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ENERGY EFFICIENCY IN MOTOR CARRIER MOVEMENTS

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HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND POWER

OF THE

COMMITTEE ON

INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

H.R. 1681

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

JULY 9, 1979

Serial No. 96-54

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ENERGY EFFICIENCY IN MOTOR CARRIER MOVEMENTS

MONDAY, JULY 9, 1979

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ENERGY AND POWER,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met at 10 a.m., pursuant to notice, in room 2322, Rayburn House Office Building, Hon. Richard L. Ottinger presiding, Hon. John D. Dingell, chairman.

Mr. OTTINGER. The subcommittee will come to order.

Mr. Dingell is at Camp David solving the energy problems of the country. The President could not seek anybody better for his assistance. In his absence I will read his opening statement.

Today the Subcommittee on Energy and Power is holding the first hearing on H.R. 1681, which is intended to reduce the waste of diesel fuel resulting from inefficient use of the Nation's trucking capacity.

The aim of this bill is to discourage deadheading, a practice under which a truck, having completed a delivery, returns empty even though there is freight available that it could conveniently carry.

Industry sources have estimated that more than 100 million gallons of diesel fuel each year are wasted that could be saved if trucks would only backhaul, or return loaded, whenever possible. The American people cannot tolerate such a drain upon their already scarce fuel resources.

There are a number of factors that contribute to deadheading, including imbedded industry practices and regulatory requirements. H.R. 1681 would address one particular regulatory issue: Federal Trade Commission advisory opinion 147, which the manufacturers claim forbids the granting of backhaul allowances—that is to say, forbids the manufacturer from granting a price break to the buyer who provides his own transportation. The FTC denies that the advisory opinion has this effect, but that denial has so far not halted the deadheading.

The immediate controversy over the meaning of the FTC's regulations is only one concern of this subcommittee. Over many years, in the absence of oversight and legislative action, many other factors have supported deadheading and other wasteful practices throughout the trucking industry. Twice so far this year—in March during the negotiations for a new master freight agreement and during the last few weeks of protests by independent truckers—we

have been reminded that the rising cost and scarcity of fuel pose a serious threat to this crucial industry.

We must look carefully and imaginatively at the situation in order to determine what legislative action we may take in order to conserve gas and diesel fuel and to assure that most efficient use is made of our vital national trucking fleet.

[The text of H.R. 1681 follows:]

96TH CONGRESS
1ST SESSION

H. R. 1681

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.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 31, 1979

Mr. LEHMAN (for himself and Mr. SIMON) introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

A BILL

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

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That this Act may be cited as the "Diesel Fuel and Gasoline
- 4 Conservation Act of 1979".

1 SEC. 2. Section 382 of the Energy Policy and Conser-
2 vation Act of 1975 (42 U.S.C. 6362) is amended by adding
3 at the end thereof the following new subsection:

4 “(d) It shall not be unlawful for a seller of goods, wares,
5 or merchandise pursuant to a uniform zone delivered pricing
6 system to grant backhaul allowances to a buyer where the
7 backhaul function is actually performed by the buyer or an
8 authorized carrier serving the buyer, where the allowance is
9 no greater than the actual savings in delivery costs to the
10 seller and where the allowances are available to all the sell-
11 er’s customers on a nondiscriminatory basis.”.

Mr. OTTINGER. Our first witness this morning is our colleague, Congressman William Lehman from the State of Florida. He is supposed to be joined by Congressman Paul Simon, who we will hear when he arrives.

We welcome you before the subcommittee and welcome your assistance.

STATEMENT OF HON. WILLIAM LEHMAN, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF FLORIDA

Mr. LEHMAN. Thank you, Mr. Chairman.

The chairman's opening statement pretty well covered a great deal of my testimony. So as not to be redundant, I would like to submit my testimony for the record and just talk for a few moments from it.

As you cited in your statement, the time is now ripe for this kind of legislation. We have heard a lot about diesel fuel shortages and deadheading in the trucking industry. Increasing food costs often lead the jumps in the Consumer Price Index to which we are all too accustomed. This bill, though a rather modest proposal, can make an important contribution toward slowing inflation and conserving our precious fuel.

What this particular legislation deals with will not be remedied by the administration's trucking deregulation legislation. The need for this legislation arises out of the Federal Trade Commission's opinion that granting backhaul allowances in a uniform zone delivered pricing system would be a violation of the Robinson-Patman Act which prohibits price discrimination "between different purchasers of commodities of like grade and quality."

Now the next few paragraphs are just sort of an explanation of how this prohibition is applied in practice. I am sure the staff and members of the committee do not need another explanation because they are familiar with what happens and what the whole purpose of this legislation is. We must deal with these antieconomic benefit regulations as demonstrated by the Federal Trade Commission's opinion in regards to the Robinson-Patman Act.

H.R. 1681 will permit the seller to grant an allowance which reflects the cost savings to the seller. I think the linchpin of this legislation is that it does permit an allowance which is an incentive for the person who is using the truck to avail himself of the space on an empty truck to carry goods on an empty truck in a backhaul manner. The allowance cannot be greater than the actual transportation costs saved, and such allowances must not be discriminatory. In other words, if the seller wishes to allow only one-half of his savings to one customer, he must offer one-half to all others.

