" imposed by current FTC regulatory interpretations without violating the Robinson-Patman Act's price discrimination prohibition. In fact, since 1699 involves only the transportation of the buyer's ordered products, it would not affect the regulations of the Interstate Commerce Commission or the status of common contract carriers.

S. 1699's enactment, at a time when all of America is groping for ways to save energy, would certainly seem to be in the nation's best interest. By using one truck trip to provide the service that would otherwise require two truck trips, 100 million gallons of fuel could be saved annually. This would be accomplished by permitting trucks that have made deliveries to pick-up other products (backhaul), thus eliminating many of the irrational empty return trips the present law encourages. Moreover, this more efficient use of truck transport would not only save fuel and reduce company operating costs but would ultimately reduce consumer costs.

Since S. 1699 accomplishes major fuel conservation, while equitably reflecting the true economics of delivery costs, by permitting a buyer of goods to receive an allowance no greater than the actual saving in delivery costs to the seller, F.O.O.D. urges you to support it fully.

Yours truly,

F. RANDALL MURPHY,
President.

FOOD MARKETING INSTITUTE,
Washington, D.C., July 11, 1977.

Subject: S. 1699, "Diesel Fuel and Gasoline Conservation Act of 1977."

Hon. HENRY M. JACKSON,
U. S. Senate, Washington, D.C.

DEAR SENATOR JACKSON: On June 27, 1977 I was privileged to appear before the Energy Conservation and Regulation Subcommittee on behalf of the Food Marketing Institute ("FMI") in support of S. 1699. FMI supports the bill because it is clearly necessary in the public interest—it will result in substantial energy savings and will reduce the cost of distributing food and other products.

While we believe that the present record clearly justifies passage of this legislation, some of the testimony and opinions offered at the hearing reflect, at least partially, misunderstandings as to both the intent and effect of the bill. Since the record remains open until July 15, 1977 for additional submissions, we offer this letter so as to discuss certain questions which arose during the hearing. Those questions involve: the availability of backhaul to large and small companies; the effectiveness of a uniform f.o.b. option alternative; and the effect of the bill on ICC regulations and on types of motor carriers.

A. THE AVAILABILITY OF BACKHAUL TO LARGE AND SMALL COMPANIES

S. 1699 requires that an allowance offered by a "zone" seller be uniform and non-discriminatory. While the f.o.b. prices offered pursuant to the bill will differ given the cost differences inherent to transporting different distances, because the bill is and should be voluntary, sellers may offer allowances pursuant to formulas of their choice. Thus, by way of example, one seller may offer an allowance equal to the full actual cost of delivery while another seller may offer an allowance equal to 90 percent of actual cost. However, because the bill requires uniform and non-discriminatory allowances, whatever formula is utilized by a seller must be made available to all of its customers. Therefore, every customer of each seller will be treated fairly and the same way.

In this context, the "large" versus "small" issue raised at the hearing is a "red herring." Size has no bearing on the benefits to be derived by this bill because, in the food industry, all retailers could get the advantage of backhaul allowances because even the smallest retailer gets his goods from wholesalers who operate motor vehicles to deliver to retail outlets and are thus able to pick up goods at the seller's dock. Thus, all retailers, regardless of size, will be able to benefit from this bill whether they realize the savings directly or through a wholesaler.

The organizations supporting S. 1699 confirm this fact and reveal the support of the "small" as well as "large" company. FMI itself has almost 1,000 members most of which are smaller retailers. In fact, we estimate that approximately 20-25 percent of our members operate only *one* grocery store, and approximately 75 percent of our members operate *less* than 10 stores. The National American Wholesale Grocers' Association ("NAWGA") also offered its endorsement of S. 1699 and its membership is essentially small companies, approximately half of which are so classified by SBA standards. The National Association of Retail Grocers of the United States, who lists 40,000 local independent retailers as members, are supporting the bill. Also, the Cooperative Food Distributors of America, an association of independent or multi-unit store operators who jointly own a common warehouse to serve their stores, supports the bill.

Any notion that this bill disadvantages the "little guy" is nonsense and, given that the bill does *not* alter the Robinson-Patman Act, there can be no viable contention that it harms any retail segment. Whether it be the food industry or any other industry, the full measure of protection offered by the Robinson-Patman Act will remain as strong as ever.

