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DIESEL FUEL AND GASOLINE CONSERVATION ACT OF 1977

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 1699

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

SEPTEMBER 14, 1978

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DIESEL FUEL AND GASOLINE CONSERVATION ACT OF 1978

THURSDAY, SEPTEMBER 14, 1978

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION,
Washington, D.C.

The committee met at 10:10 a.m., in room 235, Russell Senate Office Building, Hon. Howard Cannon (chairman of the committee) presiding.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. The hearing will come to order.

I must apologize for being late. I have been involved in a hearing in the Armed Services Committee this morning for some time.

This morning the Committee on Commerce, Science, and Transportation is conducting a hearing on S. 1699, the Diesel Fuel and Gasoline Conservation Act of 1978.

This legislation was introduced by Senators Johnston, Bumpers, McClure, and Stone on June 15, 1977 and was sequentially referred to the Committee on Energy and Natural Resources and the Committee on Commerce. On March 8, the Energy Committee reported the legislation without amendment and without recommendation.

Last spring the Commerce Committee requested written comments from the public on S. 1699 and received responses from a wide range of groups and individuals.

Today's hearing is an attempt to further explore some of the issues addressed by the public comments and to clarify the intent and potential impact of the legislation.

This bill amends section 382 of the Energy Policy and Conservation Act of 1975 by stating it would not be unlawful for a seller of merchandise pursuant to a uniform zone delivery pricing system to grant backhaul allowances to a buyer arranging for his own transportation. The allowance can be no greater than the actual savings in delivery cost of the seller and must be available to all the seller's customers on a nondiscriminatory basis.

While the actual wording of the legislation is relatively simple, the issues that it addresses are complex. It can be legitimately argued that this bill will have a tremendous impact on all industries utilizing a uniform zone delivered pricing system, including the food industry. The bill will also have an impact on the common, contract, and private carrier sectors of the motor carrier industry. The legislation may also have an impact on the competitive balance between large and small companies in the food industry and the enforcement activities of the FTC with respect to the Robinson-Patman Act.

Finally, the legislation may effect all of us as consumers.

[The bill and agency comments follow:]

[S. 1699, 95th Cong., 2d sess.]

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Diesel Fuel and Gasoline Conservation Act of 1977".

SEC. 2. 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 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 nondiscriminatory basis.".

U.S. SMALL BUSINESS ADMINISTRATION,
Washington, D.C., September 25, 1978.

Hon. HOWARD W. CANNON,
Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is to acknowledge your request of September 7, 1978, for the views of the Small Business Administration concerning 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."

Enclosed herewith is SBA's statement before your Committee on September 14, 1978. As noted in our statement we oppose S. 1699 for the following reasons:

(1) It would be an initial step toward weakening the Robinson-Patman Act;

(2) Because it could lead to price discrimination;

(3) Because it is questionable whether it would result in substantial energy savings; and

(4) Because in the long run we believe consumer prices would be higher because of the diminished ability of small businesses to compete with larger companies.

If we can be of any further assistance, please don't hesitate to call upon us. We appreciate your continued interest in the Small Business Administration and its programs.

Sincerely,

PAUL D. SULLIVAN,
Assistant Administrator for Congressional and Legislative Affairs.

The CHAIRMAN. Because of the large amount of material that will be covered in this hearing and the relatively short period of time we have, I must insist that all witnesses be as brief as possible in their oral presentation. Since the committee has already received and reviewed the written statements, I suggest the witnesses try to summarize the major points they wish to emphasize. This will allow more time for questions and answers. The complete text of the written statements will be printed in the hearing record. The first witness is the Hon. Michael Pertschuk, Chairman of the Federal Trade Commission (FTC), and formerly a very key staffer of this committee. We are delighted to have you here today and you may proceed, sir.

STATEMENT OF HON. MICHAEL PERTSCHUK, CHAIRMAN, FEDERAL TRADE COMMISSION; ACCOMPANIED BY ALFRED F. DOUGHERTY, JR., DIRECTOR, BUREAU OF COMPETITION; AND JAMES C. HAMILL

Mr. PERTSCHUK. Thank you very much, Mr. Chairman. I never thought when I left the committee that I'd learn this much about backhaul. As you said in your statement, it is an extremely complicated issue as it unfolds at each level.

I have with me this morning Alfred Dougherty, who's the Director of our Bureau of Competition; and Jim Hamill, his assistant, who has worked with the Commission on these issues.

In many industries manufacturers prefer to sell their goods on a delivered price basis. That is, they deliver their products to buyers and include freight charges in the price offered. In many delivered price systems a uniform delivered price is quoted that is identical to all buyers within a given geographic zone extending for some distance from the seller's point of manufacture or shipment. But a uniform delivered price doesn't reflect the actual cost of delivering the goods to buyers. These costs obviously vary according to the buyers' distance from the seller's loading dock. To be the same to all, a uniform delivered price must in some fashion average freight costs to all buyers, wherever located.

The proponents of backhaul allowances don't want the goods delivered to them; they want to use their own freight capabilities and pick up goods at sellers' docks. In many instances, the buyers have empty trucks available that have just completed deliveries of goods. The term "backhaul allowances" applies to a deduction of a freight charge from a delivered price invoice. Buyers with empty trucks want to pick up goods at sellers' docks, receiving backhaul allowances, and avoid having to return to their bases "deadhead," or empty.

Proponents of S. 1699 state that sellers—at least in the food industry—won't give reasonable backhaul allowances because of alleged uncertainties in FTC policies respecting the legality of providing such allowances. But the Commission's various statements on this subject have uniformly endorsed backhaul allowances as long as price discrimination does not result at the seller's dock. The Commission's policy of enforcing the Robinson-Patman amendments to the Clayton Act makes us especially vigilant in the area of price discrimination.

S. 1699 appears on its surface to promise something for everyone. First, it appears simple, even innocuous, because all it does is allow buyers to deduct sellers' actual freight costs when they show up with trucks to carry their own goods. Second, the bill's proponents assure us that backhaul allowances will be available to all on a nondiscriminatory basis, so that no buyer would be disadvantaged by the bill. Third, S. 1699 promises savings on food costs. Fourth, the bill is even titled the Diesel Fuel and Gasoline Conservation Act, promising energy conservation. Proponents of S. 1699 would lead us to believe that the only thing standing between energy savings and lower food costs is the Robinson-Patman Act and its badnatured watchdog, the FTC.

The first problem with the backhaul allowance formula in S. 1699 is that it mixes apples and oranges. Proponents of the bill point to the virtues of "cost-justified backhaul," because sellers' "actual" costs of freight will be deducted from delivered prices. The problem is that the uniform delivered prices from which backhaul allowances are deducted do not reflect such actual costs of transportation. As noted, uniform delivered prices are based on an averaging of freight costs to both close and distant buyers, which is why the delivered price is the same to all buyers. When actual freight costs are individually deducted from uniform delivered prices that are based on average costs, we get apples and oranges. Or, perhaps I should say apples and lemons. Deducting actual transportation costs from the price charged a customer already paying more for delivery than it actually costs, leaves him still overcharged; that customer is in a "lemon" position. Deducting actual costs from the delivered price to another customer whose delivered price included a transportation charge less than actual transportation costs is indeed giving him a free "apple."

The result is discrimination at the seller's loading dock. Because different figures representing actual transportation costs are deducted from a uniform delivered price, two buyers purchasing the same goods from the same place would pay different prices. The close-in buyer pays what's called "phantom freight," an amount reflecting more than the actual cost to deliver goods to him. Distant buyers pay less in freight in a uniform delivered price than the actual cost of transportation to their docks. The result is "freight absorption" by the seller. Lest one believe this absorption is due to some charitable motive on the seller's part, losses suffered in freight absorption to distant buyers are subsidized by phantom freight collected from proximate buyers. Where buyers who pay different prices at the seller's dock are in competition with each other, the price differences have a potential for substantial competitive injury. Because where such competitive injury can be shown, the Robinson-Patman amendments to the Clayton Act may be violated, proponents of discriminatory loading dock prices want S. 1699 to create an exemption to existing law.

The Commission has long favored backhaul allowances, but we don't mix the apples and oranges (or lemons). Where uniform delivered prices based on averaged transportation costs are offered, it is lawful to deduct part or all of these average costs, as long as the resulting price at the dock is the same to all. Where delivered prices are not uniform, but based on the seller's actual freight costs to each individual buyer, it is perfectly lawful to deduct part or all of the actual freight costs to reach a uniform nondiscriminatory loading dock price. What you can't do without creating a discriminatory price is to deduct actual from average—as S. 1699 would provide—or average from actual. The Commission, for purposes of the Robinson-Patman Act, in fact, really isn't concerned about what amount you deduct, as long as the resulting price is the same to competing buyers. To us, this is commonsense. At the seller's dock, all things being equal, the price should be the same to all buyers of goods. Because each allowance is different for each buyer, the second argument of proponents of S. 1699, that it is nondiscriminatory, is incorrect.

An illustration at this point may be helpful. Suppose the uniform delivered price on a product is $100. One buyer is located close to the

seller and another is located three times further away. The actual cost of delivery by the seller to the close-in buyer is $5. To the distant buyer, the actual cost is $15. To be able to charge both buyers the same delivered price ($100), the seller must average his freight costs, which works out to $10 for each of the two buyers. A buyer clutching the newly enacted S. 1699 seeks to invoke his backhaul allowance. The distant buyer is told by the seller that his backhaul allowance is $15 and that the loading dock price is thus $85. The close-in buyer also asks for a backhaul allowance and is told the seller's actual cost of delivery is $5, and that therefore his loading dock price is $95.

If the two buyers compete, the close-in buyer is clearly disadvantaged by what is now a $10 price spread between the seller's two prices, though both buyers arrive at the same dock for the same goods with the same size truck. Whether the disfavored buyer elects a delivered price of $100, or a pickup price of $95, the favored buyer paying a pickup price of $85 can undersell him. In this example, the favored buyer could actually sell below the disfavored customer's purchase cost and still make a profit. It is precisely this kind of price discrimination that is barred by the Robinson-Patman Act, but that is permitted under S. 1699.

Proponents of S. 1699 also ignore the difficulty in administering the bill's provisions. Just how will the seller, who uses its own fleet in a uniform delivered price system, go about allocating his costs of transportation? And more importantly, how would the FTC be in a position to monitor many thousands of discounts based on them? Freight factors such as truck purchase, maintenance and depreciation, labor costs, dock construction and maintenance and other transportation equipment costs may not be conveniently isolated in a seller's account books under "transportation costs." Or to illustrate the problem, where a seller makes two sales, one to a buyer 200 miles away and another to a buyer 100 miles away, how does he allocate to each sale his actual costs of warehousing overhead? Proponents of S. 1699 have stated that the FTC preference for backhaul allowances based on deduction of average costs from uniform delivered prices ignores the difficulty in computing average costs. They ignore the difficulty of determining actual costs by firms that don't use (and maybe never have used) such actual costs in constructing their delivered price systems. It would seem that where actual costs are used in computing delivered prices, deduction of such actual costs is simple, and correspondingly, where a delivered price is based on average costs, the deduction of average costs should be easier than the computation and deduction of so-called "actual" costs.

The most alluring of the arguments of S. 1699's proponents is that it will result in substantial energy savings. The Federal Energy Administration (FEA), a lukewarm supporter of the bill, in testimony before the Energy Committee, expressed serious reservations about extravagant claims for energy savings by S. 1699 proponents. Further, the FEA introduced the intriguing prospect that backhaul allowances may incite fronthauling, the dispatching of empty trucks to pick up goods. Such energy-wasteful fronthauling would be lucrative to buyers in some instances. A distant buyer might fronthaul to gain freight allowances if he can be assured that he can resell the goods to consumers located close to the seller's dock.

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Apart from the weaknesses in the bill's provisions, there is another aspect of S. 1699 that troubles the Commission. One most conspicuous feature is that while the bill has been referred to almost exclusively as a food industry bill, there's no such limitation written into it. That is, the bill's exemption for price discrimination applies to any industry operating under zone delivered pricing. There are other substantial industries characterized by uniform zone delivered prices, such as the cement industry. An assessment of the impact of S. 1699 on such industries would seem to be absolutely necessary prior to any favorable congressional action.

In conclusion, S. 1699, as we view it, is really a device for immunizing price discrimination otherwise in potential violation of the Robinson-Patman Act, which the Commission enforces. We advise the committee against the bill on its merits, because lawful backhaul allowances can be afforded buyers today, if only manufacturers would allow pick-up at their loading docks.

Thank you, Mr. Chairman. We will now be glad to answer any questions.

The CHAIRMAN. Thank you very much for your statement, Mr. Chairman.

In your letter to the committee of August 18 you stated that S. 1699 would create an exemption from the Robinson-Patman Act. Would you explain that statement?

Mr. PERTSCHUK. It's essentially the thrust of our testimony today, that we view the deduction of different prices for different buyers—discriminatory pricing at the loading dock, as a discrimination in violation of Robinson-Patman.

The CHAIRMAN. With the exception of Commissioner Clanton, does the Commission letter of August 18 reflect the views of FTC with respect to backhaul allowances?

Mr. PERTSCHUK. Yes, Mr. Chairman. I may point out that the testimony that I delivered this morning has the universal support of the Commission, including Commissioner Clanton.

The CHAIRMAN. Does the Commission fully support the views presented by Mr. Johnson of the Bureau of Competition before the Senate Energy Committee and Mr. Dougherty before the House Committee on Antitrust?

Mr. PERTSCHUK. On backhaul, Mr. Chairman, yes. Both of those pieces of testimony are consistent with the Commission's position.

The CHAIRMAN. In order to have a more complete hearing record, the Commission's letter as well as Mr. Johnson's and Mr. Dougherty's testimony will be made a part of the record.[1]

Commissioner Clanton disagrees with the Commission's position that nonuniform FOB prices are inherently anticompetitive and violate the Robinson-Patman Act. Do you know if he's taken that position because of the additional need to determine if the nonuniform pricing would result in a lessening of competition or tend to create a monopoly?

Mr. PERTSCHUK. I believe that's his position. Al, you have talked to David on this.

Mr. DOUGHERTY. I believe that's his position, Mr. Chairman. The Bureau of Competition and the four Commissioners who have en-

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[1] See p. 12.

dorsed the position that's presented in the Commission's August 18 letter to the committee believe that he misconceives the majority position. On the basis of existing law, there's no doubt of the necessity to prove anticompetitive effects.

The CHAIRMAN. Does the Commission have any information on the extent of the practice of granting backhaul allowance in the food industry?

Mr. PERTSCHUK. We do not, Mr. Chairman. Several years ago the Commission undertook, as part of a study of retailing, to ask some questions about the extent of the practice of backhauling, and frankly, the study did not produce any usable information. So the fact is, we do not know or do not have this information.

The CHAIRMAN. Do you know whether or not the advisory opinions have helped to increase the use of this alternative form of pricing?

Mr. PERTSCHUK. I don't think we know that.

Mr. DOUGHERTY. Well, I believe that the clarifications that have been issued by the Commission in 1973 and 1975—the clarifications of the Advisory Opinion 147—were intended to make clear the Commission's position so as to encourage backhaul and, if my recollection serves me, the National Commission on Productivity concluded in their analysis that those clarifications eased the situation and businessmen were more inclined to engage in backhauling as a result of the Commission's clarifications.

Mr. PERTSCHUK. There are conflicting reports as to whether backhauling is being made available in some industries, and whether its being used or not. We really do not know the extent.

The CHAIRMAN. Is it fair to say that the Commission's position is that it is not illegal to permit cost-justified nondiscriminatory backhaul allowances?

Mr. PERTSCHUK. Yes; but, of course, the question is, what is a nondiscriminatory allowance.

The CHAIRMAN. I understand. That's where you say you can't mix apples and lemons.

Mr. PERTSCHUK. That's right. We would say any price which is not cost-justified at the loading dock, which is different to equivalent buyers, is a discriminatory price.

Mr. DOUGHERTY. The key is to get equivalent or identical prices at the dock, and the use of the term nondiscriminatory backhaul allowances may be taken to mean something else. I'm just concerned about that language.

The CHAIRMAN. If everybody gets the same backhaul allowance, it would be discriminatory at the dock if dock pricing is——

Mr. PERTSCHUK. It could be, unless the pricing system itself was a pricing system which was based upon an f.o.b. price plus actual freight costs, in which case the backhaul allowances would be perfectly legal.

Mr. DOUGHERTY. If you're deducting actual freight costs from an actual pricing system, you're OK. If you're deducting average freight costs——

Mr. PERTSCHUK. If you're deducting actual——

The CHAIRMAN. That shows this is a confusing thing.

Mr. DOUGHERTY. That's right. If you're deducting average freight costs from a uniform delivered pricing system, that's OK. But if you're deducting actual freight costs from an average pricing system, you're in trouble.

The CHAIRMAN. There's nothing in this legislation to indicate that this only affects the food industry and you pointed that out in your statement, on the contrary, it affects all industries that utilize a uniform zone delivered pricing system.

Now to what extent is this pricing mechanism utilized in American industry?

Mr. PERTSCHUK. Well, I think it's quite widely used. We do have underway, for example, a study of uniform delivered pricing in the cement industry, an area where there have been antitrust problems in the past. It's our view that if you looked at delivered pricing systems industry by industry there might be evidence supportive of discriminatory pricing, but we do not know, again, in answer to your question, the extent to which they are used. Al, you may, or Jim.

Mr. DOUGHERTY. From our past efforts in enforcing the antitrust laws, we know that some forms of delivered pricing systems exist in industries such as the plywood industry and cement industry and food industry, and I can't tell you what proportion of American manufacturing industries are characterized by delivered pricing systems, but I think our point made this morning really is that we think the committee should look beyond the food industry before undertaking this type of legislation.

The CHAIRMAN. There isn't anything in this bill that would make it uniquely applicable to the food industry, is there?

Mr. PERTSCHUK. No; there's not.

The CHAIRMAN. Now S. 1699 states, in part, that the allowance can be no greater than the actual savings in delivery costs to the seller.

Now on what basis would this actual savings in cost be computed? That is, would it be computed on common carrier rates or just how would it be computed?

Mr. PERTSCHUK. I think that's a problem with the bill itself. As we point out, even if we accept the bill, the basis on which actual costs are to be computed by a manufacturer whose system is based upon using his own transportation opens up a whole range of questions which are not answered by the legislation.

The CHAIRMAN. Would you define for us what constitutes a nondiscriminatory backhaul allowance?

Mr. PERTSCHUK. Yes; I think, as a matter of fact, Al basically addressed that. An actual backhaul allowance from a price system based upon an f.o.b. price plus actual freight costs would be nondiscriminatory. By the same token, an average——

The CHAIRMAN. So what you're saying there is that if the seller simply sells at his dock to everybody at one price, then you've got no problem.

Mr. PERTSCHUK. Yes; but you can get there two ways. You can get there by starting with an f.o.b. price and adding actual freight costs to the sales, or by taking a uniform delivered price and deducting an average freight cost. That, too, would be equal, but each f.o.b. price would be based upon different calculations and there the seller has the freedom to do either. We don't care what the price is or how it's set, so long as you don't have that discrimination at the dock.

Mr. DOUGHERTY. Mr. Chairman, I might add that the proponents of S. 1699, in my view, have really never addressed the question of

how different prices can be justified off the dock to different buyers.

The CHAIRMAN. Will this legislation, if it's enacted, result in a lessening of competition or tend to create a monopoly?

Mr. PERTSCHUK. We fear that. We fear that it will give a competitive advantage to buyers, or could, of the kind that the Robinson-Patman Act is concerned about.

The CHAIRMAN. Well, who is likely to be injured?

Mr. DOUGHERTY. Mr. Chairman, I believe that the most likely injured parties would be small buyers who are situated close to the sellers, the manufacturers, particularly manufacturers that do not offer f.o.b. dock prices. So those small buyers cannot take their trucks to the dock and pick up goods.

The CHAIRMAN. If that's the case, why do you suppose that small as well as large grocers support this legislation?

Mr. PERTSCHUK. Some of the small grocers might buy through large wholesalers, but many do not.

Mr. DOUGHERTY. I believe that the small businesses are on both sides of this issue.

Mr. PERTSCHUK. Yes.

Mr. DOUGHERTY. And I think, as Chairman Pertschuk indicated, most of the small businesses—and I don't know how that's defined—that supposedly support this legislation probably buy essentially through wholesaling cooperatives or wholesaling organizations, so those organizations might derive the same benefits as the large food chains.

The CHAIRMAN. Is there any connection between distance from the seller and the size of the buyer?

Mr. DOUGHERTY. I don't know the answer to that, Mr. Chairman. I don't know whether there's any data available. I suspect that the large buyers, the large food chains who have their own truck fleets, are going to be the primary beneficiaries of this legislation and they probably exist a greater distance from the supplier than the smaller companies.

The CHAIRMAN. Would this legislation result in different prices being offered at the seller's factory?

Mr. DOUGHERTY. Off the dock, yes.

Mr. PERTSCHUK. Yes.

The CHAIRMAN. And if that's the case, what effect would it have on the FTC's enforcement of the Robinson-Patman Act?

Mr. PERTSCHUK. Well, you would have the problem that sellers who are competing are getting different prices. To the extent that those are large sellers who are competing with smaller sellers, they would have a substantial competitive advantage in the marketplace, not cost-justified.

Mr. DOUGHERTY. I believe that the answer addresses the first question you asked, and that was whether or not the position the Commission took in its letter to you indicated that there would be an exemption to the Robinson-Patman Act. In fact, there would be. The effect of this would be to create an exemption from that act.

The CHAIRMAN. So you're really saying you wouldn't be able to enforce the act because this provides really, in effect, an exemption from it and you could have a difference in pricing?

Mr. PERTSCHUK. That's one result. A second result is, as you indicated in your question about the calculation of the backhaul allowance, we could not effectively monitor the extent to which the act itself was complied with because of the inability to get inside the whole accounting system of the firms. So it's doubly difficult.

The CHAIRMAN. In December of 1976 the Commission accepted a consent order from Ideal Basic Industries. Are you familiar with that case?

Mr. PERTSCHUK. I am, although I think I'll ask Al to comment on that.

The CHAIRMAN. Well, as a condition of that consent agreement, Ideal agreed to allow customers the option of obtaining a point-of-origin price where the seller also offers a delivered price, and the term "point-of-origin" was defined as being no greater than the delivery price offered to the customer less the actual transportation cost which would be incurred by the seller if the sale were made on a delivered basis.

Now doesn't that confirm the use of actual transportation costs as an appropriate basis for backhaul allowance?

Mr. PERTSCHUK. Yes, but it's a uniform delivered price, with a uniform f.o.b. price; that's the essential distinction.

Mr. DOUGHERTY. Ideal does call for the deduction of all or part of the actual transportation costs to reach a loading dock price, but Ideal has expressly agreed with the Commission that any f.o.b. price quoted must be nondiscriminatory and identical to all buyers. So the position that Ideal has taken with the Commission is consistent with our position here today.

The CHAIRMAN. Well, now, in the *Ideal* case, was it a uniform delivered price system?

Mr. PERTSCHUK. It is not now, as I understand it.

Mr. DOUGHERTY. No.

Mr. PERTSCHUK. It's a uniform delivered price system with a uniform f.o.b. price option measured by actual cost.

The CHAIRMAN. So you're saying in the *Ideal* case it was f.o.b., so the purchaser was actually paying an f.o.b. price plus the actual cost of delivering and therefore, if they were granted the backhual allowance, they could get the actual cost of delivery?

Mr. PERTSCHUK. Is that correct, Al?

Mr. DOUGHERTY. Ideal is today quoting to all buyers an f.o.b. price that is equal to a uniform delivered price less the actual cost of transportation to the most distant point.

Mr. PERTSCHUK. They are going about it the hard way. They are using a single actual transportation cost and backing it away in order to get a single f.o.b. price at the loading dock. So there again, Ideal is not offering different prices to different buyers at the loading dock.

The CHAIRMAN. What are the customary zone sizes that are used in this type of business?

Mr. PERTSCHUK. We don't know, Mr. Chairman.

The CHAIRMAN. Are there any rules governing the drawing up of the zone sizes?

Mr. DOUGHERTY. I believe that it's determined by the individual seller. We certainly don't apply rules that would determine zone size.

The CHAIRMAN. They may use a number of zones or they may use just two or three?

Mr. DOUGHERTY. Certainly.

Mr. PERTSCHUK. Yes; as Jim points out, it's really the zone of effective competition. It's really determined in part by the marketplace.

The CHAIRMAN. In a case involving the Boise-Cascade Corp., the Commission upheld an initial decision of an administrative law judge that seems to confirm the use of actual transportation costs as an appropriate basis for the backhaul allowance.

Now how does this case differ from S. 1699 and how does it differ from the *Ideal* case?

Mr. PERTSCHUK. In Boise-Cascade, the basic issue was that the southern plywood manufacturers were using a system in the South based upon a West Coast actual delivery cost system, which we held to be illegal. The pricing system there was not technically a uniform delivered price as such. The backhaul allowance which is allowed is an actual cost backhaul allowance backed off to the f.o.b. price resulting in equal price at the loading dock. The delivered price referred to the FTC order is not a "uniform" delivered price, but an f.o.b. price plus actual freight?

The CHAIRMAN. So you're saying they did not have an average delivery price?

Mr. PERTSCHUK. Right. That's my understanding.

Mr. DOUGHERTY. The Commission found the use of the West Coast pricing scheme by Boise-Cascade to be an artificial system, so held it to be illegal, and is now requiring Boise to deduct an actual freight cost from a system that is based on actual costs. So it's again actual-actual and it's consistent.

The CHAIRMAN. Inasmuch as this bill, if it's passed, permits a backhaul allowance at the seller's option, under what circumstances do you see the seller willing to grant the freight allowance?

Mr. PERTSCHUK. Where you have power buyers, essentially. You're really intervening in the relationship between the buyer and the seller and giving the power buyer the leverage to force the seller——

The CHAIRMAN. You're saying that the big power buyer is likely to negotiate that kind of an allowance and the little buyer is likely to be out in the cold?

Mr. PERTSCHUK. Right.

Mr. DOUGHERTY. Mr. Chairman, I believe one of the major problems here is that many uniform delivered price sellers do not offer f.o.b. dock prices, and in fact in 1973 I believe Congressman Dingell wrote to the Commission and recommended that a provision be enacted where it would 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. In other words, require an f.o.b. price to be offered off the dock by all sellers.

The Commission in its 1973 and 1975 clarifications of Advisory Opinion 147 basically picked that up and said that's the way the Commission would prefer to go, to see sellers offer fair prices off the dock.

That question is not addressed by S. 1699 and in fact we think—or rather I think personally—that would be a better way to go. The Commission has not formally adopted my recommendation for legislation, but the Commission in its clarification seems to be heading in that direction also.

The CHAIRMAN. But, of course, if you go that route, then obviously you're going to have the consumers at the distant point, at a more distant point, paying a higher price.

Mr. PERTSCHUK. They could be; that's right. You would have both uniform pricing and f.o.b. prices where transportation to a more distant point might result in higher prices at the retail.

Mr. DOUGHERTY. Where the f.o.b. buyer transports to a further zone, the same should hold true.

Mr. PERTSCHUK. That's right. You would have that. In some instances, prices will reflect the higher cost of transportation.

Mr. DOUGHERTY. That's consistent with any cost-based system in the competitive marketplace.

Mr. PERTSCHUK. Moreover, under present uniform delivered price systems some consumers are going to be subsidizing others.

The CHAIRMAN. Thank you very much, gentlemen. We appreciate your being here.

[The following information was referred to on p. 6:]

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C., June 26, 1978.

Hon. MICHAEL PERTSCHUK,
Chairman, Federal Trade Commission,
Washington, D.C.

DEAR MR. CHAIRMAN: The Commerce Committee is presently considering legislation, S. 1699—the Diesel Fuel and Gasoline Conservation Act of 1977, designed to remove the economic and legal impediments to the granting of backhaul allowances by merchandisers who utilize a uniform zone delivered pricing system. I am writing to seek a clarification of the Commission's position on the legality of backhaul allowances with respect to the Commission's enforcement of the Robinson-Patman Act.

The underlying intent of S. 1699 is to legislatively mandate a clarification of the legality of granting backhaul allowances. I find a number of difficulties inherent in this type of approach to solving the problem. First, if the Commission can internally clarify its position and make that position known to members of the food industry, there may not be a need for this legislation. The formula by which the backhaul allowance would be calculated under S. 1699 may not be the most equitable approach possible. It may be preferable to have the Commissioners clarify their position rather than impose a Congressionally-mandated solution to this complex and difficult problem.

As you may know, Mr. Alfred F. Dougherty, Director of the Commission's Bureau of Competition, submitted written comments to the Committee outlining his opposition to S. 1699. Mr. Dougherty stated that "backhaul allowances can be entirely lawful under the Robinson-Patman Act" provided that the allowances resulted in "both a uniform f.o.b. price and a uniform delivered price available at the election of the buyer." Mr. Dougherty, however, makes it clear that the views expressed were his own and should not be construed as representative of an official Commission position. It is helpful to the Commerce Committee to have the views of the FTC staff, but the Committee is still faced with the reality that merchandisers in the food industry are not offering allowances that wholesalers and retailers feel compelled to take advantage of. I believe it would be appropriate for the Commission—rather than Commission staff—to state its position on backhaul allowances and define the manner in which those allowances may be equitable and legally granted.

I look forward to hearing from you and receiving the Commission's views on this issue. Your response will be helpful to this Committee in considering S. 1699 and equally helpful to the food industry in providing further clarification on the position held by FTC Commissioners on the backhaul issue.

Sincerely yours,

HOWARD W. CANNON, *Chairman.*

FEDERAL TRADE COMMISSION,
Washington, D.C., August 18, 1978.

Hon. HOWARD W. CANNON,
Chairman, Senate Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR CHAIRMAN CANNON: This is in response to your letter of June 26, 1978, requesting a "clarification of the Commission's position on the legality of backhaul allowances with respect to the Commission's enforcement of the Robinson-Patman Act." The Commission initially commented on this subject in 1967, in FTC Advisory Opinion 147. The Commission has maintained the same position in its three subsequent statements on the issue. A history of these developments is attached.

Your Committee's current concern with this issue is prompted by its consideration of S. 1699, the Diesel Fuel and Gasoline Conservation Act. This legislation would create an exemption from the Robinson-Patman amendments to the Clayton Act, which bar anticompetitive price discriminations. The FTC's Bureau of Competition testified twice in 1977 in opposition to S. 1699, because it would legalize certain price discriminations, without regard to anticompetitive consequences at the buyer level. Attached are copies of the Bureau of Competition statements. The Commission endorses the Bureau statements as accurate reflections of the Commission's longstanding position.

The proposed legislation would legalize varying backhaul allowance deductions from uniform delivered prices. Under the proposed legislation such allowances are justified by what are purported to be actual savings in delivery costs to the seller. However, the uniform delivered prices, from which backhaul allowances would be deducted, would not originally have been computed to contain actual delivery costs. Uniform delivered prices, to be the same to all, are based on a system of averaging transportation costs between various buyers at various distances from the seller's shipping point. The deduction of so-called "actual" costs from a price reflecting average costs results in non-cost-justified price differences at the seller's dock.

This feature of S. 1699 can result in significantly different prices to different buyers at the same seller's loading dock. From a cost perspective, these differentials cannot be justified: at a single seller's loading dock the price should be the same to anyone arriving to pick up goods in the same quantities, since the seller has the same costs at the pick up point to everyone.[1] Proponents of S. 1699 have never explained why equal costs do not merit equal prices.

The Robinson-Patman Act protects against the threat to competition posed by non-cost-justified price differences to competing buyers. Different prices from one seller to different buyers (i.e. discrimination) may be justified by differences in the seller's actual costs of manufacture, sale or delivery. Such differentials may result from different methods of sale or quantities of goods sold or delivered. This does not mean however, that differences in price can be justified on the basis of hypothetical costs that could have been incurred but were not. Under the Act, "savings" in a seller's cost that justify price differences between competing buyers must be savings in the cost of selling to one buyer (or class of buyers) over other buyers (or classes of buyers). Thus, to justify charging different prices to different buyers, the seller must be able to show the cost savings as between the buyer (or buyers) given a lower price, and other competing buyers paying a higher price.

The Commission's position has always been that at the loading dock, the price to all buyers of the same quantities of the same goods should be identical. Therefore, where sellers offer uniform (identical to all buyers) prices which include product delivery, and such sellers wish in addition to offer loading dock (f.o.b.) prices that include no delivery charges, they may do so, as long as the resulting price at the loading dock is the same to all. Price differentials at the loading dock, in addition to being economically unwarranted, contemplate price discrimination proscribed by the Robinson-Patman amendments to the Clayton Act. Such price discrimination may tend to injure competition between and among buyers of goods from the same seller.

We hope this restatement of the Commission's position on backhaul allowances is helpful to the Committee in its deliberations.

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[1] Assuming, of course, that particular prices have not been lowered in good faith to "meet competition," governed by § 2(b) of the amended Clayton Act.

While Commissioner Clanton does not support the approach espoused in S. 1699, he disagrees with the Commission's apparent position that non-uniform f.o.b. prices are inherently anticompetitive and violate the Robinson-Patman Act. Section 2(a) of that statute requires more than a showing that price differences exist, even if they are not cost justified within the meaning of the Act. There must be additional proof that the discriminatory prices have the probable effect of injuring competition. Commissioner Clanton does not believe such injury can be inferred solely from the fact that the mill prices offered to buyers of the same goods in the same quantities are not identical. In that regard, such factors as the size and persistence of the price differentials may be helping in establishing whether competitive injury is likely to result.

In short, Commissioner Clanton believes that there is no *per se* proscription against backhaul allowances which lead to different prices at the loading dock. Indeed, under certain circumstances such practices may enhance competition; for example, by encouraging deviations from industrywide delivered pricing schemes which have the effect of stabilizing prices. Consequently, he cannot endorse the unduly rigid stance taken by the Commission on this issue.

By direction of the Commission.

JAMES A. TOBIN,
Acting Secretary.

Attachments.

STATEMENT OF ALFRED F. DOUGHERTY, JR., DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION

[These remarks represent only the view of a member of the Federal Trade Commission staff. They are not intended to be construed as representative of an official Commission policy]

Thank you, Mr. Chairman for this occasion to contribute to this Subcommittee's important work on the effects on small business of delivered prices and backhaul allowances.

At the outset, I should state that the views I express here today are my own as Director of the Federal Trade Commission's Bureau of Competition, and do not necessarily reflect the views of the Commission or of any individual commissioner. I should also state that this is my first appearance before a congressional committee as Director of the Bureau of Competition. For that reason, it might be appropriate if I preface my remarks with some indication of my feelings with regard to the relationship of effective antitrust enforcement and the preservation of small business.

It's not inaccurate to state that this country was largely built by the success of small businesses, and that in a broader sense, small businesses symbolize the opportunity for individual endeavor that is a significant feature of the free enterprise system. A principal purpose of the nation's antitrust laws is to assure that the free enterprise marketplace is characterized by fair competition for the consumer dollar. Many small businesses have suffered from unfair methods of competition perpetrated by their larger and more powerful competitors. One of the roles of the Commission is to redress marketplace imbalances where they are attributable to anticompetitive practices. Ideally, this would result in a market system populated by numerous firms of all sizes, thereby maximizing the variety and quality of goods and services offered to consumers. The antitrust laws must play an important role in this equation by preventing undue concentration of market power in the hands of a privileged few. The abuses that flow from undue concentration of power may extend into other fields of activity, and may ultimately poison the governmental process itself. The truly diverse marketplace assures against such abuses of market power and personifies "the deeply held American belief that power should be fragmented and that decision centers should be multiple." As you are aware, Mr. Chairman, there is support for this view of the importance of small business in the everyday workings of the marketplace in the Preface to the official history of this Committee's predecessor, the Permanent Select Committee on Small Business.[2]

Turning to the subject at hand, I am here to testify regarding recent suggestions that greater latitude be provided by law to grant so-called backhaul allowances to firms desiring to provide their own transportation for products they buy, rather than to pay a uniform delivered price reflecting the cost of delivery

[2] *A History and Accomplishments of the Permanent Select Committee on Small Business, 77th to 92d Congress, 1941–1972*, 93d Cong. 2d Sess (1974).

of the goods by the seller. Our concern for this area historically results from the Commission's obligation to enforce the Robinson-Patman amendments to the Clayton Act, which bar discriminations in price that injure competition and are not based on savings in costs or the honest defensive meeting of competitive prices.

I fully appreciate that many advocates of backhaul allowances observe that the inability of buyers to utilize their own trucks, returning home empty from deliveries, to pick up product purchases results in energy waste and distributional inefficiencies. No agency in government currently is more sensitive to energy related issues than the FTC. Where backhaul is concerned, however, I advise the Subcommittee to beware of Trojan horses, which appear to be one thing, but conceal something else. It is my firm belief that nothing in existing law bars the use of backhaul allowances, where such allowances result in nondiscriminatory prices. In other words, the Robinson-Patman Act is not the culprit in the backhaul question.

Understanding the history of the backhaul allowance issue is not an easy task. At the Federal Trade Commission, for instance, the Commission has addressed the issue four times since 1973 in an effort to clarify its own position. I shall submit to the Subcommittee background materials documenting the unfolding of FTC backhaul policy, with the request that these materials be made a part of the hearing record. In a nutshell, the Commission position is that backhaul allowances can be offered to buyers confronting uniform delivered price systems, as long as the price that results from the deduction of the allowance is the same for all buyers, thereby preventing price discrimination.

From my point of view, Mr. Chairman, the real issue is simple. If I show up at a seller's loading dock with my own truck, the cost of the product I buy should be no different from the price charged to any other buyer who shows up with his own truck. This is because the seller's costs at the loading dock are the same for everyone. What is often obscured in the backhaul debate is that the backhaul proposal currently being discussed can result in different prices at the loading dock because differing amounts are deducted from a uniform delivered price. Such f.o.b. prices favor buyers from far away, likely to be the larger firms with interstate truck fleets, and discriminate against firms close-in.

Why this occurs is important in understanding this controversy. At the outset, we are talking about uniform delivered price systems, usually based on some form of geographic zone surrounding a seller's point for goods shipments. In delivered price systems every buyer pays the same price, which includes the delivery of the product. Yet the actual cost of delivering a product is obviously different, and will be higher to customers far away than to customers close-in. Delivered pricing systems average these different costs of delivery so as to equalize them out to everyone within a zone. This means that the price to the distant buyer reflects a bargain on transportation, because the price is less than the cost of the product, plus delivery. But to the nearby customer the identical price is higher than it would be if it reflected the real cost of transportation. This hidden overcharge is called "phantom freight." In backhaul situations, we are talking about a buyer who does not want a delivered price, but who has his own transportation available and wants to pick up the goods himself.

A backhaul allowance is some form of deduction from a delivered price to reflect this pick-up option. An illustration may be helpful in conceptualizing the situation. Assume the uniform delivered price of a given quantity of products is established by a seller at $100.00 to all buyers in a zone. The actual cost of the product, including profit, were it not delivered might be, say, $80.00. But in reality, delivery of that product to the customers at the far fringe of the zone may amount to, say, $30.00. To the customers located across town, close to the seller, the cost of delivery may be only $10.00. What the seller has done is average the two costs of delivery and establish a uniform delivered price. That price is $10.00 less than it would be in reality to the distant buyer and $10.00 more than it would be to the close-in buyer. This latter $10.00 is the phantom freight, a form of subsidization of distant buyers by closer ones.

Now the backhaul proposal currently being offered allows the deduction from a uniform delivered price of an amount up to the actual cost of transportation if the buyer shows up with his own truck. So, if the distant buyer in our example shows up, he deducts $30.00 from the $100.00 delivered price and pays $70.00. If the close-in buyer arrives with a truck, he deducts $10.00 from the $100.00 delivered price, and pays $90.00. Therein lies the price discrimination favoring the large over the small to the injury of competition between them. It is therefore to the advantage of distant buyers, those more likely to operate their own

fleets of trucks, to elect the f.o.b. price. There is a corresponding disincentive to utilize the f.o.b. option on the part of the close-in buyer, since he would be forced to arrange for his own transportation without corresponding financial savings accruing therefrom.

The Commission's approach has been that it is entirely legal to offer a backhaul allowance as long as the final price is the same to everyone and does not discriminate. In saying this, I hope I have led the Subcommittee full circle to my original point and have not led the Subcommittee around in circles, as is all too often the case when backhaul is discussed. To recapitulate, my original point was that at a seller's loading dock, common sense and existing law dictate that the price be the same to everyone showing up with a truck to buy the same quantities. Any system of staggered prices is inherently discriminatory, and makes no sense whatsoever. Moreover, such a system greatly benefits large buyers and greatly injures the small ones.

As I have stated, the wrong culprit is being collared when the Robinson-Patman Act is named as the impediment to backhaul and associated energy savings. The real problem is the refusal of many manufacturer-sellers, of which the food industry provides many examples, to offer buyers any alternative to uniform delivered pricing systems. It is the operation of such systems that conceals the real villainy. At the FTC we have long been concerned with industries that offer only a uniform delivered price with no option open to buyers with their own transportation capacities. In such situations, alleged ambiguities in Robinson-Patman policies have been used to explain the refusal to grant backhaul allowances.

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. 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 strutcure. 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.

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 condone certain uniform delivered pricing practices will make it that much more difficult to warrant an antitrust challenge against the delivered price system itself. The offering of a meaningless backhaul option may imply the "reasonableness" of such systems.

My proposal to remedy the delivered pricing-backhaul problem is similar to 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)

This simple proposal 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 proposal is fair and equitable to all sellers and purchasers, whether they are large or small. It is in harmony with the Robinson-Patman Act. Tremendous energy savings might be realized across many 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 to the benefit of the American consumer.

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.

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

[These remarks represent only the view of a member of the Federal Trade Commission staff. They are not intended to be construed as representative of an official Commission policy.]

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 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 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 corresdondence 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.

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[1] The proposed amendment adds a new paragraph (d) to Section 38 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.

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 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 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 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 Robinson-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.

[The following information was subsequently received for the record.]

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
October 18, 1978.

Hon. MICHAEL PERTSCHUK,
Chairman, Federal Trade Commission, Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for appearing as a witness at the Senate Commerce Committee's hearing on backhaul allowances and presenting the comments of the Federal Trade Commission on S. 1699, the Diesel Fuel and Gasoline Conservation Act of 1978. I appreciate the time and effort you and your staff put into preparing for the hearing, and I found your comments, and the comments of your staff, to be most helpful in analyzing the complex issues surrounding this legislation.

Because of the time constraints placed upon the Committee at the time of the hearing, it was impossible to fully pursue with the witnesses all of their comments on S. 1699. As a follow-up to the hearing, the Committee would appreciate your answers, and any additional comments you may wish to make, to the following questions.

Question 1. In 1973, the Commission said it intended to scrutinize delivered pricing systems in the food products industry to determine whether they are unfair and thus violate Section 5 of the FTC Act. Was that study ever conducted, and if so, what was the outcome? Does the Commission currently have any investigations of delivered pricing systems underway? Does the Commission have any plans for a Trade Regulation Rule relating to delivered pricing or backhaul allowances?

Question 2. Could you explain the difference between a zone delivered price and a *uniform* zone delivered price? Why would a seller opt for one pricing system over the other? Which one represents the more prevalent pricing practice in the food indusrty?

Question 3. Could you explain the details of pricing zones? In particular, how are zones established? Do sellers often change the size or shape of the zone to meet competition? Would two different sellers located in the same region, selling similar products, have identical zone sizes and shapes? Ahe there any FTC rules governing the establishment and operation of pricing zones?

Question 4. Could you explain how a uniform zone delivered price is computed? Is it correct to assume that a seller will average all of his freight costs within the zone to arrive at a "uniform" price? Is there a cross subsidization between "in-close" buyers and "far-out" buyers? Do some sellers set the "freight factor" substantially above the average freight costs of the zone (presumably to cover actual freight costs to all buyers)? Does the Commission have any evidence that the "freight factor" does not exceed actual cost of delivery to the most remote customer in the food industry? If this is the case, what effect does this have on the Commission's "apples from apples"—"oranges from oranges" analysis of S. 1699?

Question 5. In previous staff testimony, the statement was made that "The Robinson-Patman Act is not the culprit in the backhaul question." Who or what, then, is the culprit, and what can be done to remedy the situation?

Question 6. Does the FTC agree with former FTC Executive Director Basil Mezines' testimony before the House Small Business Committee that advisory opinions have been misused by sellers who do not want to disturb their zone pricing systems?

Question 7. Mr. Dougherty made reference to a study by the National Commission on Productivity as to the use of backhaul allowances as a result of FTC advisory opinions. Could you elaborate on Mr. Dougherty's statement and the findings of the Commission?

Question 8. Under current law, a seller has two options: (a) grant no backhaul allowance; or (b) grant identical allowances to all comers. Under S. 1699, a third option is being proposed—granting differential allowances up to 100

percent of actual savings on a nondiscriminatory basis. If S. 1699 is enacted, what would happen to option 2? Would a seller have 3 options for setting his dock prices, or would this bill have the effect of requiring any seller who wishes to grant allowances to discriminate among his customers?

Your answers to these questions, as well as any additional comments you may wish to make, will be made part of the official hearing record on S. 1699. if you or your staff have any inquiries concerning these questions, please feel free to contact Tim Lynch of the Commerce Committee staff at 224–9325. I look forward to receiving your comments.

Sincerely yours,

HOWARD W. CANNON, *Chairman.*

FEDERAL TRADE COMMISSION,
Washington, D.C., November 22, 1978.

Hon. HOWARD W. CANNON,
Chairman, U.S. Senate, Committee on Commerce, Science, and Transportation, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of October 18, 1978, in which you ask some specific questions as a follow-up to my testimony of September 14, 1978. In formulating my answers, I have relied on both our Bureaus of Economics and Competition for substantive material.

1. The proposed 1973 study was not undertaken. Instead, as part of a Bureau of Competition investigation of the retail food industry, backhaul related questions were included in a FTC Act Section 6(b) survey questionnaire form sent to major food chains. The answers received were not useful, really, and provided no empirical data on backhauling in the food industry. Currently the Commission has at least one delivered pricing investigation in progress. This is an examination of delivered pricing in the Portland cement industry and is oriented toward the possible promulgation of a Trade Regulation Rule in that industry. At the present time there is no proposed Trade Regulation Rule involving backhaul allowances.

Answer 2. As used in my testimony, a uniform delivered price is the same as a zone delivered price (uniform zone delivered price is also the same as zone delivered price). According to our Bureau of Economics, in the economics literature the major distinction between zone delivered price and uniform delivered price is that uniform delivered price is used when only one zone exists.

Answer 3. The freight charges utilized in delivered price quotations (whether point-to-point, zone or uniform) generally are those set by the ICC for whichever transportation mode is most frequently used to ship the product. In general, it is the belief of the Bureau of Economics that the choice of zone size and shape is, within bounds, somewhat arbitrary. As to the sellers frequently changing the size and shape of zones, the Bureau doubts that they have much discretion in this aspect of pricing. Where sellers engage in the "meeting competition" practice it is generally carried out by reducing either the delivered price or the f.o.b. price—not by modifying the size or shape of the freight zone.

It must be noted that in some instances where it was found that delivered price quoting was used as part of a collusive arrangement, the freight rates used in computing the delivered prices came from industry trade associations. These "freight rates" were published and distributed to all concerned with the objective of reducing the scope of error in price quoting (thus reducing the probability of accidentally destroying the stability of the collusion). In some instances the "freight rates" which were published originally coincided with the relevant ICC tariff. However, over time it sometimes happened that ICC tariff changes were not incorporated into the "freight rate" books. Hence, to that extent the industry had some discretion over the shape, size and "freight rate" in particular zones.

There is one further aspect to this. When a product is almost exclusively shipped by ICC-exempt transportation it is possible that the producers (sellers) have some discretion over the size and shape of the zones. The Bureau of Economics is not aware of this occurring in any particular industry and does not expect that the practice is either widespread or important.

In response to the question regarding different sellers encountering different sizes and shapes of zones for a given buyer, the Bureau of Economics believes that it is very unlikely to happen in practice. There may be some circumstances, for example the case of two sellers being in widely different zones of origin,

where the ICC sets up two different sets of transportation zones (one for each zone of origin). If this occurs, then it is likely that the buyer may reside in overlapping transportation zones where each is of a different size or shape. Beyond the advisory opinions dealing with backhaul allowances, there are no FTC rules regarding the establishment or operation of pricing zones.

Answer 4. Answering the various component parts of this question requires a great deal of institutional knowledge of each food industry. The Commission has not undertaken study of these industries' pricing systems, and therefore, lacks information necessary to a precise answer to the question. There are, however, some very general comments which can be related regarding the computation of freight areas in a uniform delivered pricing format. First, if the industry under consideration is competitive it is likely that each producer will compute the freight charge so as to balance the overcharges to customers closer to the shipping point against subsidies to producers located further away.

But, if the industry is not exhibiting competitive behavior the analysis becomes somewhat more complex. It is possible that the freight charge will be set above the average of all the freight charges in the zone. It would seem unlikely, absent monopoly power over the market resulting from control by a very few producers or price conspiracy, that in any uniform delivered price system the price could be so inflated that the ostensible "freight factor" would exceed the actual cost of delivery to the most remote customer. The FTC, as noted, has not undertaken any study of the actual conditions prevailing in the food industries, and so we are limited in the information we can contribute in answer to your questions.

Answer 5. As I understand the thrust of the staff's testimony, it was the view both of Competition bureau director Al Dougherty and his predecessor Owen Johnson, that the "culprit" in the backhaul problem was the unwillingness of manufacturers to provide purchasers with genuine alternatives to uniform delivered prices.

Answer 6. I have not read Mr. Mezines' testimony, but I do believe that some sellers may have been using alleged ambiguities in FTC Advisory Opinions to justify their refusal to offer non-discriminatory alternatives to delivered prices. As I have testified, I don't think there is any real ambiguity in those Advisory Opinions. There is no impediment in existing law to backhaul allowances. Sellers are merely refusing to grant them.

Answer 7. I believe Mr. Dougherty's reference was to testimony before the House Small Business Committee's Subcommittee on Antitrust, Consumers, and Employment by the Small Business Administration. In that testimony reference is made to a National Commission on Productivity and Work Quality report, *Backhaul in Food Distribution*. According to SBA, that report was based on a survey of manufacturers that showed almost 75 percent of the manufacturers responding offered backhaul services.

Answer 8. I disagree that under current law there are only two options open to sellers. There are many options. A true f.o.b. price at the loading dock—one that reflects no freight charges whatsoever—is particularly significant example. S. 1699 compels a pattern of price discrimination. Under the bill the close-in buyer exercising an f.o.b. option continues to pay "phantom freight," which is paid over as subsidy to more distant buyers in the form of backhaul allowances to them when they exercise their f.o.b. option. The result is a price discrimination of the very type that the Robinson-Patman Act proscribes.

I hope that the above responses are satisfactory, and please let me know if I can be of further assistance to you or the Committee.

Very truly yours,

MICHAEL PERTSCHUK, *Chairman.*

Next, we will have a panel: Mr. Robert O. Aders, president, Food Marketing Institute; Mr. Frank Register, president, National Association of Retail Grocers of the United States; and Mr. Gerald Peck, president, National American Wholesale Grocers Association.

All right, gentlemen, who's the leadoff man?

STATEMENT OF GERALD PECK, PRESIDENT, NATIONAL AMERICAN WHOLESALE GROCERS ASSOCIATION

Mr. PECK. If I may, Senator, my name is Gerry Peck. I represent the National American Wholesale Grocers Association.

Our members are wholesale grocery distributors. They service grocery retailers of all sizes and all types. They also service hospitals, schools, restaurants, and other types of food service outlets.

The trucks of our members deliver nearly one-third of all the distribution center supplied goods to all of these different types of consumer retail outlets. Half of our members, half of these wholesalers, are small wholesalers by Small Business Administration definition. By industry definition, the number is closer to 75 percent.

The customers of these wholesalers are also primarily small, independent operators.

The economic function that these wholesale grocery distributors serve is to buy large quantities of each of 8,000 to 12,000 items from sources across the Nation and then reassemble these items into the quantity and the assortment that the individual retailers want, and deliver to those retailers at the time they need it and at the place they need it. And they accomplish this at a very dramatically lower cost than the direct delivery from a manufacturer to that retailer.

As an association, we have always supported Robinson-Patman, and if we had to make a decision this morning on whether to support S. 1699 or to stay with our support of Robinson-Patman, we would stay with Robinson-Patman without question or without hesitation.

However, our attorneys have been involved in this question for many, many years and we are assured that there is no conflict and therefore we are here——

The CHAIRMAN. That's the point that I'd like to hear emphasized because it seems to me, frankly, having listened to the previous witnesses, that there may be a conflict and I'd like to hear your rationale as to how there is no conflict.

Mr. PECK. Well, if I may, sir, comment on Mr. Pertschuk's testimony on this point, it seemed to revolve around discrimination of prices at the dock or different prices at the dock for different customers who were competing with each other. There was no mention, however, that the delivered price is simply a combination of the price of goods and the price of delivery, two separate services. The Robinson-Patman Act as it applies to f.o.b. which has been cleared always and was cleared again this morning as a completely justifiable basis for customer pickup or backhaul, simply concerns itself with the price of goods at the seller's dock and leaves each buyer to their own devices for delivery. Each buyer pays the delivery cost, whether it's near or far. The more remote buyer pays a higher price for delivery because the merchandise is hauled further.

We think it's very important that the f.o.b. system of selling is completely clear of any discrimination charge because that indeed does require that each buyer pays a different price for delivery and that price for delivery——

The CHAIRMAN. It does—yes, that's right—because the close-in buyer—it's going to cost him less to have delivery than the distant buyer, and this, according to Mr. Pertschuk, creates no problem with them and apparently it creates no problem with you.

Mr. PECK. None, whatever.

The CHAIRMAN. In other words, if you had an f.o.b. pricing system where the price is the same to everybody, that would satisfy your organization?

Mr. PECK. Absolutely.

The CHAIRMAN. And you simply buy at those prices but you may, because of your distant delivery process, find that you're having to sell at a higher price to one retailer than another simply because your freight is higher to that retailer; is that correct?