B. THE EFFECTIVENESS OF A UNIFORM F.O.B. OPTION ALTERNATIVE

The existing FTC advisory and related opinions authorize uniform zone delivered price sellers to offer, as an alternative to a delivered price, a *uniform* f.o.b. price. Thus, as it reiterated at the hearing, the FTC supports f.o.b. prices for "zone" sellers only if the very same f.o.b. price is applicable to all buyers regardless of how far away from the seller they are located. While the FTC's adherence to that concept flows from a faulty interpretation of section 2(a) of the Robinson-Patman Act, the predictable translation of that position to business practices has usually resulted in either the refusal of seller to offer any f.o.b. option or the offering of an f.o.b. price which reflects allowances equal to only local cartage rates. Consequently, there is insufficient economic incentive for buyers to pick up their own goods except where they are virtually the seller's "neighbor."

Buyers incur costs for picking up and transporting their own goods and, obviously, the farther they must transport those goods—the farther they are from the seller—the higher their costs. Similarly, the seller pays to deliver goods to its buyers and the farther away the buyer is the more the seller must pay to have those goods delivered. Therefore, if buyers pick up their own goods and relieve the seller of that cost and obligation, the seller realizes savings and those savings proportionately increase as a function of how far the buyer is from the seller's warehouse. The purpose of S. 1699 is simply to permit a seller to offer a pick-up allowance to a buyer in amounts which, as to each buyer, reflect the cost of transporting the goods, and reflect the savings to the seller from having been relieved of that cost and obligation. If that economic incentive is available, buyers will pick up their own goods; their trucks will be productive in the backhaul mode and, in turn, fuel and distribution will be saved. The consuming public will be the ultimate beneficiary.

However, this goal cannot be achieved if, as advocated by the FTC "zone" sellers can only offer a single f.o.b. price to all, and this is true regardless of what that f.o.b. price is. For example, the dialogue at the hearings between the FTC witness and members of the subcommittee centered largely around the concept of sellers offering a single f.o.b. price which reflected reducing the delivered price by an amount equal to the seller's "average" transportation cost within the zone. In fact, there was discussion which suggested modifying S. 1699 to make that its central theme. It must be made clear that sellers are *now* free to do just that under existing FTC opinions and *no* legislation is needed in that regard. Sellers nevertheless do not so construct f.o.b. prices

because such a system is inherently unfair to them because it economically disadvantages them. The offering of such an f.o.b. price will result in close-in buyers picking up because the allowance—as to them—would be equal to or greater than the actual cost of their deliveries. The “farther-out” buyer will not pick up because the allowance is less than the cost of delivery so the seller will be left to provide the transportation. In virtually all cases then, the seller pays more than it should and is economically harmed. Moreover, such a system, as you can see, does not *encourage* pick-up, particularly on the relatively longer trips and therefore the energy and cost savings which underlie S. 1699 *will not* be realized. The FTC concept is self-defeating and contrary to the public interest. S. 1699 should be passed in its present form if it is to have any meaning and public benefit.

C. THE EFFECT ON ICC REGULATIONS AND TYPES OF MOTOR CARRIERS

The provisions of S. 1699 will, in no way whatsoever, encroach upon, modify, or challenge any provision of the Interstate Commerce Act or any regulation promulgated by the ICC. The issues addressed by this bill are not ICC issues. The bill does not deal with the permissible operational scope of any motor carrier, whether it be regulated or unregulated. The backhaul activities contemplated by S. 1699 are presently permissible from an operational standpoint. The bill deals with the fact that, because of FTC advisory opinions, many sellers consider themselves legally precluded from offering appropriate economic incentives which would encourage carriers to backhaul under their existing operational abilities.

As to the effect of the legislation on various categories of motor carriers, a segment of the American Trucking Associations, Inc. offered, at the hearing, the notion that the bill would be harmful to common carriers, as opposed to private and perhaps other types of regulated carriers. We believe that any prediction of grave or significant impact on even regular route motor common carriers, is specious. This is not to say that the effect of the bill could not have some impact on these carriers, but it is clear that, if there is any negative impact at all, it will be minor.