Mr. PECK. That's true, but I was referring to the zone of the grocery wholesaler rather than the zone of the seller or the grocery manufacturer, and one thing I think we must keep clear in this discussion is that the zone—and I believe this was one of the Senator's questions—the zone of a grocery supplier-grocery manufacturer may be half the Nation, but the zone of a grocery distributor is limited to the reach of his trucks on a daily delivery which is normally a 150-mile radius. So the competition between buyers in this instance is limited to that buyer's zone of 150 to possibly 300-mile radius where the highway system permits. It is certainly not incorporated within the zone of the seller, the manufacturer, which is, as we say, could be half the Nation. It might be several States.

The Senator did question also how much backhaul was taking place today as a result of current interpretations. We have tracked that and currently about 15 percent of the merchandise that's brought into our distribution centers is brought in on our own vehicle. That has increased over the last 10 years by only 3 percent with a tremendous effort by the industry to increase it because it does lower the cost of food distribution.

I think it's very pertinent to know also that during that same—well, during a more extended period of time, the merchandise brought into our warehouses by the common carriers, the truckers, has increased from 30 percent to 63 percent. It has much more than doubled.

So we can say that there is no threat to the common carrier industry by S. 1699. The amount of haulage covered by S. 1699 is very small in their terms. Their share of our market has increased pretty much at the expense of the railroads and we are not familiar with any effort to legislate against trucking to help the railroads. So we don't feel that the efforts to slow or to inhibit passage of S. 1699 to favor the trucking industry is in order. It's a simple competitive system.

The CHAIRMAN. Well, now, tell me how your organization works now in its purchase and resale. What are you paying at the sellers' dock now?

Mr. PECK. At the seller's dock, we pay exactly the same price that the chains pay, that large and small buyers pay. There are some Robinson-Patman differences, cost-justified differences, based on quantities which in theory at least—and we think pretty much in reality—reflect the cost of handling of those products.

The CHAIRMAN. But do most of the sellers now that you pick up from, are they selling f.o.b.? Are they selling at the same price to everybody at the dock or are they selling a uniform pricing system to some?

Mr. PECK. Forty-six percent of the tonnage that we buy comes from sellers who sell straight f.o.b., no option. The other 54 percent comes from sellers who sell on a delivered price. I think it's also significant

that even though 46 percent of the product that we buy is currently available with no question whatever on a customer pickup or backhaul basis, we are only able to utilize 10 or 12 percent of that as a portion of our total backhaul.

The CHAIRMAN. Why is that?

Mr. PECK. The reason is, we have to have an economic justification for every individual customer pickup. There's nothing that automatically says a customer pickup is justified just because it's there. There are costs involved in making a customer pickup and we have to calculate those costs and that requires us to forgo much of the backhaul opportunity that is available now.

If I may, Senator, there were other questions asked of Mr. Pertschuk. One was relative to the proximity of large or small buyers to sellers and we would submit that the large chains are primarily concentrated in the high-population areas in what we call the terminal markets, and this is the logical place for a seller to locate a distribution center to reduce their own distribution costs, and therefore we would suggest that rather than the large food chains being further from the seller; they really are closer.

It's our members, the small country wholesalers, who are further from the terminal markets, who are the remote buyers.

The CHAIRMAN. Well, point out for me, then, now what it is that you can't do now that you would be able to do if this bill were passed. Just give me a precise example.

Mr. PECK. Primarily, what we would hope from passage of this bill is that a greater number of manufacturers would make the customer pickup option available. We are not concerned today with any problems of discrimination. None of our people, large or small, feel that this bill would create any competitive problems for them. But we simply do not have access to as much customer pickup as we think would be optimum.

The CHAIRMAN. So you're saying if everybody used the f.o.b. with customer pickup or f.o.b. with the carrier delivery, you would have no problems?

Mr. PECK. Exactly—precisely. It would give us a greater option simply to save money in the food distribution system.

The CHAIRMAN. Have you gotten resistance from that 56 percent that you say won't deal that way? They are in the business of delivering, too.

Mr. PECK. Well, sir, out of that 56 percent who are delivered price sellers, there are many who have interpreted the Robinson-Patman regulations and the FTC advisory opinions as clearing backhaul, and there are sellers, manufacturers, who permit backhaul even though they are on a delivered price basis, and this practice has never been challenged by FTC. It's worked very well.

The CHAIRMAN. But they grant you the allowance. What allowance do they grant you? The average delivery allowance—is that what they are allowing you?

Mr. PECK. That I can't answer precisely, but I can say that in general the allowance granted by a manufacturer is less than the actual cost and S. 1699 requires only that the allowance not be greater than the actual cost. It doesn't specify that it should be actual cost. And we are able to haul the merchandise and justify the cost of doing so at

usually less than the actual cost, which may be the carrier cost of moving that same merchandise. That's simply because our truck is already there and it's empty.

The CHAIRMAN. You heard a flat-out statement now this morning as to what the Commission's position is. Do you think that clarifies the air at all?

Mr. PECK. I think the Commission's position has still not addressed the question of whether we are talking about price discrimination in the price of goods purchased, which is the case in f.o.b., or are we talking about price discrimination in the cost of delivery, which is the case in the delivered price system. Our position is still that the price of goods must be the same to all buyers.

In fact, I believe that during one of the hearings on this topic the suggestion was made that a statement be incorporated in the bill that the price of the goods must be the same to all buyers, regardless of any other factors, and we agreed totally to that concept.

The CHAIRMAN. Then you're saying that what you want is an average pricing system. If you want the price of goods the same to all buyers, you're saying that the fellow who is 150 miles from the seller of the goods is going to pay the same price as the guy who's 5 miles from the goods.

Mr. PECK. If it's the delivered price system, that's not true, sir, because it includes the price of delivery. It's only at the seller's dock that the equity can even be measured in the price of goods. And as soon as you start adding in the cost of delivery and start trying to measure the equity of delivery costs you get into problems. And our contention is that if we should consider that it is the price of goods at the seller's dock that must be equitable to all customers. The price of delivery of those goods is already considered to be equitable under an f.o.b. pricing system, in which delivery cost is totally different to all customers, competing or not competing. And we see no difference between that and customer pickup under the delivered price system.

We've lived with it and we find that there are many compensating factors. The distant hauler is much less likely to be in the vicinity to make a pickup than the close-in buyer, and therefore will not have the opportunity to benefit from a customer pickup as frequently. The short-haul buyer has an advantage on an actual cost basis because short-haul rates are universally higher than long-haul rates.

The CHAIRMAN. Well, would you agree that if your system were followed, that a distant buyer is going to have to pay more than a close-in buyer?

Mr. PECK. Under the f.o.b. system he does.

The CHAIRMAN. And you see no problem with that?

Mr. PECK. No problem whatever.

The CHAIRMAN. There's no discriminatory pricing because the price is at the seller's dock, and the discrimination, if any, comes in in the cost of delivery. And the only discrimination, I guess, is brought about by reason of location, reason of distance, rather than any other factor.

Mr. PECK. Precisely.

The CHAIRMAN. Do you have anything else to add to your statement here?

Mr. PECK. Well, I would like to emphasize, because Mr. Pertschuk made the comment that the proponents of S. 1699 are not supporters

of Robinson-Patman, that we stand and always have and will continue to stand for Robinson-Patman, even if it means losing the backhaul privileges We find, however, that there is no threat to small operators that we represent, that we have the same competitive opportunity under S. 1699 as every other buyer, large or small, close or distant.

[The statement follows:]

STATEMENT OF GERALD E. PECK, IN BEHALF OF NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION

I am Jerry Peck. I represent the National-American Wholesale Grocers' Association, known as NAWGA. Members of NAWGA are wholesale grocery distributors serving small and large grocery retailers and schools, hospitals, restaurants and other such foodservice outlets. Trucks operated by our members deliver one-third of all distribution center supplied goods to those consumer outlets. Half of our members are small by Small Business Administration standards. The customers to whom our members distribute grocery products are also primarily small, independent operations.

Our economic function is to purchase volume quantities of 8,000 to 12,000 grocery items from manufacturers across the nation and assemble them for one stop local delivery to retail outlets in the specific quantity and assortment they need at their specific time of need at dramatically lower cost than direct delivery from manufacturers. We are also responsible for sanitation, safety and quality control.

We have historically and consistently supported the Robinson-Patman Act. It is more precious to us than backhaul, but we find no conflict. We also support Senate Bill S. 1699, the Diesel Fuel and Conservation Act of 1977, commonly referred to as the "Backhaul Bill", because:

1. It is compatible with the Robinson-Patman Act.
2. It will save Diesel Fuel and Gasoline.
3. It will promote competition.
4. It will reduce grocery costs to consumers.
5. It is no threat to contract or common carrier truckers.
6. It helps small operators as well as large.
7. It will reduce truck and highway wear and maintenance.
8. It will improve grocery distributor productivity.

These reasons for supporting S. 1699 are discussed below. NAWGA testimony and written comments to the Senate Committee on Energy and Natural Resources and to the Subcommittee on Antitrust, Consumers and Employment of the House Committee on Small Business are part of the record. We will gladly provide any additional data or clarification needed.

ITEM 1—S. 1699 IS COMPATIBLE WITH THE ROBINSON-PATMAN ACT

The Robinson-Patman question about customer pickup (backhaul) in the Uniform Zone Delivered Price System is how to measure its impact on equity and competition. The Delivered Price system simply combines the price for goods and the price for delivery. These two components can be considered separately for a perspective on what they mean in combination.

Equity in the price of goods means the same price to all buyers with only Robinson-Patman permitted differences. This equity is measured traditionally at the seller's shipping dock. It applies whatever the system of pricing goods and whatever the means of delivery.

Delivery can be made by any of three alternatives—contract carrier, seller vehicle or customer pickup (backhaul). No question of equity arises with any of these means of delivery when the purchase is FOB. Freight on Board the delivery vehicle at the seller's dock. More remote buyers simply pay the additional cost of their longer delivery.

No question of equity arises when contract carrier or seller vehicles are used to make deliveries in connection with a Uniform Zone Delivered Price purchase. In this pricing system each buyer pays the full price for goods and an additional price for delivery which is the average of the delivery cost to all customers in the zone. The measurement of equity is simply moved from the seller's dock to the buyer's dock.

The question of equity arises only when the customer pickup alternative is utilized for delivery in connection with a Uniform Zone Delivered Price purchase. Since the delivery cost is prepaid by buyers, many sellers pay a fee to buyers who provide their own delivery service. The practice has never been challenged by FTC. Nevertheless other sellers are concerned about FTC Advisory Opinion 147 which suggested that the possibility of a Robinson-Patman violation exists. The most recent FTC clarification indicates that payments to buyers for customer pickup of an amount up to the actual cost to deliver to the nearest buyer in the zone will not be questioned. This effectively eliminates customer pickup (backhaul) since it penalizes all customers except the one nearest the seller's shipping dock.

S. 1699 simply allows the seller to pay a delivery fee for customer pickup of an amount up to but not greater than the seller's actual cost for making that same delivery. S. 1699 further requires that the fee be available to all customers on the same basis.

In summary, the six combinations of pricing and delivery systems are: (1) FOB with contract carrier delivery, (2) FOB with seller delivery, (3) FOB with customer pickup, (4) Uniform Zone Delivered Price with contract carrier delivery, (5) Uniform Zone Delivered Price with seller delivery, and (6) Uniform Zone Delivered Price with customer pickup.

What is different about a customer pickup in a Uniform Zone Delivered Price purchase that it should raise equity questions when the other five combinations of pricing systems and delivery systems are clear of such questions? The physical handling and movement of goods and price of goods is the same in all six alternatives. The difference was explained by Mr. Owen Johnson of FTC to be a "variance in the pickup or FOB price" for different customer because the "distant buyer could deduct more from the uniform delivered price than his competitor, a close-in buyer." This, he said, "may violate the Robinson-Patman Act."

The key is that FTC apparently considers that customer pickup changes the pricing system consideration from Uniform Zone Delivered to FOB. In either case when the pricing system reverts to FOB, the point of equity measurement reverts to the seller's dock and the equity measurement itself applies only to goods, not to delivery. This is consistent with FTC statements that any seller can permit customer pickup simply by offering an FOB pricing option.

Clarifying one misconception in the quoted explanation of Mr. Johnson resolves the question of compatability of S. 1699 with the Robinson-Patman Act. Buyers do not, as might be inferred, deduct a fee for customer pickup from the price of goods. In the delivered price system, buyers pay the full price for goods and an additional price for delivery. In a customer pickup the seller pays the buyer for delivery service just as payment would be made to some other carrier for the same delivery service. The payment is usually considerably less to buyers than to contract carriers. The buyer who picks up (backhauls) gains, and legitimately earns, a competitive advantage whether remote from or closein to the seller's dock.

If the objective is to promote competition, then the customer pickup system which is available to all customers on the same basis and which lowers costs of delivery is a totally positive affirmation of Robinson-Patman. Customer pickup is supported by all wholesalers large or small, close to or remote from sellers. There is no fear of being discriminated against in this open competitive situation available to all customers on the same basis.

There is, incidentally, demonstrable cost justification and competitive equity for the remote buyer to receive more actual dollars for customer pickup than the close-in buyer. The goods must be hauled further meaning more costs are incurred. The remote buyer is much less likely to be near the seller's dock after making a delivery meaning less pickup opportunity. Short haul rates are higher than long haul rates giving the remote buyer proportionately less on a ton-mile basis. The marketing area of buyers are much smaller than marketing areas of sellers. Thus not all the buyers of one seller are competitive with each other. The competitive reach of grocery distributors is limited by their own cost of delivery to their own customers, not by the boundaries of the seller's zone.

ITEM 2—S. 1699 WILL EFFECT DIESEL FUEL AND GASOLINE SAVINGS

When one truck trip replaces two truck trips, there is a savings. The aggregate savings potentially available from customer pickup by grocery distributors alone has been projected to be over $300 million annually. Just a part of that amount would be a major contribution to our energy problem and to consumer food costs.

ITEM 3—S. 1699 WILL PROMOTE COMPETITION

When one seller provides a means of reducing cost through customer pickup credit, competitive pressure will force other sellers to do the same. When one buyer saves via customer pickup, competing buyers in the same zone will be forced to follow suit. This follows because the first buyer, a grocery wholesaler, will be positioned to reduce prices to grocery retailers and foodservice outlets. Other retailers will demand competitive prices from their own wholesaler.

ITEM 4—S. 1699 WILL REDUCE GROCERY COSTS TO CONSUMERS

It is standard accounting procedure for wholesalers to credit "backhaul income" directly againstt customer "delivery cost" making that cost "net of income." This is an immediate pass through of savings to retailers and foodservice outlets. Those retailers will use the leverage to lower consumer prices to attract customers. They are under competitive pressure to do so in our price oriented marketing system.

ITEM 5—S. 1699 IS NO THREAT TO THE TRUCKING INDUSTRY

Carriers enjoyed an increase from 30 percent to 63 percent of the inbound tonnage delivered to grocery wholesalers from 1948 to 1978. During this same time, tonnage received by grocery wholesalers via customer pickup (backhaul) also increased but to a comparatively miniscule extent. In the last ten years, the increase was from 12 percent to 15 percent.

All of this carrier growth was at the expense of the railroads. The growth was earned by competing with a combination of service and price. We are aware of no attempts to make trucking illegal while the truckers took away half of the railroad's grocery business. It is inconceivable that S. 1699 should be opposed to protect truckers from legitimate competition that can hardly slow their growth rate, let alone take any business away.

ITEM 6—S. 1699 HELPS SMALL OPERATORS AS WELL AS LARGE

There are 150,000 small independent retail grocery stores and 19,000 large chain stores. There are more trucks on the road, more deliveries each week serving small, independent large chains. Large grocery chains operate 304 distribution centers. Small chains and grocery wholesalers operate 2,174 distribution centers. Since each distribution center has a truck fleet on the road, the small operators have a higher probability of being near a vendor shipping point when returning from a delivery.

On the foodservice side (schools, hospitals, restaurants, etc.) 99 percent of the 550,000 consumer outlets rely on wholesalers for some supplies. 85 percent of those wholesalers are small by Small Business Administration standards. A diagram of the Grocery Distribution System is attached as an addendum to illustrate the movement of product from grocery manufacturers through distribution centers operated by wholesalers or chains to retail grocery stores of all types and sizes. A second diagram illustrates the competitive structure and numbers of outlets. These diagrams follow immediately after Page 7.

ITEM 7—S. 1699 WILL REDUCE TRUCK AND HIGHWAY MAINTENANCE

When one truck trip can do what formerly required two truck trips, there will be fewer trucks on the road. That means less traffic congestion, less accident potential, less wear on vehicle and roadway, less police surveillance, less noise, less pollution and less taxpayer cost.

ITEM 8—S. 1699 WILL IMPROVE GROCERY DISTRIBUTOR PRODUCTIVITY

The load picked up in the distributor's truck can be unloaded on the distributors, not the carriers, schedule and used to balance the workload for both people and equipment. There is no ICC truck detention penalty for the distributors own trucks.

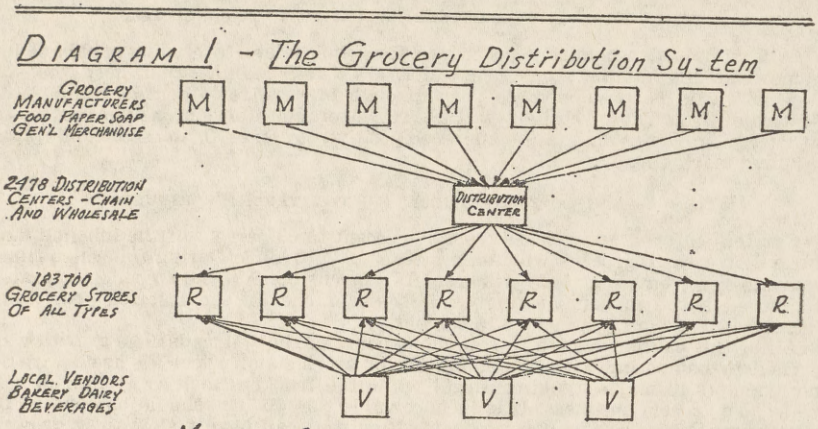
The load picked up in the distributor's truck can be timed to the day and hour that inventory replacement is needed, eliminating excess investment in inventory required by early deliveries and lost sales from late deliveries.

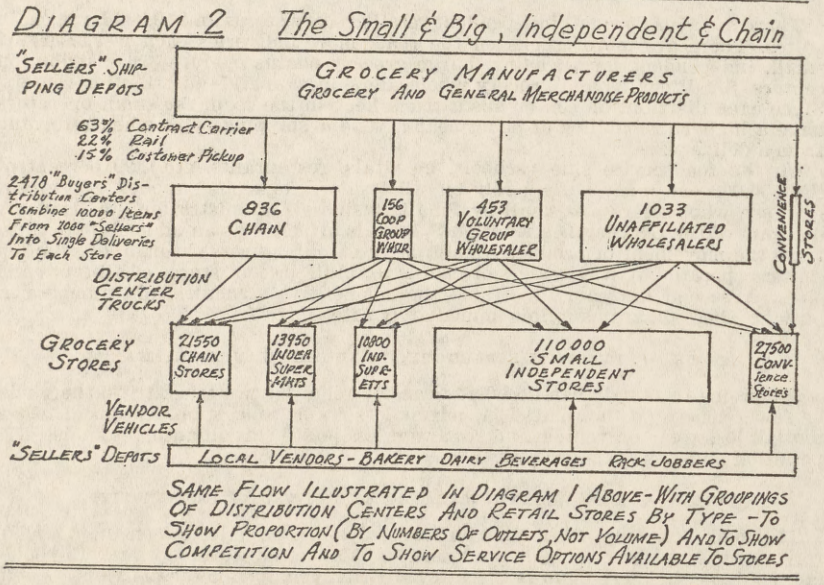
The load picked up in the distributor's truck gives the distributor earlier responsibility for the quality and safety protection of the product and earlier control of damage to the product.

The distributors truck fleet productivity improves when the percent of travel with a load increases. The nation's productivity improves when one truck trip replaces two truck trips.

We are committed to a vigorously competitive grocery distribution system. We support more intense Robinson-Patman enforcement. It is our conviction that S. 1699 will benefit consumers, save energy and increase productivity.

Thank you.





JERRY PECK NAWGA 9/13/77

The CHAIRMAN. All right. Who would like to speak next?

STATEMENT OF FRANK D. REGISTER, PRESIDENT, NATIONAL ASSOCIATION OF RETAIL GROCERS OF THE UNITED STATES; ACCOMPANIED BY HENRY BISON, JR., GENERAL COUNSEL

Mr. REGISTER. Mr. Chairman, my name is Frank D. Register, president of the National Association of Retail Grocers of the United States, with headquarters offices at Reston International Center, Reston, Va. With your permission, I'm accompanied by counsel, Henry Bison, Jr. I'll submit a written statement and read from it.

The association has more than 40,000 members in the United States. Its governing board is composed entirely of independent grocery store operators from 16 States. NARGUS members operate small stores and supermarkets.

NARGUS supports and recommends approval of S. 1699. The membership of the association took affirmative action on the measure at its 1977 convention. NARGUS believes and asserts that backhaul allowances sanctioned by S. 1699 will result in savings of fuel. The measure would assist retail grocers to acquire their merchandise at a lower cost by reducing waste, improve utilization of equipment and labor, and reduce out of stock conditions.

Independent retailers buying their merchandise through retailer-owned cooperatives or voluntary group wholesalers will have as much an opportunity to benefit from backhaul allowances as do direct-buying corporate chains.

The Robinson-Patman Act, which the association has consistently supported, will not be harmed or injured by passage of S. 1699.

NARGUS has carefully considered the terms and effects of S. 1699. It believes the proposed legislation will foster productivity gains in grocery distribution, and merits favorable consideration by the committee.

Beginning in 1967 and continuing up until 1975, the FTC issued a series of backhaul advisory opinion statements. The Commission seemed to have said, according to the interpretation of some, that regardless of how far buyers actually backhaul their merchandise, any backhaul allowance granted by manufacturers must be the same for every buyer.

The CHAIRMAN. Well, I think that if you heard the testimony this morning, I think that's only in the case when it's the average pricing system that's used, delivered pricing system, would you agree with that?

Mr. REGISTER. Could I ask counsel to comment?

The CHAIRMAN. Surely.

Mr. BISON. Yes; that's correct. Where the zone delivered pricing system is used. The bill itself applies only where the zone delivered pricing system is used.

Mr. REGISTER. If sellers using a uniform delivered pricing system may grant a backhaul allowance only if it is uniform for all buyers, an incentive is denied many buyers to backhaul their merchandise. For, as Senate Energy Committee Report 95–674 concludes, the problem with the FTC interpretation is that under its stricture sellers offering a backhauling allowance typically limit it to their cost of de-

livery to their nearest customer in the zone. For more distant customers, a uniform allowance is frequently less than an adequate reward for backhauling their merchandise.

The overall result is, according to the committee's report,

> That the latest FTC interpretation of the permissible backhaul allowance under section 2(a) of the Robinson-Patman Act in a uniform zone delivered pricing system appears to be a major obstruction to larger backhaul allowances, and thus a greater incidence of backhauling.

Legislation is needed to clarify the right of a seller under a uniform delivered pricing system to grant a backhaul allowance commensurate with the seller's savings in delivery cost when the buyer performs the backhauling function. S. 1699 provides that the backhaul allowance must not exceed "the actual savings in delivery cost to the seller." Of course, under S. 1699 the seller has the option of selling only on a delivered price basis. The bill does not require a seller to offer a backhaul allowance if he chooses not to do so. The legislation merely grants the seller the opportunity to offer backhaul allowances on realistic terms both parties may regard as reasonable.

The CHAIRMAN. Would you agree that if this legislation were passed, as the Chairman of the FTC says, that this would, in effect, be an exemption from Robinson-Patman?

Mr. REGISTER. No, sir; we would not agree with that. We do not agree with Mr. Pertschuk on the Robinson-Patman Act. We don't feel that as the bill is written there is a conflict with Robinson-Patman. NARGUS has long held the view that strong antitrust laws are needed to protect the competitive system against oppressive price discrimination. Behind the 1936 amendments to the Clayton Act was an overriding fear that powerful enterprises were free to exert their superior strength in a way as to harm small business.

The objective of the Robinson-Patman Act was, in the words of its framers, "to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them."

I assure you that if there were any possibility that the passage of S. 1699 would weaken the Robinson-Patman Act prohibitions against harmful price discriminations, NARGUS would oppose this legislation. Our own analysis and our counsel's independent judgment assure us that S. 1699 holds no harm for the Robinson-Patman Act or for independent retailers. The bill's provisions comply with well-recognized principles of the Robinson-Patman Act. S. 1699 adheres to the basic concept of nondiscrimination, and requires that the backhaul allowance system be cost-justified.

There is no basis for contending that S. 1699 would undermine or weaken the Robinson-Patman Act. A major consideration in judging the merits of S. 1699 is the extent that it serves the public interest, which in this interest relates to whether the legislation will benefit consumers. The question arises, Is backhauling by buyers, whether performed by wholesalers or by direct-buying retailers, will produce economies in retail food and grocery distribution. It does this by helping to reduce waste and inefficiency, and by stimulating a higher rate of productivity.

S. 1699 merits favorable action by the committee, first, because it will reduce waste of fuel and help to ease the pressure on rising food

and grocery prices. At a time when inflation is a national concern, it is appropriate that Congress respond to Government regulations which stifle better utilization of capital and labor.

More effective use of trucks through backhauling will benefit consumers. Vigorous competition among food and grocery wholesalers provides assurance that the legislation will benefit the public.

Second, S. 1699 poses no threat to either small buyers or to retailers purchasing through wholesalers. Business size and method of purchasing are not material factors in classifying the beneficiaries of this legislation. The advantages of backhauling are not limited to a few buyers or to any class of buyers. The bill is permissive, not mandatory, for the seller and buyer. If backhauling is not rewarding, either party may decline to participate.

Third, S. 1699 will not weaken the Robinson-Patman Act, nor will it allow harmful price discriminations. The bill is carefully drafted to preserve the essential provisions of the law against discriminatory price practices.

Fourth, the measure is needed to clarify the law so sellers and buyers will have freedom to participate in backhauling if it is their desire to do so. The purpose of S. 1699 is to remove legal uncertainty over the right of the manufacturer selling under a uniform zone delivered pricing system to grant a backhaul allowance to a buyer who, either through use of his own transportation equipment or that of an authorized carrier, actually performs the backhauling function. S. 1699 is needed to remove fears that a seller, by offering a uniform zone delivered price and a backhaul allowance reflecting his actual savings in the cost of delivery when a purchaser backhauls his own merchandise, may violate the Robinson-Patman Act.

The FTC has advised that sellers using a uniform zone delivered pricing system may not sell on an f.o.b. basis unless such a price is uniform for all buyers. Price uniformity is not required under the Robinson-Patman Act. And, economic realities considered, imposing such an unnecessary requirement severely limits the range of backhauling a buyer may engage in. The result is a serious impediment to backhauling, which the proposed legislation would remove.

Thank you.

The CHAIRMAN. You made a couple of statements there that give me a little problem. You say S. 1699 is needed to remove fears that a seller, by offering the uniform zone delivered price and the backhaul allowance reflecting his actual savings in the cost of delivery when the purchaser backhauls his own merchandise may violate the Robinson-Patman Act.

Now, as a matter of fact, we heard testimony that it wouldn't violate it on that basis from the FTC this morning. If the uniform zone delivered pricing is used and then you go to the actual cost of delivery, you may be having the distant buyer get an advantage simply because he gets more of a rebate on his backhaul than the average cost of the delivery which is factored into the uniform price.