For a common carrier to be harmed at all, it must irretrievably lose traffic; yet it is unlikely that those carriers will lose any traffic considering that their traffic is growing at a rate averaging approximately three billion miles annually over the last five years. While passage of S. 1699 will open up significant backhaul opportunities for various forms of proprietary and dedicated carriage, when compared to the annual growth alone of common carriage, the “backhaul” traffic represents only a small percentage. Thus, any “losses” which would conceivably be experienced by regular route common carriers could not represent a “loss” in the real sense and at most would only slightly detract from their enormous annual growth.

Moreover, regular route motor common carriers ordinarily have rather broad licenses in terms of both the commodities they may carry and the routes over which they may carry them. Within that framework they have the ability, unlike private or dedicated transportation, to adjust their operations so as to haul other goods in lieu of those which may be backhauled as a result of this bill.

FMI reiterates its strong support for S. 1699, a measure which is demonstrably in the public interest and will promote efficient distribution and energy conservation.

Sincerely,

ROBERT O. ADERS,
President.

AMERICAN FARM BUREAU FEDERATION,
Washington, D.C., July 13, 1977.

Re S. 1699—Truck backhauls

HON. J. BENNETT JOHNSTON, Jr.

Chairman, Subcommittee on Energy Conservation and Regulation, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

DEAR SENATOR JOHNSTON: Farm Bureau is the largest general farm organization in the United States, with a membership of more than 2.6 million families in 49 states and Puerto Rico. It is a voluntary nongovernmental

organization, representing farmers who produce virtually every agricultural commodity that is produced on a commercial basis in this country.

For many years Farm Bureau members have been concerned about the spread between the prices paid to farmers for their products and the prices paid by consumers. This spread represents approximately 60 percent of the consumer's food dollar. The cost of transportation represents about 7 percent of food costs.

S. 1699 is intended to correct a narrow interpretation by the Federal Trade Commission, which prohibits a food wholesaling or retailing company from granting a backhaul allowance to a buyer where the motor carriage is performed by the buyer or an authorized carrier serving the buyer.

This is an unjustified and anachronistic interpretation that increases food distribution costs by more than \$300 million and wastes up to 100 million gallons of fuel annually.

We recognize that S. 1699 will correct only a small part of the overall empty backhaul problem in the motor carrier industry. Nevertheless, it represents an important reform that would reduce costs, save fuel, and bring about a more rational use of transportation equipment and labor within the food industry.

For these reasons, we endorse passage of S. 1699 and urge that your Subcommittee, the Energy and Natural Resources Committee, and the Congress move with dispatch in the passage of this legislation.

We ask that this letter be made a part of the hearing record.

Sincerely,

JOHN C. DATT,
Director, Washington Office.

AMERICAN RETAIL FEDERATION,
Washington, D.C., June 27, 1977.

HON. J. BENNETT JOHNSTON,
Chairman, Subcommittee on Energy Conservation and Regulation, U.S. Senate,
Washington, D.C.

DEAR MR. CHAIRMAN: The American Retail Federation supports legislation which would clarify the conditions under which private carriage may be used, such as the provisions in S. 1699. The Federation's transportation policies support an interpretation of private carriage so that a shipper or retailer may engage in the transportation involving movement of merchandise incidental to carrying on his own business.

Under Advisory Opinion No. 147, dated March 28, 1975, the Federal Trade Commission reaffirmed a previous interpretation under the Robinson-Patman Act which would curtail the use of private motor vehicles by the purchaser under certain conditions of selling terms on a delivered price basis. The FTC ruling did not deal with the basic price of the merchandise sold, but with the transportation cost involved thereon and would not permit the seller, without radical changes in the pricing structure, to allow the purchaser the cost he would have otherwise incurred had not the private carriage of the purchaser been used in lieu of common carriage.

The Federation supports the view that the use of private motor carriage in such instances in no way contravenes the intent of the Robinson-Patman Act as to discriminatory pricing of goods sold, but has as its purpose a more efficient utilization of motor equipment. Passage of the proposed legislation will encourage energy-saving practices of retailers utilizing private equipment in the transportation of their goods. We urge approval of S. 1699.