Mr. REGISTER. Counsel may want to comment on that. I believe the legislation provides that it cannot exceed the cost of the delivery; the allowance.

Mr. BISON. Senator, the proposition here is that the Robinson-Patman Act allows the seller to grant an allowance based on cost sav-

ings. This has been in the act since it was passed in 1936. So that if a seller can sell to a buyer and do so at cost savings of either manufacture, sale, or delivery, he's allowed to give an allowance to that buyer. And that's to preserve, for the benefit of consumers and for the benefit of the economy generally, a cost savings system, so that prices will be decreased as efficiency increases and as productivity increases.

It is certainly not the intent of the Robinson-Patman Act that every seller sell at uniform prices to all buyers. The act has never required uniform prices to all buyers. There's always been provision in the act itself that allows the seller to sell at different prices to different buyers, providing it can justify those prices.

The CHAIRMAN. That's based in your lot-sized purchase, and so on. But other than that, you're not contending that a seller ought to and would have the authority under Robinson-Patman to charge a different price to you than he charges to Mr. Peck over here at his dock, are you?

Mr. BISON. If the seller can justify that price, yes, sir; if he can justify the difference.

The CHAIRMAN. The only way he could justify it would be on volume.

Mr. BISON. It could be justified on savings of costs to the seller. In other words, if he can justify it on the basis of savings of cost of delivery, then the seller is allowed to pass that saving on to the buyer.

The CHAIRMAN. It seems to me that what you're really arguing is that the seller ought to be able to sell on an f.o.b. basis that was not uniform to all buyers.

Mr. BISON. That's correct; the seller is allowed to sell where there's a uniform zone delivered pricing system, and that's important. Where there is a uniform zone delivered pricing system, then the seller ought to be able to sell——

The CHAIRMAN. I don't think it ought to relate to whether there's a uniform zone delivered pricing system or not. He ought to be able to sell on an f.o.b. basis, a uniform basis to all buyers, unless it is cost-justified, unless there is some other justification.

Mr. BISON. That's correct.

The CHAIRMAN. I don't know why it has to be in a uniform zone delivered pricing system to justify it.

Mr. BISON. If a seller is selling on a uniform zone delivered pricing system, then—and the buyer is picking up his merchandise, saving a delivery cost to the seller, that saving ought to be allowed to be passed on by the seller to the buyer.

The CHAIRMAN. Well, there isn't anything in the Robinson-Patman Act relating to the use of a uniform zone delivered pricing system, is there?

Mr. BISON. Not as such, Senator. It's not mentioned in the act.

[The statement follows:]

STATEMENT OF FRANK D. REGISTER, PRESIDENT, NATIONAL ASSOCIATION OF RETAIL GROCERS OF THE UNITED STATES

Mr. Chairman and members of the Committee, my name is Frank D. Register, President of the National Association of Retail Grocers of the United States (NARGUS) with headquarter offices at Reston International Center, Reston,

Virginia. NARGUS has represented independent retail grocers for over 80 years. The association has more than 40,000 members in the United States. Its governing Board is composed entirely of independent grocery store operators from 16 states. NARGUS members operate small stores and supermarkets.

SHORT SUMMARY OF TESTIMONY

NARGUS supports and recommends approval of S. 1699. The membership of the association took affirmative action on the measure at its 1977 convention.

NARGUS believes and asserts that backhaul allowances sanctioned by S. 1699 will result in savings of fuel. The measure will assert retail grocers acquire their merchandise at a lower cost by reducing waste, improve utilization of equipment and labor, and reduce out-of-stock conditions.

Independent retailers buying their merchandise through retailer-owned cooperatives or voluntary group wholesalers will have as much an opportunity to benefit from backhaul allowances as to direct buying corporate chains. The Robinson-Patman Act, which the association has consistently supported, will not be harmed or injured by passage of S. 1699.

NARGUS has carefully considered the terms and effects of S. 1699. It believes the proposed legislation will foster productivity gains in grocery distribution and merits favorable consideration by the Committee.

NEED FOR LEGISLATION

Federal legislation is needed to clarify the right of a manufacturer, selling under a uniform zone delivered pricing system to grant a meaningful backhaul allowance to a buyer who, either through use of his own transportation equipment, or that of an authorized carrier, performs the backhaul function.

"Backhauling" refers primarily to buyers' trucks returning from a delivery picking up the buyer's merchandise at the manufacture's distribution point for delivery to the buyer's distribution center. If buyers' trucks are prevented, for one reason or another, from backhauling, they will operate on their return trip either empty or at considerably less than full capacity.

Senate Energy Committee Report 95–674 on S. 1699 refers to a recent Interstate Commerce Committee study entitled "Empty/Loaded Truck Miles on Interstate Highways During 1976." This study reported that the percentage of truck miles generated by entirely empty three or more axle trucks was 20.4 percent. For interstate trucks only, the comparable figure was 32.9 percent operating empty. An additional 14.4 percent were operated at less than full capacity. With almost 50 percent of interstate trucks operating empty, or partially empty, there can be little doubt that huge amounts of fuel are being wasted.

One of the reasons for this waste is outmoded government regulations, which in this instance comes from the Federal Trade Commission.

Beginning in 1967 and continuing up until 1975, the Federal Trade Commission issued a series of backhaul advisory opinions and statements. The Commission seemed to have said, according to the interpretation of some, that regardless of how far buyers actually backhaul their merchandise, any backhaul allowance granted by manufacturers must be the same for every buyer. Otherwise, the manufacturer may engage in a price discrimination prohibited under the Robinson-Patman Act.

In June 1977, Mr. Owen M. Johnson, Jr., then Director of the Bureau of Competition, Federal Trade Commission told the Senate Subcommittee on Energy Conservation: "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." He also went on to say, however, that: "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."

If sellers using a uniform delivered pricing system may grant a backhaul allowance only if it is uniform for all buyers, an incentive is denied many buyers to backhaul their merchandise. For, as Senate Energy Committee Report 95–674 concludes, the problem with the FTC interpretation is that under its strictures, sellers offering a backhaul allowance typically limit it to their cost of delivery to their nearest customer in the zone. For more distant customers, a uniform allowance is frequently less than adequate reward for backhauling their merchandise. The overall result is, according to the Committee's Report, "that the

latest FTC interpretation of the permissible backhaul allowance under section 2(a) of the Robinson-Patman Act in a uniform zone delivered pricing system appears to be a major obstruction to larger backhaul allowances and thus to a greater incidence of backhauling."

Legislation is needed to clarify the right of a seller, under a uniform delivered pricing system, to grant a backhaul allowance commensurate with the seller's savings in delivery cost when the buyer performs the backhauling function. S. 1699 provides that the backhaul allowance must not exceed "the actual savings in delivery cost to the seller."

Of course, under S. 1699, a seller has the option of selling only on a delivered price basis. The bill does not require a seller to offer a backhaul allowance, if he chooses not to do so. The legislation merely grants the seller the opportunity to offer backhaul allowances on realistic terms both parties may regard as reasonable.

Bill Will Not Harm Robinson-Patman Act

As a supporter of the Robinson-Patman Act, NARGUS seriously considered the effects S. 1699 will have on this law. Representing independent retailers, the association is particularly sensitive to the need for preventing harmful price discriminations.

NARGUS has long held the view that strong antitrust laws are needed to protect the competitive system against oppressive price discriminations. Behind the 1936 amendments to the Clayton Act was an overriding fear that powerful enterprises were free to exert their superior strength in a way as to harm small business. The objective of the Robinson-Patman Act was, in the words of its framers, "to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them. . . ."

I assure you that if there were any possibility that passage of S. 1699 would weaken the Robinson-Patman Act prohibitions against harmful price discriminations, NAGUS would oppose the legislation. Our own analysis, and our counsel's independent judgment, assure us S. 1699 holds no harm for the Robinson-Patman Act, or for independent retailers.

Under the terms of the measure, backhaul allowances must be made available to all the seller's customers on a nondiscriminatory basis. By this we understand the allowance is to be functionally available to all the seller's customers so they may participate. An allowance may not be tailored to discriminate against a particular customer, or class of customers. The seller's offer is to be made known to all customers, and be potentially usable in a practical business sense by them. These conditions and terms are what is meant by the requirement in the bill that the allowances be available on a nondiscriminatory basis.

S. 1699 also requires that the allowance be cost justified in the sense that it not exceed actual savings in delivery cost to the seller. A seller may offer backhaul allowances on a nondiscriminatory basis to all customers at 100 percent of actual savings in delivery costs; or some lesser percentage.

The bill's provisions comply with well recognized principles of the Robinson-Patman Act. S. 1699 adheres to the basic concept of nondiscrimination, and requires that the backhaul allowance system be cost justified. There is no basis for contending that S. 1699 would undermine or weaken the Robinson-Patman Act.

INDEPENDENT RETAILERS BENEFIT

A retailer does not have to operate his own warehouse, or buy directly from a manufacturer, to benefit under S. 1699. Independent retail grocers purchase a major part of their merchandise from a retailer-owned cooperative, or independent wholesalers

Wholesale suppliers operate truck fleets for delivery from their warehouse to their retail customers' stores. Backhaul allowances received by wholesalers help reduce the cost of merchandise sold to retailers,

Retail members of a cooperative receive yearly patronage rebates representing the difference between the cooperative's cost of doing business and its receipts. Independent wholesalers pass on savings in cost to their retail customers in the form of lower prices, reduced charges, or allowances.

Thus, whether retailers purchase direct from the manumacturer, from a cooperative, or from independent wholesale supplier, they will benefit from backhaul allowances authorized under S. 1699. Small, as well as large retailers, will gain under the measure.

Business size is not a factor in considering the merits of this legislation. It the Committee were to investigate the matter it would find some large concerns do not favor backhaul allowances, while others support them.

CONSUMERS BENEFIT

A major consideration in judging the merits of S. 1699 is the extent it serves the public interest, which in this instance relates to whether the legislation will benefit consumers. The question arises, is backhauling good for consumers? We believe it is.

Backhauling by buyers, whether performed by wholesalers, or by direct-buying retailers, will produce economies in retail food and grocery distribution. It does this by helping to reduce waste and inefficiency, and by stimulating a higher rate of productivity.

Retail and wholesale food and grocery distribution in the United States is composed of around 300,000 firms; small and large, old and new, individually owned and publicly owned, none of which is so powerful as to dominate a market, or able to exclude competitors. The intense competitive nature of retail and wholesale food and grocery distribution is the most reliable assurance that savings in cost made possible by backhauling will pass through the distribution system to the maximum advantage of consumers.

CONCLUSION

S. 1699 merits favorable action by the Committee. First, because it will reduce waste of fuel and help to ease the pressure on rising food and grocery prices. At a time when inflation is a national concern, it is appropriate Congress respond to government regulations which stifle better utilization of capital and labor. More effective use of trucks through backhauling will benefit consumers. Vigorous competition among food and grocery wholesalers and retailers provides assurance that the legislation will benefit the public.

Second, S. 1699 poses no threat to either small buyers, or to retailers purchasing through wholesalers. Business size, and method of purchasing are not material factors in classifying the beneficiaries of this legislation. The advantages of backhauling are not limited to a few buyers or to any class of buyers. The bill is permissive, not mandatory, for both seller and buyer. If backhauling is not rewarding, either party may decline to participate.

Third, S. 1699 will not weaken the Robinson-Patman Act, nor will it allow harmful price discriminations. The bill is carefully drafted to preserve essential provisions of the law against discriminatory price practices.

Fourth, the measure is needed to clarify the law so sellers and buyers will have freedom to participate in backhauling if it is their desire to do so. The purpose of S. 1699 is to remove legal uncertainty over the right of a manufacturer, selling under a uniform zone delivered pricing system, to grant to backhaul allowance to a buyer, who, either through use of his own transportation equipment, or that of an authorized carrier, actually performs the backhaul function.

S. 1699 is needed to remove fears that a seller, by offering a uniform zone delivered price and a backhaul allowance reflecting his actual savings in the cost of delivery when a purchaser backhauls his own merchandise, may violate the Robinson-Patman Act.

The Federal Trade Commission has advised that sellers, using a uniform zone delivered pricing system, may not sell on an f.o.b. basis unless such price is uniform for all buyers. Price uniformity is not required under the Robinson-Patman Act, and, economic realities considered, imposing such an unnecessary requirement severely limits the range of backhauling a buyer may engage in. The result is a serious impediment to backhauling, which the proposed legislation would remove.

The CHAIRMAN. All right. Mr. Aders, you may proceed.

STATEMENT OF ROBERT O. ADERS, PRESIDENT, FOOD MARKETING INSTITUTE; ACCOMPANIED BY JAMES F. RILL, GENERAL COUNSEL

Mr. ADERS. Mr. Chairman, I'll try not to repeat what others have said. Let me just summarize briefly the points that I'd like to make.

First, we're not trying to do damage to the antitrust laws. We simply want to save the American consumer what we think is about one-third of a billion dollars in food costs, and we want to save 100 million gallons of precious fuel each year. You can help us do that by passing S. 1699.

We think the FTC is wrong in their interpretation. But there is no other way to clarify the law except by congressional action. There are no cases pending and none decided on this issue.

You've heard—and I would repeat—there's no disagreement in the food distribution business, whether the companies are large or small, wholesale or retail, nearby or far out. All kinds of food distributors favor this bill. None has come out against it.

Every retailer is served by a wholesaler, and every wholesaler can take advantage of the backhaul allowance.

The FTC raises the specter of problems in other industries. If there are problems in the other industries, the Robinson-Patman Act is still alive and well. All these allowances have to be cost justified, and they have to be nondiscriminatory. So, I think they raised a false spectre.

I'd like to encourage you to ask any questions of me that you'd like and particularly of our lawyers, because this does tend to become a lawyer's issue.

Accompanying me is Mr. James Rill, whom I've worked with for 10 or 15 years on this problem. And both of us would be happy to try to respond to any questions you have.

The CHAIRMAN. Let me ask you this: would you be happy if all sellers just adopted a pricing system of f.o.b.?

Mr. ADERS. Yes.

The CHAIRMAN. So, then it would be up to the buyer to get his product.

Mr. ADERS. That would be fine.

The CHAIRMAN. And the fellow who is the distant buyer is going to pay a higher price because of the delivery charges than the close-in buyer.

Mr. ADERS. The customer at the far point pays more than the close-in buyer; is that what you said?

The CHAIRMAN. Yes.

Mr. ADERS. Yes, that would be true in a given case, but it would probably, over time and over geographical distances, average out.

I think what Mr. Peck says——

The CHAIRMAN. How could it average out if you've got a customer who is 500 miles away from the seller's dock and a customer who's 5 miles away from the seller's dock? How can that average out unless you use a uniform pricing system?

Mr. ADERS. It would be on a different kind of goods. If you're buying your beans in one city and your corn in another, I might have a local backhaul where the corn is and a far backhaul where the beans are.

Throughout a grocery store, I think, the product mix would tend to equalize this out to customers, overall. Except, I do agree with Mr. Peck, that a class of consumer in this country that has a disadvantage is the person who is on the far end of the distribution system. There's no doubt that one further from the distribution point has to pay more freight. That does cost more money.

The CHAIRMAN. That's why the products cost more in Alaska.

Mr. ADERS. And in Boston, too.

The CHAIRMAN. A little more in Alaska than it does in Washington, D.C. Not much, but a little.

So, you would agree, then—the other gentlemen have stated here that you don't think that this does any violence to Robinson-Patman or does not create an exception to Robinson-Patman?

Mr. ADERS. Absolutely not. It simply clarifies it. And clarifies what is we believe, an erroneous FTC opinion. And the catch-22 that we're in is that there's no way to appeal an advisory opinion. And there's no way to litigate this question.

The CHAIRMAN. Of course, the FTC at least made their position clear here this morning, if it was not clear before.

Mr. ADERS. But that does not make it right.

The CHAIRMAN. I don't think there's anything in the law that says they have to be right.

At least we know what their position is.

Mr. ADERS. It seems to be pretty clear this morning, Mr. Chairman.

The CHAIRMAN. How is the uniform zone delivered price arrived at—do you know, any of you, anyone?

Mr. ADERS. I think Mr. Peck's testimony probably covers that better than mine. I wish you'd answer, Gerry.

Mr. PECK. The theory is that there's a price determined for the product, and then the seller determines the average cost to deliver that product, either by common carrier tariffs or by use of his own vehicles to all customers in his zone. He simply adds this average cost of delivery to the cost of this product, and that becomes the delivered price.

The CHAIRMAN. So that if he charges that average price to everybody——

Mr. PECK. To all customers.

The CHAIRMAN. So, you do in effect have a form of subsidization there. In other words, the close-in buyers then are really subsidizing the far-distant buyers under that kind of system.

Mr. PECK. That's true.

The CHAIRMAN. Inasmuch as this legislation doesn't require the sellers to grant an allowance, as all of you point out, what do you see as the incentive for the sellers to, in fact, grant it?

Mr. PECK. The best information that we have from the sellers who do not currently grant it is that they have been advised by counsel that there's at least some question by FTC——

The CHAIRMAN. You know, there is in a lot of business such a thing as the lawyer's excuse. Do you suppose that's what it is here, in part?

Mr. PECK. I think that the gentleman representing the FTC said at an earlier hearing that the manufacturers are using the FTC opinion as a crutch, and that could very well be the case. The fact is that we're not getting the backhaul.

The CHAIRMAN. You're talking now about that 56 percent?

Mr. PECK. That's right.

The CHAIRMAN. Do you have any estimate as to what percentage of that 56 percent would likely go along into the backhaul provision if this bill became law?

Mr. PECK. I couldn't guess at that. But it is a fact that the larger manufacturers, the sellers with the broadest lines, and the more volume of products, tend to the delivered price system, so the breakthroughs we have enjoyed over the past 10 or 15 years, perhaps once in 6 months, are tremendous advantages.

The CHAIRMAN. It seems to me that you have a great difficulty in coming up with any firm estimate regarding energy savings or cost savings if the allowance is at the seller's option, as it is in this bill.

Mr. PECK. Well, the energy-saving calculation, Senator, is simply based on miles traveled by trucks. What customer pickup provides is that one truck handles the chore that it is currently taking two trucks to do.

The CHAIRMAN. Of course, that's theoretical, and as you know, that's disputed, because what might be one man's backhaul is another man's fronthaul, you know, according to some.

So, the question is: Are you going to have this fuel savings on the backhaul or the fuel losses on the fronthaul, or vice versa?

Mr. PECK. That brings up a very critical point of difference between the carrier's view of S. 1699 and the food industry view.

We, in the food industry, are guilty of probably erroneous use of the term "backhaul." What we're talking about is customer pickup. We're talking only about hauling merchandise that we own in our own trucks, private carriers, and backhaul and fronthaul is our livelihood. And fronthaul and backhaul for them are both income-producing services.

And I think a great deal of that problem is exemplified by the term "one person's backhaul is the other person's fronthaul." The fact is that we're not talking about the same thing. We will be in competition with the contract carrier at any time we're bidding for a customer pickup and they're bidding for that haul.

From the standpoint of our economy, we can do it for less money and that is an important factor. From the standpoint of the trucking industry, it's a very tiny percentage of their business.

The CHAIRMAN. These manufacturers that grant you a backhaul allowance today, what is the formula that they use? Is it the actual freight charges or average freight charges, or what?

Mr. PECK. I can't answer it directly, because we're prohibited from talking about price or terms of sales, as an association, but my understanding is that it's rare that the allowance is more than 75 percent, generally, of the common carrier rate.

And that allowance is usually sufficient to justify the backhaul for the private carrier, the one who owns the merchandise.

The CHAIRMAN. So, it's rarely more than 75 percent. Then the indication would be that maybe it's based on the averaged freight charges then.

Mr. PECK. No; the 75 percent would be 75 percent of the actual not average. It would be 75 percent of the published——

The CHAIRMAN. What I meant is that they may be using the average system in the zone, the zone delivered pricing system, if they're granting you an allowance and they're only giving you about 75 percent from what the common carrier rate is.

Mr. PECK. It might be equivalent to that, but I don't believe that calculation is developed that way, because the allowance is not the same to all customers. It depends on the distance of the buyer to the seller, and if it were average, of course, it would have to be the same for all buyers.

Mr. ADERS. Mr. Chairman, if I may add here, the amount of backhaul varies from manufacturer to manufacturer. Some feel comfort-

able in the average freight, and they use that as the backhaul allowance. Some give less than that. And there are some who give more than the average freight and base their rates upon cost savings.

But, as Mr. Peck points out, they don't usually give the entire amount of the cost savings. That latter group of companies, I think, would tend to agree with us as to what the law is, and would disagree with the Federal Trade Commission.

The CHAIRMAN. Well, how would you allow—how would you compute the allowance—let's say the buyer's truck is going to stop off at gseveral sellers' warehouses on its backhaul trip; how would the allowance be computed in a situation like that?

Mr. PECK. I think that would be an illegal practice. It would be possible to make a computation of the portion of that backhaul for each stop and allocate the cost, because tariffs are published. There's nothing secret about the standard tariff for a certain distance and certain number of tons hauled. But I think it would be prohibitively uneconomical for any buyer to make these kind of stops if you can't fill a truck and drive it to another depot and unload it. That's true even from a wholesaler to a retailer. You most frequently can't justify the trip. The cost of making the stop is so far greater than the cost of driving the truck that it removes all of the economy of the trip.

Mr. ADERS. Mr. Chairman, the hypothetical question that you posed, in my 20 years' experience in the grocery business isn't the way we do things. They normally make a delivery to a store. They either come back or they make one stop for backhaul and then return.

We are picking up with expensive equipment and very highly paid drivers, and as Mr. Peck indicates, one stop on a backhaul is about all you can handle.

Mr. PECK. The one-stop service provided to the retail store has been one of the reasons that wholesalers have helped the independent grocer grow in the face of competition from the chain. The cost of very small deliveries is much higher than the cost of one large delivery, so our function is to combine all items in one truckload, make one stop, unload one time, let the store have their personnel assembled only once to make that receipt. So, it makes economies all through the chain.

But, now there are instances, but they're primarily in the small restaurants, school food service, fraternity house kind of deliveries where we deliver very small quantities, and consequently the price is much higher. It's two to three times the cost to make those deliveries.

The CHAIRMAN. What you're really saying is that this would only benefit the large buyer. He's the only person who would be advantaged by this.

Mr. PECK. By S. 1699?

The CHAIRMAN. Yes.

Mr. PECK. No; I wouldn't say that at all, because for a wholesaler, even the smallest wholesaler, a truckload—now, we're talking about one truckload, but not one truckload of one item—there are very, very few manufacturers that do not have a line of items that is fairly complete, so that one truck can back up to the seller's dock one time and load it either with one item or with a combination of items for even the smallest wholesaler.

So, we see no disadvantage. In fact, we did a poll of some of our small members, the average of them is about $5 million a year, which

compares to the billions of dollars per year sales for some of the large chains. We talked to our small wholesalers who were in urban areas in competition with the large chains and to our small wholesalers in rural areas, very remote.

Of all the people we talked to, only one is not currently utilizing backhaul, and he was a remote wholesaler who serviced very small stores in a country area. Those in an urban location in direct competition with the large chains were the ones most eager for the passage of 1699.

The CHAIRMAN. Would this legislation result in numerous prices being offered at the sellers' factory?

Mr. PECK. Different prices for the same item?

The CHAIRMAN. Yes.

Mr. PECK. I can't see how that could develop. I don't really believe that would happen.

The CHAIRMAN. You said earlier you agreed that they could offer different pricing now based on quantities, for example.

Mr. PECK. Based on quantities, yes. The cost of loading a pallet-load one time with 40 cases on it, is far less than loading those 40 cases one at a time by hand. So, there are price differences.

The CHAIRMAN. Would it result in a different price because of the distance from the seller's dock as well?

Mr. PECK. Our feeling is that the price for goods, the price that buyers pay, large and small, whether they're close in or far out, should be exactly the same, with whatever Robinson-Patman differences are permitted. But it should be the same for all buyers.

The price for delivery should be thought of at least distinctly from the price of goods, and the price of delivery has historically been related to the distance traveled. And it's quite easy—I think it's already been said here—to justify an actual payment of more dollars to the more distant buyer because the more distant buyer incurs greater cost, and the more distant buyer has less opportunity, so there's an equilibrium developed there.

The CHAIRMAN. But if the backhaul is to be based on the actual costs, then you're going to have a different price to every buyer.

Mr. PECK. A different price for delivery, we'd like to think, yes; but a different price for goods, no.

The CHAIRMAN. Is the confusion regarding the Commission's advisory opinion over whether backhaul allowances are legal, or simply over how they can be computed?

Mr. PECK. I don't think there's a question of legality. I think the only confusion is this distinction between the price of goods and the price of delivery. When you talk about the price of goods, only as you do in an f.o.b. sale, you talk about equity at the seller's dock.

When you talk about a delivered price, which is a combination of the price of goods and the price of delivery, you talk about equity at the buyer's dock, and the FTC contention that under the delivered price system, when you introduce a customer pickup, you must measure it back at the seller's dock. That says they are essentially considering that the price system has changed back to f.o.b., whatever name you might want to put on it.

And we're very comfortable with that, so long as when you do that, you also move the point of equity measurement back to the seller's dock.

The confusion is that if you are measuring price equity at the seller's dock and you're still talking about the delivered price equity at the buyer's dock, there's no way to resolve it.

The CHAIRMAN. Are we simply creating more confusion, then? Yes?

Mr. BISON. Senator, I'd like to comment just to say this: That the need for S. 1699 is more apparent today, in our view, than ever before. Having heard the Chairman of the FTC testify and the head of the Bureau of Competition testify, Mr. Dougherty, they made it very clear this morning, I think, that the Commission's position is that a backhaul allowance given or offered by a seller selling under a uniform zone delivery pricing system has to be uniform, in their view.

Now as a student of the law, I disagree with that but I would not disagree with the evident position that the Commission's view is very clear now, clearer than it's ever been, that a nonuniform backhaul allowance by a zone delivered price seller may be illegal. And the Chairman has made it clear that this is a position held by his colleagues on the Commission.

So I'd say to you, that the need for this legislation has never been more apparent than it is today.

The CHAIRMAN. Well, it's never been more apparent, if you want to do something different than what they say the law is.

Mr. BISON. Exactly.

The CHAIRMAN. But it would seem to me that they were clear. If you've got a uniform zone pricing system, then you can be granted a backhaul allowance, based on an average price, the average cost to the buyer. And if you want to use that, you've got no problem.

On the other hand, if you use an f.o.b. pricing system, you can be granted a backhaul allowance. It doesn't matter if you've already got the backhaul allowance because you're paying what the price is at the seller's dock.

But if there is to be such an allowance, the allowance would be on the actual cost because you've got the f.o.b. price at the dock, plus the actual costs for it to be delivered wherever it is, whether it's a 300-mile market, or whether it's a 3-mile market.

So in those two situations, you've got no problem, as I see it. It's very clear under their decision and it seems to me that the only thing that is in dispute here is whether you can have the uniform zone pricing system and get the actual cost back, or when the uniform zone pricing system is based on the averaging or can you do it in the alternative?