Sincerely,

LOYD HACKLER.

CONTRACT CARRIER CONFERENCE,
Washington, D.C., July 15, 1977.

Re S. 1699—Diesel Fuel and Gasoline Conservation Act of 1977.

HON. J. BENNETT JOHNSTON,
Chairman, Subcommittee on Energy Conservation and Regulation, U.S. Senate,
Washington, D.C.

DEAR SENATOR JOHNSTON: I am writing you to express the support of the Contract Carrier Conference for the subject legislation. The Contract Carrier

Conference is a trade association representing the interests of contract carriers throughout the country. The Conference is affiliated with the American Trucking Associations.

Contract carriers are trucking companies licensed by the Interstate Commerce Commission to haul freight in interstate commerce. There are approximately 4,000 contract carriers in the country the vast majority of which are independently, as opposed to publicly, owned. Contract carriers are fully regulated with respect to safety, financial responsibility and scope of operating authority.

Contract carriers differ from common carriers in that they offer a specialized transportation service that is not held out to the public. A contract carrier offers this service generally in one of two ways: (1) by dedicating his equipment to the exclusive use of a shipper; or (2) by providing a transportation service designed to meet a distinct need of the shipper. Contract carriage is the logical alternative for a shipper who does not want to invest the time and money to acquire and run his own fleet of trucks but has needs that cannot be met by a common carrier who, by law, must hold himself out to the general public.

Many contract carriers serve food stores like A&P, Shop Rite, and the like. As we understand the subject legislation, a purchaser of goods in a uniform zone delivered pricing system would be able to get a reduction in the price of the goods purchased (not to exceed the vendor's cost of delivery) if he picks up the goods at the seller's place of business.

Presently, many contract carriers are operating at less than capacity when they return to their contracting shipper's warehouse after making deliveries. If the proposed legislation is enacted, there will be an economic incentive on the part of the purchaser to utilize his contract carrier to pick up purchased goods from his vendors located in the area of the carrier's last deliveries for return haul to the purchaser's warehouse. While the purchaser gets the reduction in price to reflect the money he saves the vendor, the carrier obtains more freight and operates in a more fuel efficient manner.

Indeed, it is our understanding that some vendors in a uniform zone delivered pricing system do offer a discount to purchasers who pick up the purchased goods while others do not citing the Robinson-Patman Act to justify their refusal. Consequently, enactment of the proposed legislation will clarify this somewhat uncertain area.

We respectfully request that this letter be included in the hearing record on the subject legislation.

Very truly yours,

THOMAS A. CALLAGHAN, Jr.

COOPERATIVE FOOD DISTRIBUTORS OF AMERICA,
Des Plaines, Ill., July 8, 1977.

HON. J. BENNETT JOHNSTON, Jr.,
Chairman, Energy Conservation and Regulation Subcommittee, Energy and
Natural Resources Committee, U.S. Senate, Washington, D.C.

DEAR SENATOR JOHNSTON: Our association, Cooperative Food Distributors of America (C.F.D.A.), is a national food trade association representing the retailer-owned form of food distribution. Our sixty-four members in the United States operate eighty-five distribution centers, with annual sales of approximately \$8 billion. The wholesalers are owned by some 28,000 independent food retailers whose estimated annual volume is approximately 20 percent of all food sold at retail in America.

C.F.D.A. supports the principle of any legislation which would clarify the legality of granting full backhaul allowances which would be equal to actual savings in delivery cost to the seller. We strongly support your efforts to enact this energy-saving legislation.

Sincerely,

EARL E. MASON,
President.

NATIONAL INDEPENDENT DAIRIES ASSOCIATION,
Washington, D.C., May 19, 1977.

Senator J. BENNETT JOHNSTON,
Chairman, Subcommittee on Energy and Conservation, Energy and Resources
Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: It is understood the staff of the Subcommittee on Energy and Conservation, Energy and Resources Committee, is considering proposed legislation which would amend the Robinson-Patman Act by indirect action through an amendment to the Energy Policy and Conservation Act, to increase motor carrier backhaul. The National Independent Dairies Association is opposed to such legislation and any other attempts to amend the Robinson-Patman Act directly, or indirectly.