Mr. BISON. I'd like to say it in a different way, Senator. I'd like to say the issue here is whether a seller selling under a uniform zone delivered pricing system can pass on to a buyer cost savings, savings in the cost of delivery to that buyer, whether he can pass on those savings to that buyer. Or does he have to charge a uniform price to every buyer, regardless of his cost savings to those particular buyers.

I think that's the issue and I think the act ought not to be distorted. The Robinson-Patman Act ought not be distorted, sir, by requiring uniform prices so that cost savings cannot be passed on down through the system of distribution to the benefit of consumers.

And I think that's the issue before us today.

The CHAIRMAN. Staff has a question.

Mr. LYNCH. An example might help to explain. Under the standard example, if $10 is the cost of merchandise and $1 is the transportation

cost for far customers, and 50 cents is the transportation cost for near customers, that would come out to 75 cents as an average transportation cost for both the near and the far buyer.

So the cost then to each would be $10.75. Is that correct?

Mr. BISON. That's correct.

Mr. LYNCH. Under this bill, would f.o.b. price at dock be $9.75 to the far customer, $10.75 minus $1?

Mr. BISON. Would you repeat that question?

Mr. LYNCH. Under this bill, would the f.o.b. price at dock be $9.75 to the far customer, $10.75 minus $1?

Mr. BISON. Yes. The f.o.b. price, under the uniform zone delivered pricing system, would be the delivered price of the merchandise with an allowance which is no more than the cost of the savings of delivery to that partnership buyer.

Mr. LYNCH. Then what would be the cost to the close-in buyer?

Mr. BISON. Well, it would depend on what the delivery cost is.

Mr. LYNCH. It's 50 cents.

Mr. BISON. It could not exceed that. Now the system is that the buyer has offered those allowances based on a certain percentage of the cost savings, 85 percent, 95 percent, 100 percent, 50 percent to all buyers, depending on what the cost of delivery was to each buyer.

Mr. LYNCH. Assuming for the moment, though, that he did give the full cost, the full freight cost, it would be $9.75 for the far customer and $10.15 for the near customer.

Mr. BISON. If you were granted an allowance and that allowance was equal to the cost savings, yes.

Mr. LYNCH. So it would result in two different prices.

Mr. BISON. Yes, two different prices. May I say to the Senator, I don't see anything wrong with two different prices. That's the system under which we operate. That's the competitive system.

The law has never, in its history required uniform pricing. The FTC has not said that all sellers must sell to all buyers at the same price.

Mr. ADERS. What the FTC has done this morning is to throw out cost justification. They have ignored the question of whether it is or it is not nondiscriminatory and they have assumed competitive injury. They have completely aborted the Robinson-Patman Act.

Mr. RILL. Please let me add something to that, Senator.

I think the major problem with the FTC advisory opinion, which, of course, has never been enforced by the FTC, but has created a cloud over cost-justified backhaul, is that it makes these assumptions. It assumes that the allowance is not going to be uniformly available. It assumes there's going to be a discriminatory employment. It assumes there's going to be competitive injury. And it assumes that there's going to be an absence of cost justification.

All those assumptions have created an unrealistic example on the basis of which there's been a very substantial impairment of the realization of the efficiencies which could be achieved.

I suspect on that basis that the advisory opinion has given you either bad advice or no advice. It misconceives the underlying nature of the law which was created by the Robinson-Patman Act.

The CHAIRMAN. Thank you very much, gentlemen.

[The statement follows:]

STATEMENT OF ROBERT O. ADERS, PRESIDENT, FOOD MARKETING INSTITUTE

Food Marketing Institute ("FMI"), a non-profit trade association whose over 900 members include both food retailers and food wholesalers, appreciates the opportunity to submit these views endorsing S. 1699. Among FMI's members are retailers and wholesalers ranging in size from the very smallest to the largest and included are independent grocers, chains, and voluntary and cooperative wholesalers. Approximately 25 percent of FMI's members operate only one store and 75 percent operate fewer than ten stores. The association conducts programs in research, education and public affairs on behalf of its members.

FMI's support for S. 1699, which would provide allowances for "cost justified backhaul", stems from the opportunity provided by the legislation for all distributors to achieve greater efficiency and reduced costs in obtaining products from sellers who ordinarily operate on a zone delivered price basis. In addition, it should be by now generally accepted that this legislation will promote significant energy conservation and increased efficiency by eliminating wasteful empty truck movement. The net effect of S. 1699 will benefit industry, its customers, and the public at large.

I. OBJECTIVES OF THE LEGISLATION

The retail and wholesale food industry is fully committted to energy conservation and efficiency in the distribution of food products. Many comments and much testimony have been received by this and other committees setting forth in great detail the energy saving and increased efficiency that can be expected to follow the passage of this legislation. Those benefits can no longer be considered speculative, and I will here review only briefly the reasons they can be expected. Backhaul, as used in S. 1699, refers to the pickup 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 wholesaler. For example, a food distributor's trucks may start out in the morning from the distributor's 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 may pass a supplier's warehouse where it could pick-up a full load of products scheduled for delivery to the buyer/distributor's warehouse. Unless the pick-up opportunity—backhaul—is used by all buyers in smiliar situations, the buyers—the members of our industry—find themselves in the wasteful practice of delivering products to their outlets and then returning empty, or deadheading, back to the warehouse. At the same time, suppliers warehouses that food distributors may pass on the way are delivering products to the distributors warehouses and then deadheading back to their plants. In other words, you have a situation where trucks operated by both the supplier and the buyer are passing each other, pulling empty trailers.

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, according to the same report, would be reduced by 500 million miles annually and the overall reduction in the cost of food distribution would be approximately one-third of a billion dollars. Some may quibble with those exact numbers, but such quibbling should not be allowed to obscure the fact that if backhaul productivity in the grocery industry alone could be significantly improved, tremendous energy and cost savings would be realized.

S. 1699 will promote such backhaul productivity. The legislation will permit, not require, sellers to grant cost-justified backhaul allowances to all the sellers customers on a non-discriminatory basis. By "cost-justified backhaul allowance" I mean an allowance no greater than the delivery cost which would otherwise have been incurred by the seller in delivering a product to his customer. What this legislation means to the food industry is that transportation saving 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 those wholesalers who themselves operate warehouses, run

trucks, and are in a position to perform backhaul services. Thus, the energy cost savings will be reflected throughout the chain of distribution. As the food retailers costs are lowered, the benefits will flow throughout to consumers, because the improvements in product distribution efficiency, in the form of lower transportation costs, can, and in the highly competitive food industry will, be passed on to them.

II. NEED FOR THE LEGISLATION

S. 1699 is made necessary because of confusion engendered by an advisory of the Federal Trade Commission issued in 1967, which with several subsequent related opinions and statements, implies that the grant of cost justified backhaul in the context of zone delivered price systems may be illegal. Those opinions are to the effect that if an allowance is granted which results in different purchasers paying different prices for merchandise at the seller's dock and if the price differences results in injury to competition then the allowance may be unlawful under the Robinson-Patman Act. The Commission's consistently expressed position has been that in the context of a zone delivered price system a supplier may not offer cost-justified (and thus variable through nondiscriminatory) backhaul allowances but may offer only identical allowances to all buyers.

The Commission has never adequately addressed the question of whether cost-justified backhaul allowances would result in injury to competition—although without such injury there would be no violation of the Robinson-Patman Act—nor has it issued a single complaint or formal rule attempting to prohibit or limit cost-justified backhaul allowances. In fact, recent FTC consent decrees, and pronouncements of FTC and Justice Department officials are at odds with the Commission advisory interpretations and would support the thrust of S. 1699. Nevertheless, the opinions cast a cloud on the legality of cost-justified backhaul and many, though not at all, sellers rely on the FTC advisory opinions in refusing to discuss backhaul allowances with their customers. As a result, cost-justified backhaul allowances are not generally available. Clarifying legislation such as S. 1699 therefore represents the only effective and sure resolution of this matter.

III. S. 1699 WILL NOT AMEND THE ROBINSON-PATMAN ACT NOR ENCROACH UPON THE INTERSTATE COMMERCE ACT

S. 1699 will not revise, modify or amend the Robinson-Patman Act. All that S. 1699 will do is clarify that it is not illegal to permit cost-justified, nondiscriminatory backhaul allowances.

What S. 1699 will do is allow retailing companies the opportunity to negotiate for allowance based on the competitive desire to operate as efficiently as possible, to obtain transportation savings in those instances in which their suppliers operate within a uniform zone delivered price system. Such an opportunity is similar to the relief mandated by the Federal Trade Commission in its recent decision in *Boise Cascade Corp, et al.* In that decision the Commission ordered southern plywood sellers to provide a cost savings-related pickup (or backhaul allowance) as an alternative to the delivered price.

S. 1699 does not constitute a drastic change from the status quo; it does not abrogate the entire uniform zone delivered price system. It merely permits the supplier the option of granting the allowance where it is cost-justified and where it is applied in a nondiscriminatory fashion. In fact, S. 1699 may offer the optimum latitude for salutary price negotiations between buyer and seller which can occur within the framework of a zone delivered pricing system. Unless buyers can effectuate cost-justified allowances which, once granted, must be made available to all buyers on a nondiscriminatory basis, sellers can continue to rely on FTC's advisory opinion to maintain artificial freight rates and insulate their price structures from competitive forces. A legal memorandum prepared by FMI's counsel discussing the relationship between S. 1699 and the Robinson-Patman Act is attached to this statement.

In addition, since this legislation involves only transportation of a buyer's own products, it does not alter in any way the permissible operational scope of any motor carrier, regulated or unregulated. It will not affect the Interstate Commerce Act, or regulations of the Interstate Commerce Commission, or the status of a common contract carriers.

IV. CONCLUSION

In conclusion, passage of S. 1699 will allow suppliers to offer meaningful backhaul programs which in turn will reduce the cost of food distribution and result in savings which can be passed on to consumers. S. 1699 will result in needed fuel savings. All food retailers regardless of size, and thus every customer of a food retailer will benefit. It is because of those potential savings in distribution costs and energy that FMI actively supports S. 1699.

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.

For the above reasons the Food Marketing Institute,[1] 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:

"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, nondiscriminatory 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 a seller operating under a uniform zone delivered price system[3] the option of granting cost-justified backhaul allowances to

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[1] A trade association representing approximately 950 independent retailers, food chains, and food wholesalers.

[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.

[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.

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 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 interpretations of Section 2(a) of the Robinson-Patman Act.[6] 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 nondiscriminatory 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.

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:

(*a*) The person[7] 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 trend to create a monopoly.

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 nondiscriminatory 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 nondiscriminatory 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 back-

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[4] Transportation Task Force—Food Service Advisory Committee, Federal Energy Administration (1975).

[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).

[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.

haul 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."

In *Federal Trade Commission* v. *Borden Company*,[10] 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 offensible 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 that all the elements of a Section 2(a) violation were present.[12]

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. 147,[13] 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 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.

In Advisory Opinion No. 194,[14] 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

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[9] 323 F. 2d 44 (7th Cir. 1963), *cert. den.*, 377 U.S. 923 (1964).

[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. (1948). Where, for example, the near buyers and the far buyers' geogrpical 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.

[13] 72 FTC 1050 (1967).

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)

In Advisory Opinion, No. 198,[15] the Commission rejected the request of a seller that operated with a uniform delivered price system to grant a proposed 5 percent discount to all customers buying in truckload quantities.[16] The Commission, in rejecting the request, noted that the alleged cost saying depended upon averaging the savings in freight rates and that the freight rates to nearby customers was considerably less than 5 percent.

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 conclusion that a cost-justification defense,[17] 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" and an FTC news release[18] relative to the issue. The first clarifying opinion 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 nondiscriminatory 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 allowances.[19] The Commission's letter stated that,

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[14] 73 FTC 1309 (1968).

[15] 73 FTC 1312 (1968).

[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 expand 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.

[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, 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, "his acion 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."

"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 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 10 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.

In *Ideal Basic Industries, Inc.*,[22] 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)

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

"—a price set by 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)

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[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. *Russelville 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).

[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 77 (1974); *Ideal Basic Industries, Inc.*, FTC Docket No. 9039 (December 1976); *Boise Cascade Corp., et al.*, FTC Docket No. 8958 (1976).

[22] FTC Docket No. 9039 (December 1976).

[23] FTC Docket No. 8958.

[24] Proposed Order, ¶ 3.

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 foreword to an analysis of the Robinson-Patman Act,[27] 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]

"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.

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[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 foreword, p. iii.
[29] *Id.* at foreword, p. iv.
[30] *Id.*
[31] *Id.* at foreword, 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.

The CHAIRMAN. The next witness is Mr. Donn McMorris, American Trucking Associations.

STATEMENT OF DONN McMORRIS, FIRST VICE CHAIRMAN, AMERICAN TRUCKING ASSOCIATIONS; ACCOMPANIED BY LANA BATTS, ASSISTANT DIRECTOR OF ECONOMICS

Mr. McMORRIS. Mr. Chairman and members of the committee, my name is Donn D. McMorris and I am first vice chairman of the American Trucking Associations, Inc., 1616 P Street NW., Washington, D.C.

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.

I have with me today Miss Lana Batts, assistant director of economics, American Trucking Associations.

My remarks will be quite brief as compared to my written statement. Before I begin my testimony, I would like to note that two of our 13 affiliated national conferences of specialized types of motor carriers—namely, the Private Carrier Conference and the Contract Carrier Conference—do not agree with the ATA position, and I believe have made their positions known to this committee.

My personal involvement in the trucking industry spans some 40 years. I am chairman of NW Transport Services, Inc., headquartered in Denver, Colo. NW Transport is a general freight motor common carrier operating in the States of Arizona, Colorado, Idaho, Nebraska, New Mexico, Oregon, Washington, Utah, and Wyoming.

We welcome this opportunity to discuss the suggestion that the Robinson-Patman Act be amended to make it clearly legal for the sellers of merchandise to buy f.o.b., the sellers' shipping points at different prices.

As this committee undoubtedly has come to realize, trucking, its shippers, and the regulations affecting both 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 as concerned as the Con-

gress is about keeping the cost of transportation to a minimum, while assuring an adequate level of service to all shippers, large and small.

The regulated motor carrier industry is primarily made up of small businesses. Of some 16,000 regulated property carriers, almost 13,000 have annual operating revenues of less than $500,000. In fact, fewer than 600 carriers out of 16,600 gross more than $7 million a year—the revenue level determined by the Small Business Administration to be a small business in trucking. The trucking industry is small business when compared to the economic corporate giants which are becoming so prevalent in America today, particularly in the food industry.

The regulated motor carriers meet their obligations to serve the general public by balancing their operations multidirectionally to minimize empty miles and time. I say "multidirectionally" because few for-hire operations are made up of two-way directional flows—a front haul and backhaul. Freight movements, by nature, are unbalanced at any given point in terms of weight, volume, equipment requirements, and time. Modification of Robinson-Patman, as envisioned by S. 1699, would only tend to disrupt this complex network of freight distribution performed by regulated motor carriers.

Modification might solve, to a limited extent, a backhaul problem for a small segment of the transportation community, but at the expense of transportation service generally, primarily, and particularly, that of the common carriers. 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 generally do so by taking the movement away from the regulated 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 carrier's needed balance of multidirectional movements would be adversely affected.

During hearings before the Subcommittee on Antitrust, Consumers and Employment of the House Small Business Committee, some proponents of the bill argued that only one-sixth of the average annual gross revenues (or $300 million) would be lost by all regulated motor carriers by modification of the Robinson-Patman Act. But such a loss would significantly and adversely impact on the financial viability of the regulated motor carrier industry. Between 1970–76, class I and II motor carriers had an average annual net income of $453 million, just slightly more than the estimated lost gross revenues. While expenses would eventually be reduced to make up for the decline in revenue, expenses would remain flat in the interim, thus resulting in an almost negligible profit margin for the industry.

As regulated carriers did adjust to the selective loss of this traffic, the cost would be borne by other shippers (users of carriers) in two ways: either increased rates or decreased service levels. The first alternative would be for carriers to maintain service levels, which could only be done by increasing rates. The alternative would be for carriers to decrease service levels, which would mean poorer service to small businesses, including small shippers and communities.

The larger question surrounding any modification of Robinson-Patman should be whether or not this nation wants and needs a strong

regulated motor carrier system. Proposals which erode the position of the common motor carrier system should be considered carefully.

There has been reference made by others to the common carrier rate in this hearing today. There are usually several common carrier rates on the same product between the same points. I think it is not possible for us to identify, as it relates to this hearing, one common carrier rate, as such.

The committee should also consider that no valid case can be made that any significant amount of fuel will be saved by modification of Robinson-Patman. In fact, the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy made no recommendation concerning this bill.

You have heard testimony that this bill, if passed, would save 100 million gallons of fuel. We disagree, as my written testimony shows. The rounding to the largest 100 million also renders the figure highly suspect.

I am reminded by 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 passed on hard data showed that 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?

Our studied conclusion is that the available data simply do not allow even a cursory estimation of the minimal fuel savings to be obtained. Whatever is to be gained by one segment of food industry will hurt those regulated carriers which must serve the entire shipping public.

The proposal for broadened customer backhauls will be utilized by only a few industrial giants, especially in the food industry. Most firms simply cannot afford to have trucks away from their base and primary source of business to devote the extra time and distance needed to engage in backhauling. What appears to be sought is a competitive advantage with a supposed reduction in fuel savings being merely a "Trojan horse."

If, on the other hand, the food industry can demonstrate that a real problem exists, the Federal Trade Commission should hold a rulemaking proceeding which would seek to establish the parameters necessary to allow the specific backhauling sought.

In conclusion, ATA believes that the present regulated motor carrier system offers the greatest potential for the minimum amount of empty mileage for all carriers.

In closing, the regulated motor carrier industry is willing and anxious to work with you and the staff on this committee to address legislation which would benefit all shippers and consumers, but deplores efforts which will simply give unfair competitive advantages to a select few in the name of fuel conservation.

For all of the foregoing reasons, we respectfully request that suggestions to amend the Robinson-Patman Act not be recommended by the committee for enactment into law.

Thank you very much.

The CHAIRMAN. Thank you very much for your fine statement, Mr. McMorris.

In the food industry, the manufacturers, retailers, wholesalers, and co-ops, each one presumably utilizing transportation services in one form or another—do you have any information you could give us as to the dominant form of trucking for each of those segments? In other words, does one segment utilize common carriers, one segment something else? Do you know?

Mr. McMorris. I don't think I could give you that.

The Chairman. Ms. Batts?

Ms. Batts. Sir, I don't know where I could find that kind of an estimate. Certainly, the only base data which is available on who hauls what, is within the Census of Transportation, and that merely aggregates the food industry as a whole and then separates it to common and private. And right off the top of my head, I can't tell you how that split is. But I don't think we can subdivide the food industry into wholesale and retail.

The Chairman. What would be the direction of traffic divergence in the motor carrier industry if this bill were to become law?

Mr. McMorris. You would see some additional carriers moving over into private carriers versus regulated carriers, in my opinion.

The Chairman. Is it fair to assume that major food manufacturers, for example, General Foods, utilize private trucking in the delivery of goods under a zoned delivered pricing system?

Mr. McMorris. I can't answer that specifically for that particular shipper or manufacturer. But in some cases, yes, that is true. People who are shippers comparable to General Foods.

The Chairman. This legislation would affect all industries that use the uniform zone delivered price system. What impact would this broader scope have on trucking? What other industries use zone delivered pricing and also use common carrier trucking that would be affected?

Mr. McMorris. That goes all the way from the manufacture of automobiles to steel to building products. I'm not an expert in that field, but that is my general understanding, that many, many, many—that there are very, very many zone delivered prices.

Ms. Batts. Sir, if I may answer? One of the problems with the bill is that we really have no idea of what industries will take advantage of the change. We tried to determine within industries which ones would be affected, and we found it very difficult to get information from major trade associations of other industries if they do indeed use a zone pricing system. There doesn't appear to be data available to determine what industries will use it. And I think that's one of the areas that should be carefully investigated. We need to know what industries will use it. At this point, we don't know, as the FTC indicated earlier this morning.

The Chairman. All right. Thank you very much. We appreciate your being here.

Mr. McMorris. Thank you.

[The statement follows:]

STATEMENT OF DONN D. MCMORRIS ON BEHALF OF AMERICAN TRUCKING ASSOCIATIONS, INC.

Mr. Chairman, and members of the subcommittee, my name is Donn D. McMorris and I am First Vice Chairman of American Trucking Association, Inc., 1616 "P" Street, N.W., Washington, D.C. 20036. ATA is the national trade associa-

tion of the motor carrier industry, representing all types of motor carriers, with affiliated associations in every state and the District of Columbia.

Before I begin my testimony I would like to note that 2 of our 13 affiliated national conferences of specialized types of motor carriage—namely, the Private Carrier Conference and the Contract Carrier Conference—do not agree with the ATA position and, I believe, have made their positions known to this Committee.

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.

We welcome this opportunity to discuss the suggestion that the Robinson-Patman Act be amended to make it "clearly legal" for sellers of merchandise to buy FOB the seller's shipping points at different prices. As this Committee undoubtedly has come to realize, trucking, its shippers, and the regulations affecting both 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 as concerned as the Congress is about keeping the cost of transportation to a minimum, while assuring an adequate level of service to all shippers—large and small.

The regulated motor carrier industry is primarily made up of small businesses. Of some 16,600 regulated property carriers, almost 13,000 have annual operating revenues of less than $500,000. In fact, fewer than 600 carriers out of 16,600 gross more than $7 million dollars a year—the revenue level determined by the Small Business Administration to be a small business in trucking. The trucking industry is small business when compared with the economic corporate giants which are becoming so prevalent in America today, particularly in the food industry.

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. Under this system, the shipper has benefited greatly. In fact, a recent survey of industrial shippers by the U.S. Department of Transportation revealed motor carrier service is ubiquitous regardless of the (1) geographical scope of the shipper, (2) annual volume shipped, (3) dollar expended on freight movement, and (4) shipment size.[1] And finally, it is important to realize that the regulated motor carrier industry is a very large 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 fronthaul and a backhaul. Freight movements, by nature, are unbalanced at any given point in terms of weight, volume, equipment requirements, and time. Modification of Robinson-Patman, as envisioned by S. 1699, would only tend to disrupt this complex network of freight distribution performed by regulated motor carriers.

Modification might solve, to a very limited extent, a backhaul problem for a very small segment of the transportation community, but at the expense of transportation service generally, particularly that of the common carriers. 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 generally do so by taking the movement away from the regulated 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' needed balance of multi-directional movements would be adversely affected.

During hearings before the Subcommittee on Antitrust, Consumers, and Employment of the House Small Business Committee, some proponents of the bill argued that only one-sixth of the average annual increased gross revenues (or $300 million) would be lost by all regulated motor carriers with modification of the Robinson-Patman Act. Average increased revenue for the regulated industry

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[1] "Industrial Shipper Survey (Plant Level)," Office of Transportation Planning Analysis, Department of Transportation, Washington, D.C. September 1975.

1970–76 was $1,902,533,000. But such a loss would significantly and adversely impact on the financial viability of the regulated motor carrier industry. Between 1970–76, Class I and II motor carriers had an average annual net income of $453 million—just slightly more than the estimated lost gross revenues. While expenses would eventually be reduced to make up for the decline in revenue, expenses would remain flat in the interim; thus resulting in an almost negligible profit margin for the industry.

As regulated carriers did adjust to the selective loss of this traffic, the cost would be borne by other shippers (users of carriers) in two ways: either increased rates or decreased service levels. The first alternative would be for carriers to maintain service levels, which could only be done by increasing rates. The alternative would be for carriers to decrease service levels, which would mean poorer service to small businesses, including small shippers and communities.

The larger question surrounding any modification of Robinson-Patman should be whether or not this nation wants and needs a strong regulated motor carrier system. Proposals which erode the position of the common carrier system should be considered carefully.

This Subcommittee should also consider that no valid case can be made that any significant amount of fuel will be saved by modification of Robinson-Patman. In fact the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy made no recommendation concerning this bill.

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 was originally made by the National Commission on Productivity in 1973,[2] and based on a book by Dr. Gordon Bloom in 1972.[3] 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—from the smallest pickup utilized for personal use to largest twin trailer combination. It is merely a truck counting and weighing study and not a backhaul study. Nor is it a commodity study. It merely records certain body types as being empty or loaded. And finally, the study covers movements conducted only during 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 Highway Administration, conducted a much more valid study last year to determine the amount of empty truck miles. The results of that study showed that only 20.4 percent of all truck miles in 1976 were empty.[4] 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 only three percent of the time could empty trucks, going in opposite directions, be matched."

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,[5] 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

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[2] "Productivity in the Food Industry," a report by the staff of the National Commission on Productivity, 1973.

[3] Gordon F. Bloom, "Productivity in the Food Industry," (Cambridge: MIT Press, 1972).

[4] "Empty/Loaded Truck Miles on Interstate Highways During 1976," Bureau of Economics and Bureau of Operations, Interstate Commerce Commission, April 1977.

[5] Letter from Frank G. Zarb, Administrator, Federal Energy Administration to Lewis A. Engman, Chairman, Federal Trade Commission, Aug. 15, 1975.

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.[6]

The Federal Energy Administration in a response to a question posed by its own Food Industry Advisory Committee as to why it was not 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 the areas which would produce greater returns as a result of Federal regulatory or policy actions."

Among the other areas with greater potential fuel savings in the trucking industry, the FEA listed the encouragement of intermodal freight operations, and increased truck weights and sizes.[7]

Moreover, a recent study by the Federal Energy Administration entitled, "Potential Fuel Conservation Measures by Motor Carriers in the Intercity Freight Market," did not address the issue of the type of backhauls under consideration in S. 1699.[8]

Our studied conclusion is that the available data simply do not allow even a cursory estimation of the minimal fuel savings to be obtained. Whatever is to be gained by one segment of food industry will hurt those regulated carriers which must serve the entire shipping public.

The proposal for broadened customer backhauls, will be utilized by only a few industrial "giants," especially in the food industry. Most firms simply cannot afford to have trucks away from their base and primary source of business to devote the extra time and distance needed to engage in backhauling. What appears to be sought is a competitive advantage, with a supposed reduction in fuel usage being merely a Trojan horse.

If, on the other hand, the food industry can demonstrate that a "real" problem exists, the Federal Trade Commission should hold a rulemaking proceeding which would seek to establish the parameters necessary to allow the specific backhauling sought.[9]

In conclusion, ATA believes that the present regulated motor carrier system offers the greatest potential for the minimum amount of empty mileage for all carriers.

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 unnecessary 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 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 to alleviating the problem where it can.

In closing, the regulated motor carrier industry is willing and anxious to work with you and the staff on this Committee to address legislation which benefits all shippers and consumers, but deplores 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 suggestions to amend the Robinson-Patman Act not be recommended by the Committee for enactment into law.

Position of the American Trucking Associations, Inc., on Modifying the Robinson-Patman Act

Present motor carrier system is a highly complex industry.

Regulated trucking industry is primarily made up of small trucking firms.

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[6] 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 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?

[7] Statement read by E. W. Gregory, transportation program, Federal Energy Administration, to the Food Industry Advisory Committee, Oct. 19, 1976.

[8] "Potential Fuel Conservation Measures by Motor Carriers in Intercity Freight Market," prepared by Charles River Associates, for the Federal Energy Administration, March 1977.

[9] For example, Alfred Doughterty, Jr., of the FTC in September 1977, said before the House Small Business Subcommittee on Antitrust that nothing in existing law bars the use of backhaul allowances as long as they are nondiscriminatory.

These small trucking firms provide a highly ubiquitous service regardless of (1) geographical scope, (2) annual volume shipped, (3) dollar expended on freight movement, and (4) shipment size.

Regulated trucking companies meet service obligations by balancing multi-directional flows to minimize empty miles and time.

Modification of Robinson-Patman would disrupt the complex freight distribution network of regulated carriers.

Modification of Robinson-Patman empties one truck to fill another.

Small shipper and small communities would pay either for the excess capacity or experience decreased service levels.

Modification of Robinson-Patman would actually alter the nation's commitment to a strong common carrier system.

Fuel will not be saved because of modification.

FEA does not support charges that modification of Robinson-Patman would save substantial amounts of fuel.

The CHAIRMAN. May I say for all of the witnesses, we may have additional questions to submit to the witnesses for the record.

Mr. MCMORRIS. We'll be happy to respond.

The CHAIRMAN. Mr. Tom Rothwell, consultant, National Small Business Association.

STATEMENT OF TOM ROTHWELL, CONSULTANT, NATIONAL SMALL BUSINESS ASSOCIATION; ACCOMPANIED BY HERBERT LIEBENSON, VICE PRESIDENT, GOVERNMENT AFFAIRS

Mr. ROTHWELL. Good morning, Mr. Chairman. My name is Thomas Rothwell. I'm an antitrust consultant, an antitrust lawyer, consultant to National Small Business Association. Sitting at this table on my right is Mr. Herbert Liebenson, vice president for government affairs of the National Small Business Association.

Initially, I want to point out that we speak here specifically on behalf of not only the NSB, but also the National Association of Retail Druggists and 24 other national trade associations, whose identities I've listed in attachment A [1] to my prepared statement. This should shed some light on the nature, scope, and the breadth of interest of business in general in the modifying legislation being proposed here.

I would like to make a preliminary statement, Mr. Chairman, about a matter that does not appear in the written statement, but was raised several times vis-a-vis the discussion, the economic discussion, as to the workings of this in reference to costs and cost savings. We're dealing with two terms, "cost" and "savings," both words of which are deceptively simple.

Cost is something that, of course, I think we all know that the accountants and the ratemakers, the regulatory agencies, debate about seemingly endlessly. There is also an aspect to the word "savings" that should be called to the committee's attention as it's used in the arguments, especially by the proponents of the bill. "Savings" itself is not a simple word or a simple concept, as used by them. It has a variety of meanings, and if I can be permitted a couple examples to demonstrate this, I think that we then could intellectually analyze some of the arguments made by the proponents in more simple terms.

If I take $10 out of my paycheck and put it in the bank in a savings account, I can say that I have saved $10. If that same day I decide not to buy a new automobile, can I say I have saved $7,000? Well, perhaps so. But that is the use of the word "savings" in two entirely different contexts.

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[1] Attachment A is in the committee files.

Now, what is one person's cost, of course, is another person's price. We talk about the distinction between the zone delivered pricing, which of course is adopted by the seller in order to overcome the economic disadvantage of remoteness, and it's his remoteness from the potential customer that is important to him. And in order to make his business more competitive over a larger area, the zone delivered pricing has become a standard practice in many, many industries.

One that I'm particularly familiar with, the selling of finished steel in the form of humble nuts and bolts. The manufacturer and the wholesaler of nuts and bolts use a zone-delivered pricing system because of the disadvantageous weight-value relationship involved in shipping a finished steel product.

Now, there can be no question that the Robinson-Patman Act as interpreted today, and it has been interpreted for a long time, permits zone-delivered pricing at the option of the seller. He can set his own zone. He can decide for himself.

The CHAIRMAN. By the way, how are those zones established? Do they just automatically outline where a zone is?

Mr. ROTHWELL. If you're in a different business, say selling nuts and bolts at wholesale, and you decide you're selling in a four-State area, you may decide, on the basis of the transportation costs and your own marketing potential, that that four-State area would give you a viable economic opportunity. So you'd set that up as a zone.

Now, there is an occasional competitive opportunity beyond that four-State area. Perhaps that would include another six States. You might set that up as zone B. But I suggest, Mr. Chairman, that that has always been left to the individual discretion of the seller, and what he is trying to do is equalize the natural economic advantage-disadvantages equation vis-a-vis remoteness.

The CHAIRMAN. Do they change the size of those zones on occasion to meet competition?

Mr. ROTHWELL. They certainly do. The zone idea is precisely for that reason, to make themselves competitive in a more remote market as compared to some other seller who is closer to that market. So that's precisely the economic motivation and effect of zone-delivered pricing, Mr. Chairman.

Now, back to the Robinson-Patman Act. From the very beginning, the cases and opinions demonstrate that the seller can have a zone-delivered price. He can decide how far those zones should reach, how many of them he should have. That same seller can also have a pickup price. He can have a price at the factory, an f.o.b. price.

The Commission's position throughout has been consistent and as stated this morning. I don't think there is any serious student of antitrust who would gainsay the proposition that as long as the price is the same for every buyer at the seller's loading platform, the only differential that would be permitted by law would be a differential vis-a-vis quantity. That is to say, that if I go to a seller's platform and pick up one case of product x, I can be charged one price; if another purchaser goes and picks up 1,000 cases at that platform, based upon the actual cost-saving experience of the seller, he can charge a different price to the larger purchaser. Other than that, which is a fairly simple concept in operation, the law today is and has been that, (*a*) zone-delivered prices are lawful; (*b*) associated

therewith, you may have a platform price, provided that that platform price is the same for all purchasers, unless the differences that do occur can be cost justified.

The very basis of that is, of course, quantity. In other words, a difference in price based on the seller's cost experience, which is a different concept than this cost "savings." That is, expenses that he did not incur have never been utilized for cost-justification purposes, this is really what S. 1699 is all about.

Now, there can be no question that in operation this measure, if enacted into law, would affect a much broader spectrum of industries than just the food industry. It has an all-encompassing effect, if you will. Its consequences are hard to imagine.

Query: Would it tend to drive sellers away from zone-delivered pricing so as to escape the scope of the bill? I don't know.

Query: Would it advantage the large at the expense of the small? We feel the answer to that is very clearly yes. In simple, obvious, practical experience, all we have to do is ask ourselves, what kind of purchaser would be interested in picking up a truckload of product, and would have a truck in the vicinity so that he would be able to do that at an economic advantage to himself? The answer is obvious, Mr. Chairman. It is, if I may, the Sears, Roebuck type of purchaser who would be advantaged. And this measure, if it were to have the kind of effect in the marketplace that it seems to potentially have, should, as one witness at a prior hearing commented, should probably be entitled "the Economic Concentration Act of 1978," because this is at least theoretically, its probable effect.

The CHAIRMAN. Do you think that there is a formula that could be developed in granting the backhaul allowances that would be nondiscriminatory to the small businessman?

Mr. ROTHWELL. I think we have that formula in the law today. As long as the seller's cost experience at his dock being the same for all buyers, why should the remoteness of the buyer be factored into that equation? If he's in the business of delivery, he has to factor in the remoteness element. But if he sells from his own platform, then his actual experience in reference to buyer A is precisely the same as his cost experience in reference to buyer B.

Now, that's the system we have today and that does provide equity. Certainly we don't need to encourage the growth of the large, especially at the expense of the small. And we feel that that's the inevitable economic impact of this measure, should it become law.

So, in conclusion of this summarization of my written statement, Mr. Chairman, the measure would, without doubt, change existing law. The measure would, without doubt, advantage the large-scale purchaser, the present giants in buying their products for resale and it will without doubt, as a relevant matter, in many specific cases severely disadvantage the smaller purchaser who now gets a rough form of equity at the seller's platform.

The CHAIRMAN. What is the relationship now between the small grocers and the suppliers? In other words, do they get their merchandise directly from the manufacturer or the wholesaler or cooperative association?

Mr. ROTHWELL. Of course, the small grocer, as we understand it—and I don't present myself as an expert in that particular industry,

Mr. Chairman. The small grocer, as I understand it, typically buys his goods from a grocery wholesaler. And of course, the testimony I've heard about the cost savings, energy savings and cost savings that this bill might entail for the food chains—let me note that there is no guarantee whatsoever that a significant part of those savings would be passed on to consumers. Indeed, I think the endemic problem in the food industry today is a low and unsatisfactory "return on investment" type of profit measure.

The CHAIRMAN. Now, your organization represents a lot of other industries or businesses in addition to the food industry. In light of the fact that this legislation would affect all zone-delivered pricing systems, what effect would this have on the other industries and small businesses that you represent?

Mr. ROTHWELL. If the chairman would look at the 26 national associations listed on attachment A, I think it becomes obvious that no single answer can be given to describe the economic impact of this on such diverse economic situations.

As encountered on the first list, the automotive warehouse distributors and the National Association of Tobacco Distributors, the National Association of Brick Distributors, et cetera, they all have an interest; they all have reviewed proposals and prepared testimony, and they have acceded to the fact that this should be and is their position.

And I want to call it to the committee's attention. We simply did not go to each one of these associations and ask them for an economic forecast of its particular and specific application to their industry situation.

The CHAIRMAN. But they all oppose any changes in the Robinson-Patman Act, any weakening.

Mr. ROTHWELL. They certainly do, especially of the dimension suggested or proposed by S. 1699, which when disparate prices are made lawful at the shipper's platform, based upon remoteness, that would build in an automatic disadvantage to the smaller industries and the smaller organizations represented in this attachment.

But, of course, the National Retail Druggists Association, with 30,000 members, and the National Small Business Association are the two major clients testifying here, Mr. Chairman.

The business of the National Small Business Association that has a membership comprised of more than 1,000 of the 1,200 industry categories as established by the Small Business Administration—I don't think there has been enough detailed research—I don't think there's time and money to do the research—as, for example, predict with any degree of empirical prooflike certainty, the results of this on people who sell bricks, for example; and this is one reason the National Small Business Association exists, to make this kind of presentation.

Mr. Chairman, if I may venture a further comment, some of the most enlightening case histories and studies of zone-delivered pricing and its economic impact have come from the building materials industry, and most especially cement and the cement cases brought by the FTC over the years.

And the economic testimony received and the quite profound discussions about the practices, make cement an industry that has been—well, the subject matter has been well litigated with reference to that industry.

May I point out that the reason for this is, no doubt, the peculiar weight/value relationship insofar as cement is concerned. That is, you can't take a bag of cement very far in a truck until the cost of transportation surpasses the value of the bag. The weight/value relationship in cement has always made the transportation aspect very critical. The natural economic possible distribution circle around a given cement plant is a much smaller circle than for, let's say, someone making watches. That's the operation of this weight/value relationship.

The zoned-delivered pricing was employed. It was utilized in the past to effectuate an industry conspiracy. It gave rise to the picturesque phrase, "phantom freight," where purchasers were charged freight costs that were never incurred.

And this, of course, was the subject of a classic antitrust case and a cease-and-desist order by the FTC and was subsequently approved by the Federal court.

Mr. Chairman, I wish that I was as profoundly informed as your questions suggest. Perhaps I should be, but I simply cannot give you the detailing of the economic impact in this diverse group of industries; rather, we're content to let these people appraise their own interests, and we have in mind that they focus on that issue pretty well.

The CHAIRMAN. All right, thank you very much, Mr. Rothwell.

[The statement follows:]

STATEMENT OF THOMAS A. ROTHWELL ON BEHALF OF NATIONAL SMALL BUSINESS ASSOCIATION AND NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

Mr. Chairman, and members of the committee, my name is Thomas A. Rothwell of the firm Rothwell, Capello and Berndtson of Washington, D.C. The statement that follows is submitted on behalf of National Small Business Association and National Association of Retail Druggists. The National Small Business Association represents some 50,000 small business members spanning more than 1,000 categories of the 1,200 SIC classifications. The National Association of Retail Druggists has 30,000 members and has traditionally represented the point of view of independent retail druggists throughout the Nation for more than 75 years. The 26 national trade associations listed on Attachment A support this statement. Executives of these major associations have asked that we express our very deep appreciation to the Chairman and members of this distinguished Committee for the opportunity to appear here today and testify in reference to a problem that is believed to have a potentially substantial impact on small business.

S. 1699 was introduced in the Senate by Senators Johnson, Bumpers, McClure, and Stone on June 15, 1977. It was referred to as a back-haul allowance measure and was initially presented as a proposal that would result in substantial energy savings. S. 1699 was first referred to the Committee on Energy and Natural Resources and the Senate Commerce Committee. Following hearings on S. 1699, the Energy and Natural Resources Committee refused to support the proposed legislation. After receiving a copy of the proposed bill and analyzing it closely, it became apparent that what was being offered was a proposal to permit an overt discrimination in price as between competing customers under certain circumstances, and to make such price discrimination lawful and appropriate.

The measure is limited in its terms to business firms that engage in zone delivered pricing. Otherwise, it is of general application and would apply to any seller that used so-called bracket or zone delivered pricing.

This marketing device of zone delivered pricing has an ancient and honorable lineage. Perhaps its most familiar employment, at least in consumer goods, is the postscript added to a great deal of national advertising of consumer goods over the years . . . "Slightly higher west of the Rockies." The practical aspects of the matter are that the manufacturer or producer is willing to deliver on a uniform delivered price to customers within a certain defined area, without regard to their location. For example, the producer would undertake to deliver

the product at the buyer's place of business at a stated uniform price anywhere within, let us say, a 150 mile radius of the shipping point. Then, perhaps, from a 150 to 500 mile radius, there would be a somewhat higher uniform delivered price.

This has worked in some industries to increase competitive opportunity for a producer in that he could compete effectively in a remote market and, to some extent, avoid the natural economic disadvantage of remoteness, both in reference to himself and his customers.

This marketing device of uniform zone delievered pricing has been subject to abuse in the past, such as in the well-known cases in the cement industry wherein competitors agreed upon a plan to compute their freight from stated distribution points, whether or not the freight originated from said points, and applied delivered freight rates from such points. This resulted in uniform delivered prices to purchasers in a given area as to all of the sellers of cement. This group of cases is best remembered by law students as involving "phantom freight".

This is not at all involved in the proposal embodied in S. 1699. What S. 1699 means, put simply, is that buyers would be permitted to pick up products at the sellers' warehouse, and pay different prices for those products depending upon the location of the purchaser.

Thus, a customer whose warehouse was 25 miles away would pay one price in picking the goods up from the seller's shipping platform, while another buyer located 150 miles away could lawfully be charged a lower price. Central to a consideration of this proposal must be an acknowledgement that the actual costs of delivery, from the point of view of the seller in each case, are identical. As long as the seller delivers at his own shipping platform, his cost experience in reference to buyer A is no different than his cost experience in reference to buyer B. Thus, what is being proposed is that the seller will be authorized by law to offer two different prices to two different buyers, computed on their degree of remoteness from the seller's shipping platform, even though the seller's actually incurred costs in reference to those two buyers are precisely identical.

That in a nutshell is what S. 1699 is all about.

It is a little difficult to attempt to dispel some of the confusion surrounding this legislative proposal. It might be well to set out those aspects of the matter as to which we all can agree. These seem to be as follows:

1. Under present law, a seller can sell his product from his own shipping platform, if he chooses to do so.

2. Such a seller can also lawfully charge a smaller or a lesser price for product pickup at the seller's warehouse than he charges for the delivery of the product.

3. A seller is not obliged to sell on the basis of zone delivered pricing. He has a number of options. For example, he can sell on the basis of a net price plus delivery cost; he can absorb delivery costs and sell on the same price basis to all of his customers wherever located; or he can also use a uniform zone delivered pricing plan.

All of the above are today lawful and permitted. A seller can have a perfectly proper price schedule that says $1.25 per unit if picked up at the seller's warehouse and $1.50 per unit if delivered to the buyer's place of business. Thus, there is today available the possibility of lawful back-haul, plus an advantageous price concession that is available if the back-haul option is employed.

As noted above, S. 1699 would change all this by providing that the seller could charge two different buyers different prices even though both buyers picked up the product at the seller's warehouse. This is new and somewhat startling.

Let us look at the disadvantages, the trade-offs, the detriments involved should S. 1699 become law.

First, it does direct violence to the basic philosophy of the Robinson-Patman Act. (See Memorandum Opinion of Hon. T. Everette MacIntyre to National Small Business Association 9–30–77, Attachment B.) Robinson-Patman, like its predecessor the 1914 Clayton Act forbids non-cost justified price discrimination as between competing customers. S. 1699, if enacted into law, would permit one category of non-cost justified discrimination, and would change present law by making price discrimination in fact not price discrimination in law.

Under S. 1699 the amount of the price discrimination could be measured by the cost of common carrier transportation between the seller's place of business and the buyer's place of business. This cost in many instances could be substantial.

The purchaser, such as the Safeway store, would rarely, if ever, incur this cost. For example, the actual additional cost to the Safeway division in picking up a load from a seller on a back-haul basis might be $100.00. The reward for

doing this could be let us say, $500.00. Thus, the difference of $400.00 as between the incremental cost experience of the buyer and his back-haul allowance would represent an effective discrimination in price. This explains why the chains, and most especially the chain food stores, are backing this measure. There is a most substantial profit incentive for them should S. 1699 become law.

S. 1699 is in a sense a blank check. It would permit the seller to provide a price discrimination to an important buyer up to and including the cost of transporting the goods by common carrier. Common sense should indicate that if it were cost advantageous for the seller to use common carrier facilities, and pay common carrier rates, such seller would be doing that already.

Let us look now as to who would be advantaged by S. 1699. Not all purchasers can use the goods of an individual seller on a truckload quantity basis. We should think of a truckload quantity in terms of a freight car, as the quantam of goods carried in today's semi-trailers approach that can be put into a freight car.

What kind of purchaser would be interested in attaining that quantity of Campbell Soup, for example, in one shipment? Also, let us look to the kind of buyer that would be positioned to take advantage of S. 1699. What kind of buyer has a large semi-trailer that is empty and also in the vicinity of a supplier's warehouse so as to back-haul a load?

The answers to these questions are obvious. Of course, we are talking about large quantity buyers operating chain stores with a fleet of trucks at their disposal.

The operation of the back-haul proposal then clearly serves the purposes of the large regional and national chains, such as exist in drug retailing as well as in the food industry. This will inevitably lead to an increase in size and power as to the favored class of purchasers, accompanied by a corresponding detriment to the small.

Do we need increased concentration in food retailing? In drug stores? An accelerating rate of demise for their independent although smaller competitors? S. 1699, which permits the large chain to obtain a substantial price discrimination, would be helpful if such were national policy goals. Those who speak for the independent sector of the economy are already profoundly concerned about the growth of the bigs and we must trust the Congress to refrain from encouraging further growth of the giants.

The opinion of the Court of Appeals in the case of *The Great Atlantic & Pacific Tea Company, Inc.* v. *Federal Trade Commission*[1] is most significant in its recognition of the competitive disadvantages imposed upon small business enterprises by large buyers that Section 2(f) of the Robinson-Patman Act was designed to prevent. As the Court of Appeals wisely points out adoption of A. & P.'s views regarding the buyer's use of the meeting competition defense would only serve to emasculate Section 2(f), and the following scenario would result:

". . . large buyers could consistently play one seller off against another to the point where all bids are below sellers' costs and then in reliance upon the sellers' potential good faith and meeting competition defenses, thus vindicate the final price. Such tactics would ultimately result in the acquisition of increased, and perhaps overwhelming market power to the large buyer, all to the competitive detriment of the buyer's competitors. In addition, tolerating of such abusive behavior by buyers would in most cases, favor the largest seller, the ones most able to bear the losses resulting from such a competitive situation, with the further result of ultimate anti-competitive effects among sellers."

Now let us consider the claimed energy savings aspect of the matter. S. 1699 does, in fact, provide an incentive, an extra profit opportunity to certain purchasers. Would such incentive operate to have a purchaser send an empty truck to the seller's warehouse to pick up a truckload of goods and get his favorable price? If so, we have an empty front-haul, which completely negates any energy saving aspect. There is nothing in S. 1699 nor is there any suggestions of a means to control inefficient front-hauls.

If the seller has to make the trip anyhow, assuming less than truckload quantities are involved, all that has been accomplished is to switch loads from one truck to another. The same number and length of trips will be made.

There was an interesting statistic published in an ad by the Southern Railroad Company with respect to fuel efficiency. It seems that railroads achieve 238 ton miles per gallon of diesel fuel, whereas a truck can only achieve 60 ton miles per gallon—an efficiency ratio of 4 to 1. From the trucker's point of view, the most

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[1] 557 F. 2d, 971, 2d Circuit, 1977.

favorable data we have encountered is that truck fuel efficiency is 75 ton miles per gallon of diesel fuel. Even these more favorable figures do not materially affect the 4 to 1 ratio.

While we are aware there are conflicting views on the impact of back-haul, for the information of the Committee and for the purpose of having it introduced in the record, we are submitting a study, "Fuel Utilization in Food Distribution", prepared by L. L. Waters Ph.D. and Joseph R. Hartley, D.B.A., of the Department of Transportation, Graduate School of Business, Indiana University. (See Attachment C.) Their study indicates:

1. Even under optimal circumstances, the fuel savings would be minimal.
2. Some empty truck mileage is inevitable to position trucks after unloading for the next haul. Balanced two-way loads are impossible from various cities because they consume more than they produce.
3. There is already substantial use of private trucking from grocery manufacturers along with widespread policies allowing for private pick up. One-third of the tonnage moving from processors is by private truck.
4. The Transportation Task Force of the Food Service Advisory Committee of the FEA in 1975 concluded that 100,000,000 gallons of truck fuel could be saved per year through widespread private pick up of processor grocery products. The study is faulty and the conclusion is wrong.

To the extent that the back-haul allowance-profit incentive diverts freight from rail transportation to the buyer's truck transportation, the energy diseconomies are palpable.

In preparing this statement, we have reviewed the Report of the Transportation Task Force of the Food Service Advisory Committee that speaks of 100 million gallons per year of fuel economy that could be achieved were back-hauling to be "authorized". The letter of transmittal from the Committee's Chairman, Mr. John N. Curlett, Jr., refers to a needed amendment to the Robinson-Patman Act. A look at the markup of this Transportation Task Force discloses that they are all prominent food chain figures. There is little to be found in this Report to support the claim of a potential saving of 100 million gallons of fuel. What is disclosed is a recognition that an amendment to Robinson-Patman is required so as to permit varying back-haul "allowances" to be granted by the seller.

In this, we agree with the Task Force. An amendment to Robinson-Patman is precisely what is being now proposed. The Task Force even provided the text of such a proposed amendment to Section 2(a) of the Robinson-Patman Act as follows: ". . . nothing herein contained shall prevent differentials resulting from actual freight allowances upon commodities sold under delivered pricing systems."

The relationship between this language proposed by the food industry in June, 1975, and S. 1699, seems too obvious to merit extensive comment.

There remains one other major aspect to be considered—the opportunity for abuse. The plan seems to be for a system of "picking up merchandise at a supplier's plan upon completing a delivery to a close-by retail store". In such a case (and the above situation is as described in the Task Force Progress Report dated May 14, 1975, p. 2), the buyer's truck could then deliver to the same group of stores in reverse order, all the way back to the buyer's warehouse. What would be the maximum back-haul allowance permitted in such a case? S. 1699 would seem to authorize the granting of a common carrier rate for the entire load, all the way to the buyer's warehouse. This would be a most discriminatory allowance under the circumstances, but one that would be legitimized by S. 1699.

The point to be made is that there is no reason to increase the opportunities for abuse in reference to rebates, allowances and concessions. S. 1699 indisputably does this, and there is simply no feasible method of controlling such excesses. S. 1699 is silent as to such matters, and there will be no way to control or even discourage further discriminations that favor the bigs at the expense of the smalls. S. 1699 should be recognized for what it is: an attempt to create a large loophole in the Robinson-Patman Act so as to permit price advantages to the large retail chains.

NATIONAL SMALL BUSINESS ASSOCIATION,
Washington, D.C., September 27, 1977.

Hon. A. EVERETTE MACINTYRE, Esq.,
Washington, D.C.

DEAR MR. MACINTYRE: There has come to our attention a legal opinion rendered by Counsel of the National American Wholesale Grocers' Association. That opinion is to the effect that S. 1699, Diesel Fuel and Gasoline Conservation Act of 1977, "is completely consistent with the philosophy and language of the Robinson-Patman Act."

We and other representatives of small business, as well as members of the legal profession, are well aware of the long years of work you have done involving the Robinson-Patman Act, and your knowledge concerning that law. In view of this, I would like to ask if you would please review the legal opinion rendered to the National American Wholesale Grocers' Association referred to above and provide us with a statement of your opinion regarding its soundness as a statement of law.

May we hear from you at your earliest convenience.

Sincerely,

JOHN LEWIS, *President.*

ATTACHMENT B—MEMORANDUM OPINION

MCKEAN, WHITEHEAD & WILSON,
ATTORNEYS AT LAW,
Washington, D.C., September 30, 1977.

Re would S. 1699 of the 95th Congress entitled "Diesel Fuel And Gasoline Conservation Act of 1977" permit price discriminations now prohibited by the Robinson-Patman Act?

Mr. JOHN LEWIS,
President, National Small Business Association,
Washington, D.C.

DEAR MR. LEWIS: This is in response to the request for a legal opinion on the above stated question. It is understood the request for this opinion has been generated, at least in part, because counsel to the National American Wholesale Grocers' Association, Inc. was rendered a formal opinion in which it was stated that S. 1699 would permit pricing which makes only due allowance for differences in cost and that "such a position is completely consistent with a philosophy and the language of the Robinson-Putman Act."

It appears that those assertions are rooted in a confusion of both the facts and the applicable law pertinent to the discussion.

Perhaps the confusion arises out of a misconception of the facts, the findings and the ruling in the Federal Trade Commission case in its Dkt. 5253, *In the Matter of National Lead Co., et al*, decided January 12, 1953, 49 F.T.C. 791–907. There the respondents were selling white lead on the basis of a zone delivered pricing system. Within a particular zone all buyers paid exactly the same price per hundred pounds of the white lead delivered to them at their destinations irrespective of whether they were near or far away from the manufacturer's point of shipment. In the complaint as originally drawn, the charge is made that this practice resulted in the sellers, the manufacturers making a larger net return from the sales of their merchandise to some near-by customers than they made on sales to customers who were located at greater distances. This was despite the fact that the sales were being made on a delivered basis at the destinations where the customers were located and that the prices of the goods thus paid by the customers at such destinations were uniform. In other words, there were no differences in those actual prices paid for the goods at such locations.

In its disposition of the matter the Commission in its statements of Fndings of Fact and Conclusion stated (pg. 871) the following:

". . . the complaint does not clearly show that the alleged unlawful discriminations as between purchasers of the respondents' products who are located in the same zone occur as the result of differences made in *actual prices* at which the respondents sell their products. For this reason, the Commission is of the opinion that this charge of the complaint should not be further considered."