The proposed Diesel Fuel and Gasoline Energy Conservation Act of 1977 is not a new proposal. It is a shopworn proposal in new attractive trappings. Such legislation would benefit the huge supermarket chains and other big food industry conglomerates and play havoc with the medium and small-sized companies in the food industry.

Additionally, it is clear that the Robinson-Patman Act does not prevent economically sound backhauls. In support of this argument, I enclose a copy of the Report of the Ad Hoc Subcommittee on Antitrust, the Robinson-Patman Act, and Related Matters of the Committee on Small Business and invite attention to the section page 111 entitled "Reply to the Argument that the Robinson-Patman Act prohibits Backhaul".

The members of the National Independent Dairies Association are deeply concerned about energy conservation. At the NIDA annual meeting last month, they discussed the need for self-inspection of all their dairy processing operations for energy conservation. However, NIDA is quick to recognize this proposed legislation as not a *bona fide* conservation measure and recommends against its introduction.

Very truly yours,

ARTHUR H. BERNDTSON,
Executive Vice President.

NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION,
New York, N.Y., July 11, 1977.

Hon. J. BENNETT JOHNSTON,
Russell Senate Office Building, Washington, D.C.

DEAR SENATOR JOHNSTON: Please consider these observations in support of S. 1699. They supplement testimony delivered June 27.

Arguments for S. 1699 include:

1. *Significant diesel fuel and gasoline savings.*—The 100 million gallon estimate is challenged but that is not really important. We made no quantity estimate but it is apparent that major and unnecessary fuel waste can be corrected by S. 1699.

2. *No conflict with Robinson-Patman.*—A critically important concern for us. We represent small wholesalers and their customers.

3. *Benefits accrue to the consumer.*—We can speak only for the food industry but competition in all industries should force benefits to consumers.

4. *Small business has equal opportunity.*—Buyers with only one truck or an authorized carrier can backhaul.

5. *Cost savings.*—Savings in fuel not consumed and other savings resultant from one truck run replacing two truck runs.

6. *Increased productivity.*—Control of timing maximizes utilization of equipment and, in the buyer's warehouse, it helps to balance workloads.

7. *Increased control.*—Over sanitation and damage and security because the buyer is handling his own merchandise in his own trucks.

Arguments against S. 1699 include:

1. *"Special interest bill for profiteering major food chain."*—Simply untrue. S. 1699 will benefit wholesalers and retailers, large and small as well as chains large and small. Consumers will get food price benefits. The nation will save

fuel. Profiteering allegations have been disproved repeatedly in recent years. There is no windfall in S. 1699 or any other backhaul option unless it is the cost savings that may be retained by sellers who are paid for delivery but do not provide it. Nevertheless we are sincerely grateful to Mr. Rothwell for leaping to the defense of Robinson-Patman.

2. S. 1699 "*substantially weakens and modifies the Robinson-Patman Act.*"—Mr. Rothwell states that S. 1699 "rewards remoteness and punishes proximity" an "overt and incongruous discrimination." The uniform delivered price system itself, not S. 1699, "rewards remoteness and punishes proximity but neither the FTC nor Robinson-Patman consider that a discrimination. And S. 1699 offers a compensating factor. In the real world *shorthaul costs more per mile or per weight than longhaul* by a sizeable margin..

On the "actual cost savings" credit basis of S. 1699 the closer buyers can be paid more per mile or per weight for the backhaul service than remote buyers. It is also a fact that most buyers will have a combination of remote and close-in backhaul opportunities that tend to be compensating. Also both close-in and remote buyers may be large or small, chain or wholesale.

The other reference to possible Robinson-Patman violation was made by Mr. Owen Johnson who left FTC three days after the hearing. He said the views in his testimony were "not those of the Commission or any Commissioner." He also confessed to personal "skepticism toward delivered price systems generally." Then he said that FTC advisory opinions and clarifications of backhauling in uniform delivered price situations avoided Robinson-Patman concerns without discouraging backhaul. He went further to recommend that S. 1699 be made mandatory to demonstrate FTC support for backhaul. However, he also said that S. 1699 created a new condition wherein a distant buyer could "deduct more from the uniform delivered price than his competitor, a close-in buyer, resulting in a variance in the pickup, or f.o.b. price, and a discrimination which *may* violate the Robinson-Patman Act."