Also the Commission, in its opinion (pages 881–882) stated:

"In addition to charging the respondent with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act, the amended complaint, in Count II, alleges that each of the respondents discriminates in the price of its lead pigments as between different purchasers, in violation of Section 2(a) of the amended Clayton Act. Certain of the discriminations, it is alleged, occur as a result of the use of the zone method of pricing and selling to competing customers in the same zone. As stated in the conclusion appended to the findings, the Commission is of the opinion that on this phase of the case the *Complaint fails to state a cause of action.* This is because the allegations are that each of the respondents sells its products in accordance with a delivered pricing system, but

the alleged discriminations occur as a result of differening net prices received by each of the respondents at its factory. Thus, the Complaint *does not show that the alleged unlawful discriminations are between purchasers located in the same zone occur as the result of differences in actual prices at which the respondents' product are sold.*"

Emphasis in the preceding quotations from the findings and opinion is supplied. Note, particularly, the emphasis of the words "actual prices". Those references are to the prices paid by the buyers at the points of delivery where the prices were uniform and did not vary from one purchaser to another, although there were considerable differences in the cost of the delivery incurred by the seller serving some customers as against his serving other customers. However, the point is made that the "actual prices" were made at the points of delivery after the cost of delivery had been sustained by the seller. Therefore the differences incurred in transportation were considered of not more significance by the Commission that if they had been differences in the cost of manufacture or sales expenses since there was no difference in the prices paid by the competing customers at any particular destination. It was at that point where title to the goods passed and the goods became the merchandise of the buyers.

In view of the foregoing, it seems clear that the Federal Trade Commission in the *National Lead* case did not find and rule that a zone delivered pricing system where customers pay the same delivered price irrespective of their location violated the Robinson-Patman Act. That is not to say that if the sellers instead were selling FOB their docks and mills at different prices to different customers and where the sellers actually sustained no delivery costs would not be found to be violative of the Robinson-Patman Act. Indeed, this is what the Federal Trade Commission has held in its advisory opinion 147 and 194 to which reference has been made.

Officials of the Federal Trade Commission appeared and testified before a Subcommittee of the House Small Business Committee which held hearings on efforts to amend or repeal the Robinson-Patman Act, in 1975–1976 and another Subcommittee of the House Small Business Committee which held hearings recently on proposals to permit varying prices to different customers when sellers were loading the buyers' trucks at the sellers' docks. All testified that the Federal Trade Commission has never taken a position that sellers are not permitted by the terms of the Robinson-Patman Act from making sales FOB the sellers' docks and loading customers' trucks in doing so, when there is no discrimination in prices in making such sales. Some of that testimony was presented as recently as September 7, 1977 by the FTC's Director of the Bureau of Competition.

On the basis of the foregoing referenced interpretation of the Robinson-Patman Act's inapplicability to uniform delivered pricing, where competing customers pay the same delivered prices, as in the *National Lead* case, it is appropriate to refer back to the first question with which we are concerned here.

First, one should consider what is prohibited by the Robinson-Patman Act. Briefly stated, the Robinson-Patman Act makes it unlawful to discriminate in price between different purchasers of commodities of like grade and quality and where the effect of such discrimination may substantially 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 benefits of such discrimination. In the event that a seller should be challenged as having violated that provision of law, he is provided with an absolute defense to the charge that he violated the law if he can and does show that the different prices he made, provided only due allowances for the differences in the cost of manufacturing, sale or delivery resulting from the different methods or quantity in which such commodities were to the purchasers sold and delivered.

Second, one should consider what is proposed to be permitted by S. 1699. It would permit a seller to sell goods of like grade and quality in truck load quantities to different purchasers at different prices at the seller's manufacturing plant or loading docks. This would be true even though the seller in such instances incurred no greater cost in loading the trucks for the sale to customer A than he incurred in the loading of the truck for customer B. Upon the completion of the sale to both customer A and customer B title would pass to the good so loaded at the sellers' docks where the trucks would be loaded. From that point in time onward, buyers would be owners of the purchased merchandise. They would be free to haul it wherever they pleased, sell it at what prices and to whomever they pleased, Consequently, any cost incurred in the transportation and delivery of the merchandise involved would be cost incurred by the buyers and not the

sellers. Therefore, differences which would arise in the cost of the deliveries made by the buyers of their merchandise to the different places to which they would transport the goods would be differences in costs to buyers, and not differences in cost incurred or under the control of the sellers.

Third, in view of the foregoing provisions of the law and of the facts as above stated, it is difficult for anyone with a knowledge of the Robinson-Patman Act and other laws which prohibit discriminations in price between different buyers to justify any claim that the provisions of S. 1699 would not permit what is prohibited by the Robinson-Patman Act. They say that because they refer to the different prices as reflecting only the difference in costs the buyers would probably incur in transporting the goods to the places where they would expect to resell them.

In conclusion, it is submitted through this opinion that the proponents of S. 1699 disregard the fact that it provides for sales at varying prices FOB the docks of the sellers and therefore disregards the fact that sellers do not incur any cost in making deliveries to one as against another wherever located. Therefore, it is further submitted that those proponents are in error when they say that such legislation takes the position which "is completely consistent with the philosophy and the language of the Robinson-Patman Act."

Sincerely,

A. EVERETTE MACINTYRE.

ATTACHMENT C—FUEL UTILIZATION IN FOOD DISTRIBUTION

CONCLUSIONS

This study has addressed the question of whether major fuel savings will result from national action to stimulate vigorously pickup of groceries from processors with the private trucks of grocery wholesalers and retailers. The conclusions follow:

1. Even under optimal circumstances, the fuel savings would be minimal. The average for-hire truck haul from processors is over 400 miles with two-thirds of the products moving 503 miles. This sharply contrasts with the typical empty truck backhaul from retail outlets which will range from about 30 miles to 90 miles, though some may reach 130 or 140 miles. For the average movement, the short retail backhauls simply will not match the long hauls from the grocery processors.

2. Many factors prevent the optimal circumstances assumed above for fuel efficiency in trucking. Some empty truck mileage is inevitable to position trucks after unloading for the next haul. Balanced two-way loads are impossible from various cities because they consume more than they produce. Denver, Miami, San Diego, Houston, and Washington are examples. Many transport companies experience two tons to the West Coast for one ton east. Variations in weight and length, limitations on bridges and particular routings, as well as seasons preclude optimal loads uniformly throughout the nation.

3. There is already substantial use of private trucking from grocery manufacturers along with widespread policies allowing for private pickup. One-third of the tonnage moving from processors is by private truck. Serious problems would be created by vigorous stimulation of private pickup at processors. A recent ICC study revealed that only about ten percent of regulated for-hire trucks run empty on the interstate highway system versus about one-fourth empty for private trucks. Filling the empty private trucks of food wholesalers and retailers will merely shift the empty problem to the for-hire trucks. Equally serious would be creation of excess capacity and higher for-hire costs, which would soon be translated into higher rates to the food industry and consumer.

4. The Transportation Task Force of the Food Service Advisory Committee of the FEA in 1975 concluded that 100,000,000 gallons of truck fuel could be saved per year through widespread private pickup of processor grocery products. The study is faulty and the conclusion is wrong. The problems mentioned above were overlooked in the study. The study attempts to reason from only a few specific and simple examples to a general conclusion about one of the most complex physical distribution systems in the nation.

Within the area of food distribution a new factor has loomed which would seem to be of great importance, and that is the necessity to conserve fuel supplies. In the realm of transport this should be put in proper perspective. From a cost point of view, fuel is roughly one-fifth as significant as the level of wages in transport. Nevertheless, the intelligent utilization of fuel is not only of concern to the industry but of equal importance to the economy.

We have examined the data available in this realm to determine whether or not major fuel economies can be achieved in food distribution by increased private trucking. We have focused upon the issue of whether some form of mandating processors to allow wholesalers and retailers to pick up shipments in private trucks would achieve the milennium in fuel efficiency.

We will in the course of this paper present some points that might support such an extension but the overwhelming weight of the evidence would be to rely upon the distribution arrangements which now prevail. As a further prefatory item, we should readily concede that selected wholesalers and retail chains in unique situations might well benefit by the new arrangement and, simultaneously, complicate or raise the costs of ten for everyone benefited. If we are to assume a statesmanlike role for purposes of deciding this issue in the interests of national conservation on fuel, we have simultaneously an obligation to think in the national interest of food distribution and not the particular position of a limited number in a position to benefit.

We start out with both an admission and a strong warning. On the face of things, a truck going down a highway hauling nothing represents a waste of the truck as well as the diesel fuel it is burning. On the other hand, this could be the highest use made of that fuel—if it is a specialized vehicle unsuited to hauling something else, or if it is on the tail end of a run after previous stops for partial unloading, or if it is a valuable piece of equipment which must be utilized the maximum number of hours in the specialized service for which it is best suited, or for a dozen other reasons which will be outlined. A hotel is full at 95 percent occupancy. An unemployment rate of three percent may be irreducible. Empty mileage of some trucks is in the same category. As a nation we must be careful that we do not encourage higher costs and inefficient utilization of capital and labor by seeking to solve the fuel problem.

Mismatch of haul lengths from processors compared to private truck backhaul distances from retailers

Census of transportation.—It is impossible to analyze separately the tens of thousands of intricate movements of grocery products in an economy as complex as the United States. Indeed, it is dangerous to analyze a handful of specific transport movements of grocery products if the intention is to reach sweeping conclusions for the nation with respect to any measure of efficiency, be it fuel consumption or other cost factors. However, there are some broad measures of the way goods is moving at the present time in the foods industry. The last census of transportation was conducted in 1972. That census measured the movement of all manufactured and processed products from plants or warehouses near the plants directly to retail customers or to distribution centers more than 25 miles from the processing plant. Of course, the census includes the food processing industry. See Appendix A for a discussion of the census exclusion of fluid milk and fresh fruits and vegetables. These exclusions do not affect the conclusions of this study.

Restructuring and refining the census data on food and kindred products plus soaps and detergents yields three key facts for this analysis. They are: (1) average length of for-hire truck hauls from processors' plants and nearby warehouses, (2) the portion of grocery products already moving by private truck, (3) volume of movement by different types of carriers. The length of truck hauls will be examined first.

Most food distribution companies use private trucks to carry food from their warehouses to retail outlets. The trucks usually return empty. If they could fill up at a food processor's plant or warehouse, the backhaul would not be empty. This would save fuel if it did not create new empty movements for the trucks that had previously been serving the processing plants. But ignore that problem for the moment. Do the lengths of haul from the food processors match up with the return trip distances from the retail stores? That is, does the typical backhaul distance from retail outlets fit the average distances, "fronthauled" from processors? The answer is a disappointing and emphatic, "No."

Length of private truck hauls at retail.—How was data derived for private truck trips from distributors' warehouses to supermarkets? A significant portion of the private trucks for grocery wholesalers and retailers are obtained through long-term leases from truck leasing firms. These leasing firms are well informed about when, where, and how much their equipment is being used. Some have provided us information about the nature of hauls by grocery customers. This seemed the most reliable source as it should contain no bias either in favor of customer private pickup or in favor of commercial pickup for grocery manufacturers.

The preponderance of the private miles are run daily by retailers in carrying mixed groceries from their wholesalers or distribution centers to the supermarkets. These runs are not long. They typically will not exceed 150 to 180 miles round trip per truck per trip. The length of the trip is largely a function of the size of stores being served. These vary widely, with chains tending to have larger stores than independents. It may range from one to six stores but is commonly four to five stores.

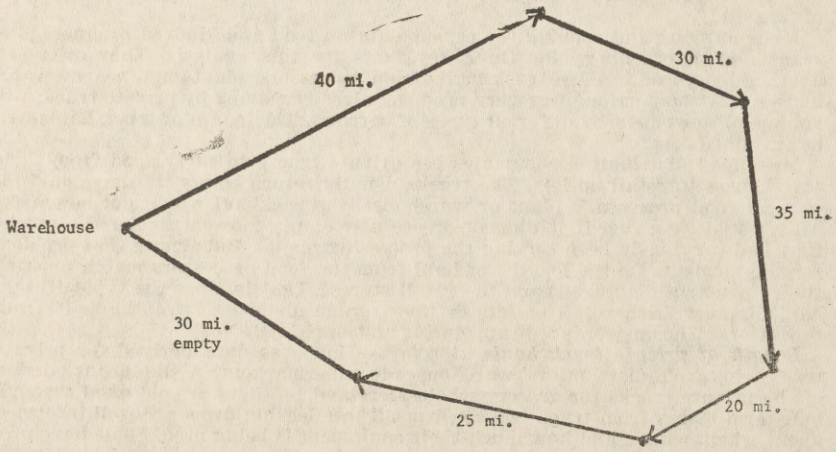
Time must be allowed, of course, for unloading and loading. This also has a wide variation. For unloading, some stores have better docks and storage facilities and manning tables differ. Some wholesale or retail chain warehouses have semi-automated or automated order selection systems and loading systems while others literally use manual labor for all loading functions. Thus the amount of time left for driving per truck-trip depends upon a host of variables that have little or nothing to do with the effectiveness of the vehicle for traveling.

The largest supermarkets may receive a full 40-foot van (standard, covered semi-trailer), be unloaded in three hours and turnaround. Such a truck might travel up to 275 miles per trip at the outside since its driver must obey the ten-hour safety rule which prohibits him from more than ten hours of duty time. The maximums backhaul in this case would be one-half of 275 miles or about 138 miles.

But this is not the typical case of retail grocery trucking. It is well known that the majority of food consumers live in urbanized areas or in towns near urban areas. Because of differing population densities, the pattern of grocery pickup and delivery runs will vary from one section of the country to another. Mileages in some of the Midwest and western states will be high, while in congested areas the vehicle may not move as much as a hundred miles a day. For the most part, the routes are circular or elliptical in nature so that the amount of totally empty mileage may be much less than half the route driven.

This is a very important point. Some comments we have seen on private grocery pickup seem to assume the typical delivery truck makes a loaded run to only one retail outlet and returns to the warehouse or distribution center for another load. Thus it is assumed that half of all private truck miles by retailers are empty. This simply does not fit the realities of grocery distribution to supermarkets.

If a tractor with trailer serves five towns, they will normally be in one quadrant. The vehicle may start out on a 180-mile route, fully loaded, depending upon the volume of orders by the stores. However, it may embark one-fourth empty because frequent service has to be maintained since supermarket inventories are kept at a minimum. The truck partially unloads at each retail outlet. By the time the truck gets to the fifth stop, it may be 30 or 35 miles from the point at which it began. The simple ellipse below illustrates something which is much more common than having a truck go out 130 miles in a straight line to one store and return.



Length of truck hauls from processors.—A careful analysis of the average length of truck hauls for each major category of grocery products has been made from the data in the 1972 census of transportation. The average length of haul by for-hire motor carriers for meat products; dairy products; all canned and preserved fruits, vegetables, seafoods, jellies, etc.; bakery goods; and flour and other cereal products was 503 miles in 1972. These five categories of grocery products constitute two-thirds of the total ton-miles from processors of all grocery products excluding fresh produce. The trend in the four years since 1972 has definitely been toward longer hauls in almost all dimensions of operation by common carrier.

Private trucks of both processors and retailers were already moving about 33.9 percent of the tonnage of products from the processors in the 1972 census. The table shows the actual length of haul for each food commodity by authorized carriers and by private carriers. Examining meat dramatizes the sharp difference of 600 miles for the average haul by common or contract carriers in contrast with trip lengths of 232 miles by private truck. The same relationship applies throughout with the exception of confectioneries. It is obvious that private trucks are already being used significantly where the hauls are relatively short with an overall average of 163 miles. It is equally clear that long hauls are the backbone of the truck supply network from food processors. And the average railroad hauls are even longer than the for-hire trucks.

TABLE 1.—AVERAGE LENGTH OF HAUL BY TRUCKS FOR PROCESSED GROCERIES FROM PLANTS

	Billion ton-miles all modes	Average truck haul in miles	
		For hire	Private
Meat: Fresh, chilled, frozen	12.6	600	232
Dairy products	3.2	425	121
Canned and preserved fruits, vegetables, seafoods	20.5	464	260
Flour, cereals, corn products and other grain mill products	14.2	334	297
Bakery products	1.0	455	275
Sugar	5.3	157	130
Confectionery and related	1.9	61	384
Beverages and flavoring extracts	10.7	216	99
Miscellaneous food preparations	9.1	298	222
Total and average	[1] 78.6	407	163

[1] Rounding error.

Retail backhauls are too short for typical truck hauls from processors.—We will now shift to the average length of hauls from the distribution centers to the retail stores which were discussed above. These were commonly 150 to 180 miles. The portion of empty backhaul was less than 75 to 90 miles. The point is obvious: The private deliverly trucks are well adapted to do their job of hauling numerous loads, short distances, rapidly and frequently. The common carriers are well adapted to their job of making hauls for grocery products of 500 miles up to 1,000 and even 2,000 miles. On the one hand, the distributor is the local postoffice, which is quite a different operation than transporting across a nationwide postal system.

We have examined the number of plants and distribution centers of some of the larger food companies of the country and it is quite apparent that even these major enterprises do not have so many plants and distribution centers that they would be accessible to the typical wholesale grocery enterprise. In short, the inbound movement to wholesale grocery enterprises involves such vastly different characteristics that it has little in common with the distribution of inventories from the wholesalers to the individual stores. This inevitably means that the savings in fuel attributable to an expansion of backhaul is likely to be minimal even in optimal situations.

There are and will be cases where particular routes for retail distribution fit some shorthauls from a particular processor. But these will be the exception rather than the rule.

We are, of course, aware that some large chains, which in turn own their own processing plants and have sophisticated physical distribution staff with logistics experts, can use their equipment in a dual role. Even in their cases, this use would be limited.

Common carrier backhauls already low but some empty movement is unavoidable

No hope exists that empty mileage in any form of trucking can be wholly eliminated. The results of various classes of carriers was surveyed in a recent study released by the Interstate Commerce Commission in April, 1977. Tables on pages 9 and 10 of the study disclose that the regulated for-hire carriers had by far the lowest percent of empty mileage, being slightly above one-tenth. See Tables II and III. Private carriage was in the vicinity of one-fourth, though intrastate operations of private carriage was 34.9 in vans. This may be explained by the shortness of the interstate runs and the particular roles performed on short runs. The low, empty level of the regulated carriers is attributed to the fact that they are primarily in the trucking business. Their whole efforts are devoted to minimizing empty miles and maximizing load factors and, more significantly, revenues which may not be the same thing.

A certain amount of empty mileage is bound to occur because return loads suitable for carrying in the same specialized vehicle are not likely to be available A certain amount of positioning of equipment is essential in the trucking industry which makes for empty mileage, just as it makes for nonrevenue mileage in the air industry. The airlines generally relocate planes during the night, as they have always done historically, to originate flights from optimal points to serve the best interests of their clientele.

Some empty mileage occurs because of the very specialized nature of even van trucks that are regarded as general purpose. The variations in weight and length laws as well as limitations on bridges and particular routings as well as seasons preclude optimal loads. Then there are cases in which equipment dedicated to hauling one product cannot be used for another. A stainless steel milk truck is not likely to be used for other liquids on a return load.

TABLE 2.—COMPARISON OF PERCENT EMPTY TRUCK MILES BY TYPE OF EQUIPMENT AND AUTHORITY, 1976

Equipment: Authority	Trucks	In percent		
		Lower limit [1]	Empty	Upper limit [1]
Van:				
ICC authorized	3,909	10.4	12.2	13.9
Exempt	443	23.2	27.4	31.6
Private	2,266	23.9	26.7	29.6
Refrigerated van:				
ICC authorized	1,008	9.1	11.0	13.0
Exempt	586	10.9	13.7	16.5
Private	560	18.5	24.2	29.9
Flat or lowboy:				
ICC authorized	1,322	12.8	16.6	20.4
Exempt	124	11.4	18.5	25.6
Private	847	18.8	23.2	27.6
Tank:				
ICC authorized	529	38.4	41.0	43.7
Exempt	85	12.1	20.1	28.1
Private	456	28.6	37.5	46.3

[1] The lower and upper limits represent bounds within which the population percent empty is expected to fall with 90-percent confidence.

Source: Interstate Commerce Commission, "Empty/Loaded Truck Miles on Interstate Highways During 1976," tables II and III, pp. 8, 9.

TABLE 3.—COMPARISON OF PERCENT EMPTY TRUCK MILES FOR INTERSTATE AND INTRASTATE TRUCK TRIPS BY TYPE OF EQUIPMENT AND AUTHORITY, 1976

Equipment: Authority	Trucks	In percent		
		Lower limit [1]	Empty	Upper limit [1]
Van:				
Interstate:				
ICC authorized	3,322	8.1	10.0	11.9
Exempt	348	21.8	26.7	31.6
Private	1,769	21.8	24.7	27.7
Intrastate:				
ICC authorized	577	20.5	26.0	31.6
Exempt	94	19.9	30.1	40.4
Private	485	27.9	34.9	41.9
Refrigerated van:				
Interstate:				
ICC authorized	942	6.8	9.1	11.4
Exempt	547	9.2	12.5	15.7
Private	421	15.6	20.5	25.4
Intrastate:				
ICC authorized	64	40.1	54.5	68.9
Exempt	36	17.5	24.4	31.3
Private	137	23.8	34.7	45.7

[1] The lower and upper limits represent bounds within which the population percent empty is expected to fall with 90-percent confidence.

Note: Sample sizes for intrastate refrigerated vans as well as exempt intrastate vans are extremely small.

Source: Interstate Commerce Commission, "Empty/Loaded Truck Miles on Interstate Highways During 1976," tables II and III, pp. 8, 9.

One of the main reasons, though, for imbalance is the fact that production of products and consumption by areas do not match. The West Coast generally has manufactured less than it has consumed in such products so that many transport companies go on the assumption of two tons West and one East. Certain cities like Denver, Miami, San Diego, and Houston are predominantly inbound cities and there is little that can be done to avoid empty mileage out. Washington, D.C., is another example of massive inbound movements of groceries and other products with little shipment outbound.

The solution to difference in empty miles is not nearly as simple as meets the eye. The conclusion might be drawn that the private truckers with one-fourth empty mileage would be immeasurably better off if they were able to take on other loads for part of the trip. This may be substituting one carrier's full mileage for another's empty mileage. For the most part, the common carriers are in the position to offer the public good service because their empty mileage factor is low, and grocery manufacturers are among their most important customers. If there should be encroachment on this area, empty miles and related costs—including fuel, of common carriers might rise. A national program of grocery private pickup, designed to conserve fuel in the public interest would turn out not to conserve fuel but only to minimize the costs of a few while adding to the costs of the many served by common carriers. This may sound good for the lucky ones but could be harmful collectively.

Estimates of fuel consumption: for-hire versus private trucks

At the outset, the census of transportation reveals that in 1972 there was a substantial amount of product already moving from processing plants by private truck, as mentioned previously. Approximately 13.5 percent of all ton-miles and 33.9 percent of all tons shipped were in company-owned vehicles. Some portion of these trucks were owned by the processing plants that chose to operate them and the other portion, of course, were owned by the food wholesalers or retailers buying the products. For-hire truckers hauled 29.4 percent of the ton-miles of grocery products from the processing plants. The railroad system carried the remaining 55.1 percent, while water transport carried somewhat over 1 percent.

The first step in examining the fuel consumption of transportation for grocery products is to measure the amount of goods shipped by truck from the processing or manufacturing plants. In 1972 motor carriers for hire hauled 57,000,000 tons of products away from the plants or local warehouses. These trucks generally traveled relatively long distances, averaging 407 miles one-way. Multiplying the varying distances of the truck hauls times the tons picked up yields the ton-mile figure. For-hire trucks in 1972 provided approximately 23.111 billion

ton-miles of transportation between processing plants, their own warehouses or customer distribution centers. A relatively small portion of the total ton-miles was engaged in moving products to specific retailers or their supermarkets.

The next step for examining fuel consumption by for-hire trucks carrying grocery products is to add an adjustment to the food products for detergents and cleaning substances. Trucks carried approximately 2,186,000,000 ton-miles of soaps and detergents from manufacturing plants for supermarket sale. The resultant total must then be adjusted downward for the fact that gross national food expenditures include restaurants and institutions. A further reduction is made for the 72 percent relation between supermarket sales and sales by smaller superettes, small grocery stores, and specialty stores. It is assumed that the supermarkets are the stores most likely to have sufficient volume for ownership of private truck fleets. The adjusted total is 11.5 billion ton-miles.

In 1974 ICC freight commodities statistics for Class I motor carriers showed average loadings of 17.3 tons per truck. Dividing the ton-miles by this weight factor yields an estimated 666,000,000 truck miles from processors' plants. At five miles per gallon, the total fuel consumed would have been about 133,000,000 gallons for 1976. (See Appendix for detail.)

To this might be added 104,000,000 as the use of fuel by private trucks in the same service. Approximately 34 percent of the volume is by private trucks and they move approximately two-fifths of the distance of the regulated carriers. It is assumed that 70 percent of groceries by private truck from processor plants are destined for supermarkets. If this seems high, the private fuel total can be adjusted downward (see Appendix). Thus, the aggregate would be 237,000,000 gallons.

This is obviously a very large number but has to be put in perspective. Gasoline sales for the year ending on October 31 were 85,000,000,000 gallons. Diesel fuel used by two of the largest regular route common carriers approximated 160,000,000 gallons.

The extensive use of private trucking from grocery manufacturers indicated by the census analysis is supported by a survey of industry practice. In 1976 the Grocery Manufacturers of America, Inc., conducted a survey of 76 grocery processors ranging from very small in size to 17 companies with sales exceeding $.5 billion. One of the questions asked was, "Do you allow customer pickups at all your plants or warehouses?" The response was that 58 percent of the companies allowed pickup at all of their plants and 53 percent allowed it at their warehouses. A second question asked if they allowed pickup at some of their plants or warehouses. The response was 67 percent at some plants and 71 percent at some warehouses. Some firms simply make private pickup with allowances available. Others promote it as a strong sales appeal. These are the variations one would expect from a free market with the physical distribution complexities of processed groceries.

Three conclusions follow. First, private trucks already carry about one-third of the tonnage of grocery products from processors (excluding fluid milk and fresh fruits and vegetables. Second, private pickup is already afforded by a considerable number of processors. Thus, we do not face an either/or situation with private pickup in the present competitive market among grocery manufacturers.

The role of private trucking at the processor level of food distribution is far more significant than we expected. Yet the Interstate Commerce Commission study in 1976 revealed that private trucks have an empty ratio more than double the for-hire carriers. Under these circumstances, suppose, for the moment, fuel savings is the only objective considered. Then national policy action to encourage even more private trucking in grocery distribution could actually increase fuel waste rather than decrease it.

If any national action is to be taken, perhaps it should be to discourage private trucking of grocery products because their empty rate is so high. The case is plausible enough that it certainly should be studied along with any proposal that contemplates a special stimulus to private trucking.

A commentary on the study of private backhaul by the Food Service Advisory Committee, Federal Energy Administration

In 1975 the Transportation Task Force of the Food Service Advisory Committee of the FEA completed a study of the potential fuel savings from a change in policies with respect to private pickup of grocery products. The analysis is based upon a number of case studies of specific operators at the retail level in the grocery industry. The report estimates that one truck mile in a private fleet generates $60 of retail sales. It proceeds from that factor to estimate that

wholesale and retail trucks are running 1.9 billion miles per year. The report then allows for a 30 percent inbound movement to distribution centers by rail. It erroneously assumes the trucks are empty half the miles and estimates a gross fuel savings of 133,000,000 gallons at 5 miles per gallon. It assumes 75 percent of the truck tonnage will be filled so the net fuel is projected at 100,000,000 gallons.

On the face of it, the study is simple and appealing. If grocery private trucks are operating almost one billion empty miles per year and if we can only fill them full, we will save the 100 million gallons estimated or even more.