Mr. Johnson's statement raises the question of where and when and how determinations of discrimination are made. The "Mill Net Theory" measured price equality at the seller's dock for merchandise only, holding that transportation costs were an accident of geographic location. FTC once embraced that doctrine in interpreting Robinson-Patman, at the seller's dock whether the sale is "less freight" or "freight included." In fact we still have f.o.b. uniformly measured but FTC has apparently shifted¹ to a new principle which measures the "actual price" paid by the buyer including merchandise and delivery and possibly other factors. This new system describes uniform delivered price system and it definitely moves the point of equity measurement to the buyer's receiving dock.

Mr. Johnson reverts to the seller's dock and f.o.b. price to frame his question about a possible Robinson-Patman violation authorized by S. 1699 despite the fact that S. 1699 is very clearly limited to uniform delivered price situations. The question is invalid for that reason.

A careful examination of the current pricing systems and purchasing options approved by FTC under Robinson-Patman law reveals that the impact of S. 1699 is to modify current and acceptable differences. Therefore S. 1699 is clean in the legal sense of conformity with Robinson-Patman and, equally important, it promotes equity at the buyer's receiving dock.

3. Mr. Donn D. McMorris of American Trucking Associations, Inc. said that S. 1699 backhaul will "adversely tamper with regulated carriers balance of multi-directional movements." We suspect this to be true to some extent because distributors suffer constantly from delivery delays caused by regulated carriers' attempts to limit service to minimize cost. It is hard to conceive that the relatively minor shift of freight hauled to backhaul handling can unbalance the enormous trucking industry. Carriers' share of wholesalers' inbound tonnage increased twice as much as backhaul over the last ten years. Carriers currently deliver 63 percent of our inbound compared to 15 percent that is backhauled. As food wholesalers, our economic function is lowest cost distribution. Backhaul lowers total system costs and saves energy. S. 1699 will encourage backhaul in one limited sector of delivered price sales.

¹ Anti-trust law developments prepared by the section of antitrust law of the American Bar Association.

4. "It isn't true that 100 million gallons of fuel could be saved with enactment of this bill."—The question is not whether it is 78 million or 118 million gallons. It's not really important. The big difference is between *could* and *would*. I don't share Mr. McMorris' access to the "genesis of the estimate" but I do recognize that the difference between potential and actual is far more significant than guesstimates of absolute gallons.

5. Mr. McMorris is also misinformed about the nature of the limited application of backhaul covered by S. 1699. Hauling one's own merchandise in one's own truck is emphatically not an opportunity limited to a few giants "seeking competitive advantage and not a reduction in fuel usage." That "most firms cannot afford to have trucks away from their base and primary source of business and extra time and distance involved in backhauling" is untrue. It has been proven arithmetically many thousands of times. That is not to say that buyers' trucks always operate more efficiently than carrier trucks but rather that the circumstances which make the backhaul more efficient should be encouraged for the benefit of energy savings and lower costs to consumers.

Respectfully submitted,

GERALD E. PECK,
President.

PRIVATE TRUCK COUNCIL OF AMERICA, INC.,
Washington, D.C., July 15, 1977.

Hon. J. BENNETT JOHNSTON, Jr.,
Senate Committee on Energy and Natural Resources, U.S. Senate,
Washington, D.C.

DEAR SENATOR JOHNSTON: This is to inform you of the action taken by our Board of Directors this date at its Board Meeting in White Sulphur Springs, West Virginia, with respect to S. 1699.

"The Private Truck Council of America, Inc., the only independent national organization representing operators of trucks in their own non-transportation businesses, supports in principle the concept of S. 1699, the proposed Diesel Fuel and Gasoline Conservation Act of 1977. Because of various practical questions, the Board of Directors of the Council believes that the language of the bill needs further study and refinement.

"The Council is surveying its membership and will make available to the Subcommittee and others interested such information and suggestions as are developed."