We think there is a fundamental flaw in the simplistic logic of the study. It makes the error of reasoning from a few specific instances and trying to generalize about one of the most complex physical distribution tasks of the nation. Three of the case studies emphasize private movements at the retail level where processor plants are only one to five miles or 15 miles away from a particular retail store. Obviously, such cases and patterns exist in a number of communities in the nation. But the information discussed above about the typical grocery truck haul from processor being 400 miles or more demonstrates emphatically that one cannot effectively match retail backhaul on a large scale with the totally different requirements of processor shipping.

Conclusion

In conclusion, the potential fuel saving from further backhauling of grocery products is elusive. Where the retailer or wholesalers' trucks and routes can be adapted to haul goods 300 to 500 miles or more, some real savings in fuel may result. In the vast majority of situations it is doubtful that any fuel which might be saved by loading private trucks for backhauls will equal the fuel efficiency lost by the present for-hire motor carriers which are serving the food industry and nation so effectively.

Furthermore, a major shift to private pickup will probably be offset by increased empty backhauls in the vital for-hire trucking industry. Excess trucking capacity would also result. This means overall for-hire costs would increase. The resultant increased rates would be assessed to grocery products where the imbalances were being created. This would mean increased distribution costs for the majority of grocery products which do not lend themselves to private backhaul.

While empty truck movement is a serious fuel efficiency problem, it should be addressed at the national level for all products and the entire, very complex trucking system. Piecemeal actions dealing with one or two product groups run a high risk of simply replacing one set of empty trucks for another and raising truck costs and rates. If we have learned anything in the four years since the oil boycott, it is that there are no simple solutions to America's fuel problems in the transport sector.

Appendix A

Exclusion of Fresh Fruits and Vegetables and Fluid Milk from Census of Transportation

The text of the report mentioned that there are some important omissions from the transport census data. There clearly are two categories of grocery products that must be considered. One is the very large and important group of fresh produce, fruits and vegetables, which do not require a major manufacturing or processing stage. Perhaps it is self-evident that fresh fruits and vegetables are produced on a very specialized regional basis in differing parts of the nation. The most dramatic recent reminder of this was the serious freeze of oranges in Florida during the bitter winter of January and February, 1977. Another example, though farther from home, is the freeze of coffee bushes in Brazil, South America. Finally, the serious California drought is driving up the price of vegetables and fruits from one of the nation's most important produce sources. The volume of fresh fruits and vegetables produced, shipped, and consumed in the nation are available in statistics gathered by the Department of Agriculture.

A separate analysis was made of this food category but excluded from the report because it does not affect the conclusions. The tonnage of fresh fruits and vegetables is very high in total. They are hauled primarily by so called exempt motor carriers because unprocessed agricultural products are exempt from regulation by the Interstate Commerce Act. For a wide variety of reasons the rates charged by exempt truckers are relatively quite low for agricultural products.

Because of the regional specialization in fruits and vegetables the length of hauls are typically very long except for very short ones to urban areas which happen to be in the heart of a producing region.

It is unlikely that retail distributors' private trucks would seek large volumes of fresh fruits and vegetables. They would have difficulty beating the low rates already charged. The distances are usually very long, and refrigerated equipment is often required.

The second category of major food product that is not included in the transport census material includes fluid milk. It is assumed in taking the census that fluid milk to be consumed as milk—rather than milk products such as cheese, butter, ice cream, yogurt—is delivered and consumed locally in metropolitan areas of the nation. The total significance of the omission of processed or bottled milk or refrigerated milk in bulk is not of major consequence to this study, although we are aware that fluid milk does, in some instances, move as much as 1,000 miles from processing plants.

Appendix B

TONS AND TON-MILES OF PROCESSED FOOD PRODUCTS ON INITIAL SHIPMENT FROM PROCESSOR PLANTS, 1972[1]

	Million ton-miles	Percent	Thousand tons	Percent
Railroad	43,283	55.1	66,230	34.6
For-hire motor	23,111	29.4	56,768	29.7
Private motor	10,575	13.5	64,966	33.9
Water	1,242	1.5	2,601	1.4
Unknown	348	.4	880	.5
Total	78,559	100.0	191,445	100.0

[1] "Census of Transportation." Includes fresh fruit and vegatables and fluid milk. Inedibles in SIC deleted.

Appendix C

Fuel consumed by for-hire trucks from food processors for foods eventually sold by supermarkets[1]

Billion ton-miles by for-hire truck[2]	23.111
Detergents by for-hire truck[2] (assumes 80 percent goes to retail market)	2.186
Total billion ton-miles	25.297
9 percent tonnage growth since 1972 (estimated)	×109
Estimated 1976 ton-miles	27.574
Percent grocery expenditure/gross food expenditure[3]	×0.58
Billion ton-miles	15.993
Percent supermarket sales/grocery sales[4]	×0.72
Billion ton-miles	11.515
Divided by average truckloads of 17.3 tons[5]	÷17.3
Estimated for-hire truck miles (millions)	666
Divided by 5 miles per gallon	÷5
Estimated fuel by for-hire trucks from processing plants for goods flowing for supermarket retail (gallons)	133,000,000

[1] Excluding fresh fruit and vegetables and fluid milk.
[2] 1972 Census of Transportation. Inedible food products deleted from SIC items.
[3] 1976 gross national product data from "Survey of Current Business," March 1977.
[4] "Progressive Grocer 1975 Annual Report," April 1976, p. 76. Supermarkets defined as groceries with sales greater than $1,000,000.
[5] Calculated from "Freight Commodity Statistics, 1974," ICC. Computed for SIC food products moved by class I carriers; inedibles deleted.

Fuel consumed by private trucks from food processors for foods eventually sold by supermarkets [1]

Billion ton-miles by private truck [2]	10.575
Add detergents [2]	283
Total billion ton-miles	10.858
9 percent tonnage growth since 1972	×109
Estimated 1976 ton-miles	11.835
Estimated percent going to supermarket sales	×0.70
Billion ton-miles	8.285
Divided by average truckload assumed somewhat lower than for-hire loads	÷16
Estimated private truck miles (millions)	518
Divided by 5 miles per gallon	÷5
Estimated fuel for private trucks from processing plants for foods flowing for supermarket retail (gallons)	104,000,000

[1] Excluding fresh fruit and vegetables and fluid milk.
[2] "1972 Census of Transportation." Inedible food products deleted from SIC items.

APPENDIX D

ASSUMPTION OF 5 MILES PER GALLON OF DIESEL FUEL

Some elaboration is warranted on assumption of five miles per gallon of diesel fuel. Regular route common carriers usually get good mileage, especially if they own their own vehicles. The results are tied to the amount of driver training and continued supervision. The rate of replacement of equipment is a factor. In recent years, the mileage has improved substantially as a result of the particular drive-trains selected by the common carriers which have a speed capability not exceeding 60 miles an hour. The fact that the drivers are frequently limited by mileage pools and controlled by rigorous scheduling eliminates most of the incentive both to speed and to waste fuel. A combination of factors such as better drive-trains, derating of engines, air flow shields, fan clutches, and radial tires have enhanced mileage by a factor of about 25 percent.

The incentive is still present for many independent owner-operators and for personnel paid on a straight mileage basis or percent of through billings to drive at maximum speeds. Furthermore, if their ten-speed equipment were to conform to the 55-mile regulations, they might have to drive in the eighth gear with a larger number of engine revolutions and not improve their mileage. Generally, larger fleets constitute a better pool which minimizes empty miles and maximizes load factors. This further contributes to fuel efficiency.

The CHAIRMAN. The next witness is Mr. Stewart Pierce.

STATEMENT OF STEWART PIERCE, RICHMOND, VA.

Mr. PIERCE. Mr. Chairman, I appreciate the opportunity of appearing before this Committee. My name is Stewart W. Pierce, residing at Richmond, Va. My background and experience has been in distribution and traffic management. As a taxpayer, I am concerned primarily with the economic legitimacy of delivered pricing in connection with Federal purchasing. (See attached outline.)

I oppose Senate bill 1699 as being inappropriate and untimely legislation in relation to pending executive and regulatory agency matters (involving the potential of delivered pricing as an unfair trade practice and a means of shared-monopoly control and price fixing).

This bill represents a fourth clarification of FTC Advisory Opinion 147 and proposes a formula for backhaul-transport allowance in private-sector, delivered-price markets. S. 1699 reflects the continued indifference by the Congress to the well-established potential of delivered pricing as a means of shared-monopoly control and price fixing. Action on this bill would represent inappropriate economic permissiveness by the Congress and could have an untimely and chilling effect on the fulfillment and effectiveness of two pending and relevant matters:

First, the Executive Office of the President has reviewed the need for deleting the delivered-price exception in Federal purchasing and is now processing this change, avoiding further wasteful and inflationary expenditure of public funds. Of interest to me as a taxpayer, and terms of economic fairness, this change appears to establish and assert the legitimate role of the Federal Government in the Federal purchasing process; as a major purchaser of commodities in volume lots, and as an optional purchaser of regulated transportation services—on a countervailing basis with any individual bidder or seller. (Items 1955(b) and 1978(b)—attached outline.)

Second, a similar sense of action should be adopted by the Federal Trade Commission in fulfilling its 1973 commitment, prior to the involvement of a legislative clarification. This action, under authority delegated by the Congress, could enhance, not impede, the purpose and effect of the pending change in Federal purchasing. (Items 1973(a) and 1976(a).)

Mr. Chairman, in conclusion, I respectfully suggest deferment of action on this bill until the pending change outlined above has been fully implemented in the public interest of fair and economical Federal purchasing, and in the furtherance of economic justice.

Thank you, sir.

[The attachment referred to follows:]

OUTLINE.

ECONOMIC LEGITIMACY OF DELIVERED PRICING IN FEDERAL PURCHASING (1935–78)

1935: (a) Refusal by cement companies to honor President Roosevelt's request for shipping-point price option on federal purchases ("The Basing-Point System," Machlup).

1936: (a) Senate Commerce Committee hearings on S. 4055—to "abrogate" mandatory delivered pricing practices in private and public purchasing; (b) Based in part on federal purchasing, FTC case action initiated against delivered pricing practices in the cement industry.

1948: (a) House Small Business Committee Report No. 2465. Potential of delivered pricing in monopoly control and price-fixing; (b) High-water mark of FTC action against delivered pricing: Supreme Court decisions in cement and conduit cases (page 250, "Government and Business," Mund).

1950: (a) Pro-delivered pricing legislation (S. 1008) passed by Congress; veto of President Truman upheld; pressure of informal Senate "watchdog" committee for limited FTC follow-up enforcement of cement and conduit decisions (p. 454, "Congress and the Nation" (1945–64)).

1955: (a) Antitrust Commission Report: Potential of delivered pricing in monopoly control and price-fixing (p. 214, etc.); (b) Letter, July 6, Dept. of Justice (file SNB: VHK): " . . . in the next revision of procurement regulations the (delivered-price) exception will be deleted". (this deletion was not made by Department of Defense; see item 1978 (b), below.

1967: (a) FTC rejects seller-proposed backhaul-transport allowance to purchaser, equal to seller-saved cost of regulated transportation service (if shipped prepaid under quoted delieverd price) (Advisory Opinion 147).

1973: (a) Initial clarification of FTC Advisory Opinion 147, including commitment to determine the economic legitimacy of delivered pricing system in food products industry, such as the use of either regulated transportation service or backhaul transport under purchaser's option (see p. 22, Hearings, S. 1699, June 27, 1977, for statement of this commitment) (" 'Economic legitimacy'—Pricing Power and the Public Interest," Means).

1976: (a) Letter, June 9, Chairman, Senate Commerce Committee to Chairman, Federal Trade Commision: "I urge earliest possible fulfillment by the Commission of its commitment of December 1973, under Advisory Opinion 147, including the determination whether or not uniform delivered pricing in the food industry are unfair trade practices under existing law"; (b) Staff Report, Council on Wage and Price Stability, Executive Office of the President: Potential of delivered pricing in monopoly control and price-fixing in the aluminum industry (pp. ii and 220–223).

1977: (a) Press reports: Recovery suits involving delivered pricing in volume purchases of sugar and plywood by Virginia state and local agencies. (January/March); (b) Press reports: Present Administration will propose reform in rate-making and entry phases of the "public interest"-related (ICC) motor freight regulatory system.

1978: (a) "President Carter's (anti-inflation) directive on purchasing marks the first time in recent memory that the Federal Government has used procurement policies to influence national price behavior (New York Times, p. D 1, May 19); (b) Memorandum, Office of Federal Procurement Policy; OMB, EOP, June 29: Proposed deletion of delivered-price exception to basic federal procurement policy. (See Item 1955(b), above); (c) FTC 1973 commitment (Item 1973(a) above still an open and pending matter; (d) Kiplinger's Washington Letter, September 8: Cost of delivered industrial goods is being watched by government . . . when the same price is charged for an item no matter where it is shipped. Government figures difference in delivery costs should be reflected in price.

The CHAIRMAN. Thank you, Mr. Pierce.

If this bill were enacted, who would be the prime beneficiaries of it, would you say?

Mr. PIERCE. I would prefer, sir, not to answer that question, in the sense that it relates to the substantive provisions of the bill. I think the bill is untimely and inappropriate. More out of my respect for this committee than as a matter of personal interest to me, I would think, sir, that this committee would want to know the status of the FTC's 1973 commitment.

The Chairman of this committee wrote a letter on June 9, 1976, in which this committee asked the Chairman of the FTC to fulfill a 1973 promise that the Commission made in its first clarification.

In that promise or commitment the FTC said that it would determine whether or not delivery pricing in the food industry was an unfair trade practice.

The CHAIRMAN. I think they have made that determination. You heard their definition of what they consider permissible under Robinson-Patman today.

Mr. PIERCE. Perhaps I hear and understand things a little different than others, but if this committee accepts the testimony of the Chairman of the FTC today as being the response to this committee's inquiry of 3 years ago, then I will understand that the FTC has ruled and answered the question by saying that zone-delivered pricing is not an unfair trade practice.

The CHAIRMAN. I think it's quite clear that they have, in effect, said that.

Mr. PIERCE. May I suggest to the committee, if you accept the statements made by the Chairman of the FTC, sir, I think it would be

unconscionable and unacceptable in the sense of both the integrity of this committee and my understanding of acceptable bureaucratic responsiveness.

The CHAIRMAN. So, what you're saying is that the only sort of pricing that ought to be allowed is f.o.b. at the seller's dock.

Mr. PIERCE. No, sir.

The CHAIRMAN. What are you saying?

Mr. PIERCE. I'm saying that it ought to be optional.

The CHAIRMAN. How could it be optional? If you want to say that the zone-delivered pricing is not permissible——

Mr. PIERCE. I'm not really saying that, sir. What I'm saying, in terms of the indifference of Congress, is what the Small Business Committee in the House said in 1948. This is what the Supreme Court said in 1948, to which the Congress in 1950 replied—well, we're going to change that.

And indeed they tried. And President Truman vetoed S. 1008, and what did we have? We had an informal Senate watchdog committee go to work on the FTC to keep the Commission from full enforcement of the rulings in the cement and conduit cases.

We have the 1955 antitrust commission report, a significant statement of that commission, page 214, was read to the energy committee hearing by Mr. Dougherty, but he didn't mention it today; which leads me to believe that perhaps they did answer your inquiry. Perhaps the FTC said today that uniform zone-delivered pricing is not an unfair practice.

I also heard today reference to the *Atlas Cement* case, the consent case of 3 or 4 years ago.

The current fact is that on the 14th of April, the FTC opened an investigation as to the delivered pricing system in cement.

We come down to the economic question: Is delivered pricing legitimate, fair and right? Serious concern as to the legitimacy of this practice ranges from the common main-street sense of economic fairness and justice, all the way to the Supreme Court decisions.

We have heard the FTC express little or no tolerance for variable or nonuniform shipping-point pricings. There has not been one word mentioned today about the "competitive" freight absorption. Is the FTC concerned that freight absorption is not viable under the combination of uniform plant pricing and uniform delivered pricing?

The chairman asked the question: Doesn't shipping-point pricing make the distant purchaser pay too heavy a price? This is not necessarily true. If there's competition entering in from the other side of that distant point or somewhere along the line, the seller could absorb some of the freight cost, if willing to do so under applicable competitive situations.

In 1955, a letter was written to me by the Department of Justice saying that in the next change of the Federal purchasing regulations, the delivered-price exception would be deleted. That deletion never took place, and as I think about the bureaucratic or governmental environment that existed at that time, it's a small wonder that it was swept under the rug or otherwise aborted. It didn't get to the printer.

Last year the Executive Office of the President was urged by the Virginia Citizens Consumer Council to change the regulation as had

been promised in 1955. It was suggested that the change in Federal purchasing could very well induce change in private purchasing, thereby ultimately benefiting the consumer. The revised regulations will require that a bidder on volume shipments must furnish an origin price as well as a destination price.

The CHAIRMAN. Thank you very much, Mr. Pierce. We appreciate your presentation.

That concludes the hearings for today.

[Whereupon, at 12:35 p.m., the hearing was recessed, subject to the call of the Chair.]

ADDITIONAL, ARTICLES, LETTERS, AND STATEMENTS

Statement of U.S. Small Business Administration

Mr. Chairman and members of this committee, thank you very much for this opportunity to present the views of the Small Business Administration regarding S. 1699, the "Diesel Fuel and Gasoline Conservation Act of 1978."

As you know, it is SBA's mandated responsibility to protect the interests of the small business community. That mandate includes doing what we can to assure small business an equal opportunity to compete in the economic marketplace.

The Robinson-Patman Act was enacted in 1936 to assure that the free enterprise marketplace is characterized by fair competition. Our antitrust laws play a vital role in preventing undue concentration of market power, and providing for a diverse marketplace. One of the major objectives of the Robinson-Patman Act is to assure small businesses an opportuntiy to compete with larger firms on an equitable basis.

The act states that ". . . 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. . . ."

S. 1699 states that "It shall not be unlawful for a seller of goods . . . to grant backhaul allowances to a 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."

We feel that the issue of "backhaul allowance" is strongly related to provisions of the Robinson-Patman Act which prohibit predatory pricing and price discrimination. In our opinion, the effect would be to diminish the ability of small businesses to compete against larger companies and chains; contrary to the provisions of the Robinson-Patman Act. Any reduction in the competitive ability of small business could have serious consequences for our overall economic system.

Currently, sellers usually establish a "uniform zone delivered" pricing system whereby all buyers in that particular zone pay the same price for goods (including delivery), or the buyer can purchase at the seller's dock at a price which does not include delivery. In the latter case, the buyer delivers his or her own goods.

If this bill were to be enacted, it would become clearly legal for sellers who price on a uniform zone delivered basis, to grant allowances (discounts) on a differential basis to buyers who own their own trucks, or who contract with carriers to pick up and deliver their orders.

The allowances would be based on the distance of the buyer warehouse from the seller's dock. Accordingly, this would result in different prices for the same goods for different buyers. This system would benefit those large enough to own their own trucks, and would adversely affect small firms which are less likely to own trucks. The smaller firms would pay higher prices, in most instances, than would their larger competitors. Taken the next logical step; the large chain retailers, using backhaul deliveries to obtain discounts, could then justify lower prices for merchandise at their outlets. The small companies would not be able to sell at such low prices and would have to reduce their volume, and conceivably could be driven out of business. Taken a step further; the small business competition could be eliminated, thereby reducing pressure on the larger firms to keep their prices down. We feel that in the long run, neither the consumer, nor the small retailer would benefit from this bill.

Although the stated intent of the bill—"to provide energy conservation by alleviating current and continuing fuel waste," is commendable, it is questionable whether or not the bill would achieve that goal to any significant degree. In earlier hearings on this issue, a representative from the then-Federal Energy Administration stated that they (FEA) had a number of reservations concerning the extent of fuel savings which would result from enactment of S. 1699. "We still do not have the information that would enable us to predict the fuel savings . . . and I am not sure they could be established very precisely."

L. L. Waters, Ph. D, and Joseph R. Hartley, D.B.A., both of the Graduate School of Business at Indiana University, conducted a study on the subject which concluded that "even under optimal circumstances the fuel savings would be minimal." (Fuel Utilization and Food Distribution, June, 1977.) The Indiana study further indicates that enactment of such a proposal could result in additional fuel waste—fronthauling. In other words, the buyer could send a truck to the seller; the truck could travel to the seller empty, but, yet get backhaul allowances for returning with a loaded truck. That, according to the Indiana study, would result in a greater waste of fuel since fronthaul distances are, on the average, greater than actual backhaul mileage. The buyer could be encouraged to fronthaul because of the potential for realization of profits from backhaul allowances.

In addition, it is our understanding that many large chains which own their own fleets are already backhauling to a great extent. They simply are not receiving a transport discount which would be the net effect of sanctioning backhaul allowances. In any case, Robinson-Patman does not prohibit manufacturers from granting backhaul privileges just so long as such privileges are not price discriminatory. Many manufacturers indeed permit backhaul; and those who do not, explain that it may result in delays or congestion at the loading docks, of for other similar reasons—not because the law forbids it.

In summary, we oppose enactment of S. 1699 because: (1) it would be an initial step toward weakening the Robinson-Patman Act; (2) because it could lead to price discrimination; (3) because it is questionable whether it would result in substantial energy savings; and, (4) because in the long run we believe consumer prices would be higher because of the diminished ability of small businesses to compete with larger companies.

Again, Mr. Chairman, thank you for this opportunity to present our position on S. 1699.

KELLER AND HECKMAN,
Washington, D.C., September 12, 1978.

Mr. TIMOTHY LYNCH,
Senate Committee on Commerce, Science and Transportation,
Russell Senate Office Building, Washington, D.C.

DEAR MR. LYNCH: Transmitted herewith, on behalf of the Private Carrier Conference, Inc. of the American Trucking Associations, Inc., are copies of the text of a statement given on June 27, 1977 to the Senate Subcommittee on Energy Conservation by Rocco Q. Lopardo, former President and Chairman of the Board of Directors of the Private Carrier Conference, which endorses the above-referenced proposed legislation. Also furnished herewith are copies of the undersigned's letter of May 1, 1978 to Senator Howard W. Cannon which accompanied transmittal of Mr. Lopardo's testimony and elaborated upon PCC's position with respect to S. 1699. PCC would respectfully request that Mr. Lopardo's testimony of June 27, 1977 and the undersigned's letter of May 1, 1978 be associated with and thereby made a part of the record to be developed at the September 14, 1978 hearing on S. 1699 to be conducted by the Committee on Commerce, Science and Transportation.

PCC's posture with respect to the proposed bill remains unchanged. S. 1699 would allow sellers to grant private carriers transportation allowances equivalent to the actual price of transportation by regulated common carriers or the actual private carriage cost, depending upon the manner in which the goods are hauled. Passage of S. 1699 would therefore afford private carrier buyers economic incentive to haul their own purchases as productive back hauls thereby avoiding senseless, costly deadheading of miles. As a consequence, this nation's precious fuel reserves would not be exhausted in the performance of empty back hauls. The proposal would certainly prove conducive to the public interest. Since private carriers consequently would be encouraged to purchase F.O.B. origin and could avoid the impact of the addition of a uniform zone delivered transportation cost element, the ultimate consumer would also be benefitted in that the private carrier could pass along such savings in the pricing of the end product involved. This reality would therefore contribute to a minimization of the inflationary spiral in which this nation presently finds itself engulfed.

PCC reiterates its support of S. 1699, urges its passage, and wishes to express its appreciation to this Committee for granting it the opportunity to present its views on this issue.

Very truly yours,

W. H. BORGHESANI, Jr.

Attachments.

MAY 1, 1978.

Hon. HOWARD W. CANNON,
Chairman, Committee on Commerce, Science, and Transportation,
Russell Senate Office Building, Washington, D.C.

DEAR SENATOR CANNON: On behalf of the Private Carrier Conference Inc. of the American Trucking Associations Inc., we would like to endorse S. 1699 as an energy conservation measure which would help a substantial portion of the membership of the conference. PCC has more than fifty three hundred private carrier members representing every industry including the food industry which has a very substantial stake in the passage of S. 1699. As you know, private carriers are those companies that utilize trucks to carry their own goods to their own customers and, in return, pick up from their vendors incoming supplies and products for their own business use.

We are enclosing a copy of the text of a statement given on June 27, 1977 to the Senate Subcommittee on Energy Conservation by Rocco Q. Lopardo, the Chairman of the Board of the Private Carrier Conference, endorsing this proposed legislation. The position of PCC has not changed since that date and we here urge affirmative action by your Committee on S. 1699. The record will show that the Private Carrier Conference disagrees with the position of the American Trucking Associations which is in opposition to S. 1699.

In this regard, we refer to an April 1977 study of the Interstate Commerce Commission. Bureau of Economics, entitled "Empty/Loaded Truck Miles on Interstate Highways During 1976". This survey reflects the disproportionate level of empty backhauls burdening private carriers in the United States. The study shows that the highest percentage of trucks moving empty, 27.3 percent, was posted by private carriers. In contrast, the empty backhaul rate for ICC regulated carriers, common and contract, was 16.2 percent.

Two points should be made: first, in order to compete in the marketplace, companies have to engage in private carriage because of economic and service advantages over inadequate and unresponsive common carrier trucking service even though, in so doing, a 27.3-percent empty backhaul rate must be tolerated. Second, passage of S. 1699 would give private carrier buyers an additional economic incentive to carry their own purchases as productive backhauls, thereby lowering dramatically the current empty backhaul rate. Clearly, energy so expended would be on a productive basis by virtue of being utilized to haul products from vendors to the storage facilities of private carrier buyers in lieu of unproductive empty return hauls.

National transportation policy should be as concerned with the economic and energy efficiency of private carriers as it is with regulated carriers. Indeed, for the first time since passage of the Motor Carrier Act of 1935, the Interstate Commerce Commission very recently has so acknowledged. Toto Purchasing & Supply Co., Inc. Common Carrier Application, 128 M.C.C. 873 (1978). The ICC emphasized its decision would promote increased efficiency among private carriers by filling up otherwise empty backhauls; it was convinced that the high cost of energy, now and into the foreseeable future, required that the Commission pay close attention to the need for greater operating efficiency not only as to the for-hire sector, but as to all interstate surface transportation.

In this case, operating authority was granted to private carriers so that, balancing their traffic with the goods of others, they could serve shippers on a backhaul basis and thereby achieve greater economic and fuel efficiencies. On a parallel basis, S. 1699, involving no operating authority considerations whatsoever, by encouraging backhaul allowances, would give an inducement to private carriers to backhaul their own purchased goods, thereby achieving higher operating efficiencies and productive fuel expenditure.

Authorized carriers haul approximately 39 percent of the intercity truck traffic in terms of ton/miles; unregulated carriers, primarily private, haul the 61 percent greater balance. It should be clear, therefore, to the Congress, as, clearly, it is now to the Interstate Commerce Commission, that economic and fuel efficiency considerations affecting the unregulated sector of the trucking industry are of paramount national concern. We, therefore urge, passage of S. 1699.

Very truly yours,

_____ _____.

Enclosure.

TESTIMONY OF ROCCO Q. LOPARDO, VICE PRESIDENT/TRUCKING AND WAREHOUSING, THE GRAND UNION CO.

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 nonregulated trucking.

Significantly, private and other forms of nonregulated 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 then 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 nothwithstanding 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.

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