We shall be in touch with you and your staff on this matter.

Sincerely,

JOHN C. WHITE.

THE NATIONAL INDUSTRIAL TRAFFIC LEAGUE,
OFFICE OF THE PRESIDENT,
Stamford, Conn., July 20, 1977.

Hon. J. BENNETT JOHNSTON,
Chairman, Senate Energy Committee's Subcommittee on Energy Conservation
and Regulation, Washington, D.C.

DEAR CHAIRMAN JOHNSTON: In behalf of The National Traffic League I would like to submit the following remarks for the record of hearings on S. 1699, the "Diesel Fuel and Gasoline Conservation Act of 1977."

The League is a voluntary organization of 1,800 shippers, shippers' associations, boards of trade, chambers of commerce and other entities concerned with rates, traffic and transportation services of all carrier modes. It is the only shipper organization which represents all types of shippers nationwide. Its members include large, medium and small shippers who use all modes of transportation and who ship all types of commodities. The League is not a panel or committee of a trade group, or a spokesman for a particular commodity or transportation point of view, and does not permit carrier membership.

The League's primary concern is to provide for the nation and all its shippers a sound, efficient, well-managed transportation system, privately owned and operated.

To arrive at positions reflective of the broad range of shipper interests within the League, the League membership at its annual and special meetings considers, debates and votes on actions to be taken. During its seventy years of existence, the League has frequently been the spokesman for the nation's shippers before Congress on proposed transportation and regulatory reform legislation.

S. 1699, has as its purpose to provide energy conservation by alleviating current and continuing fuel waste, to reduce empty vehicle movements, and to increase efficiency in transporting goods by motor carrier which will ultimately benefit consumers.

Section 2 of S. 1699 amends Section 382 of the Energy Policy and Conservation Act of 1976 (42 U.S.C. 6201) by adding a paragraph (d) to read as follows:

"(d) It shall not be unlawful for a seller of goods, wares, or merchandise pursuant to a uniform zone delivered pricing system to grant back haul allowances to a buyer where the backhaul function is actually performed by the buyer or an authorized carrier serving the buyer, where the allowance is no greater than the actual savings in delivery costs to the seller and where the allowances are available to all the seller's customers on a nondiscriminatory basis."

Although League members have not had an opportunity to thoroughly consider S. 1699, they do support the purpose of the bill in removing regulatory limitations causing energy waste and inefficiency. Strictly speaking, of course, S. 1699 does not address itself to the regulatory actions of the Interstate Commerce Commission under its basic statute. It involves an effort to modify the administrative interpretation of the Robinson-Patman Act by the Federal Trade Commission. Nonetheless, this interpretation has prevented the implementation of transportation practices which could save energy resources. The League has a number of policies and positions which fully support elimination of regulatory policies which waste energy. The League's policy *M-1 Productivity*, states: Transportation must obtain greater productivity from its use of fuel including the minimization on fuel inefficiencies of: economic regulations; consignor or consignee loading/unloading practices; and labor practices—and with due consideration to environmental and safety requirements.

Secondly, in addressing commodity and route restrictions, the League supports elimination of gateway restrictions for irregular route and regular route carriers and an increase in the circuitry factor. The League also strongly supports elimination of unneeded restrictions in existing operating rights that cause excessive energy use.

Thirdly, in regard to private and contract carriers, the League members fully support liberalization of the present ban on "within the family" hauling. The new League policy *E-1* applies the principle of "freer entry" to both common and contract carriers. Also, conglomerates should be considered as a single shipper for purposes of contract carriage.

Finally, regarding private carrier equipment leases to common carriers, the League members recently voted on a proposal prohibiting the ICC from regulating the duration of all vehicle leases whether by common or private carrier (in addition to the present exemption with respect to lease duration on vehicles used for hauling agricultural products). The League members voted to support the intent of this proposal to permit trip leasing of private carrier equipment.

The League appreciates this opportunity to present its views on S. 1699 supporting the purpose of the bill to abolish regulatory limitations which cause inefficiency and energy waste.

Thank you for including the League's statement in the record of hearings as well.

Sincerely,

J. ROBERT MORTON,
President.

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