The very title of this bill, the "Diesel Fuel and Gasoline Conservation Act of 1979," indicates the potential of this legislation for reducing energy consumption. We are presently in the midst of our greatest fuel shortage since the 1973 embargo. I don't think we will have to discuss further the problems of our fuel and especially diesel fuel shortage in this country.

In 1975 the Transportation Task Force-Food Service Advisory Committee of the Federal Energy Administration provided the FEA with a study indicating that 100 million gallons of fuel could be saved each year if this barrier to backhauling were removed.

Unfortunately, I do not have a more recent estimate of fuel savings which would result from passage of H.R. 1681, and I recognize that actual savings may well differ from such estimates. The point to be made, however, is that substantial savings are there to be made.

Although many industries make use of zone-delivered pricing, it is my understanding that the food industry would be the prime beneficiary of H.R. 1681. Much anger over high food prices has been directed at the so-called middlemen who process, package, and sell our food from the time it leaves the farmer until it reaches the consumer. The farmer and the consumer are the ones on each end and they are both the victims of this arrangement.

Although many accusations are made concerning unjustified price increases, it is a fact that price increases are due to increasing costs within the industry. H.R. 1681 provides us with an opportunity to reduce some of these costs. These are savings that could be passed on to the consumer. We all talk about the need to fight inflation. Here is an opportunity to do something about it.

In testimony before the House Small Business Committee in 1977, Mr. Louis Fox of Associated Wholesale Grocers told of the savings potential in his company, a retailer-owned cooperative wholesale food distributor. Now this is a group of independent grocers; they are not a big chain, and yet this particular group of small- and middle-sized businessmen could save \$5 million in costs.

In the last Congress two committees in the Senate held hearings on this legislation. The Committee on Energy and Natural Resources reported the bill, but without recommendation. Members of the committee were concerned about the small buyers who feared price discrimination in favor of large buyers. I would certainly not support measures which would harm small businesses, and I believe that these fears are not warranted.

Small buyers generally buy through cooperative wholesale food distributors which have their own truck fleets. To refer once again to Mr. Fox's testimony, it is important to note that he spoke as a representative of the "independent small mainstreet grocers." He emphatically stated that this issue is not one of the small independent food retailer alined against the food chains. His members are in favor of backhaul because it in several ways lowers the cost of goods they sell in their stores.

Mr. Chairman, I was very pleasantly surprised last week to find a New York Times editorial supporting this bill. I am attaching a copy of the editorial, entitled "Deliver Lower Food Prices," to this testimony. The Times notes that it is "up to Congress to take a stand on behalf of energy conservation—and commonsense."

Mr. Chairman, we cannot afford to waste more time, money and fuel. The present energy and inflation crises cry out for action on all fronts. I urge your favorable consideration of H.R. 1681, the Diesel Fuel and Gasoline Conservation Act of 1979.

Thank you for your time and attention.

[Mr. Lehman's prepared statement and the editorial referred to follow:]

TESTIMONY OF HONORABLE WILLIAM LEHMAN
ON THE "DIESEL FUEL AND GASOLINE CONSERVATION ACT OF 1979"

JULY 9, 1979

Mr. Chairman, I first introduced this legislation in the last Congress as a companion bill to S. 1699 which was introduced by Senator J. Bennett Johnston. Congressman Paul Simon and I heard about it during hearings that were held by the House Budget Committee. We thought it made good sense and decided to introduce it in the House. We have reintroduced the bill this year and I am pleased that you decided to hold this hearing today on H.R. 1681.

I believe the time is right for passage of this kind of legislation. We have heard much about diesel fuel shortages and the wasteful practice of deadheading in the trucking industry. Increasing food costs often lead the jumps in the consumer price index to which we are all too accustomed. This bill, though a rather modest proposal, can make an important contribution towards slowing inflation and conserving our precious fuel.

The need for this legislation arises out of the Federal Trade Commissions's opinion that granting backhaul allowances in a uniform zone delivered pricing system would be a violation of the Robinson Patman Act, which prohibits price discrimination "between different purchasers of commodities of like grade and quality."

The uniform zone delivered pricing system provides that the same price shall be charged to all customers located within a given geographical zone. Such a price includes the cost of delivery.

When a wholesale distributor, for example, engages in backhauling, the truck will normally first make a delivery to a retail store. If a supplier of the wholesaler is located in the vicinity of the retail store, the truck will pick up supplies for the return trip to the warehouse of the wholesale distributor. The wholesaler in this case would be justified in expecting some sort of price reduction since the supplier is saved the cost of delivery. This discount is known as a backhaul allowance.

A problem arises, however, because of the Federal Trade Commission's 1967 opinion that granting a backhaul allowance equal to what the supplier would otherwise have to pay for delivery by a common carrier in a uniform zone delivered pricing system would probably be a violation of the Robinson-Patman Act.

In subsequent interpretations, the FTC has stated that a violation would probably not occur if the seller offered the same backhaul allowance to every customer for the identical amount and type of goods. Because the allowance would be the same regardless of the distance traveled by the customer, the close-in customers would have more incentive to backhaul than would those customers farther away within the zone. The seller, faced with the prospect of, in effect, having to subsidize deliveries to the distant customers, is naturally reluctant to offer the maximum economically feasible allowance. The end result of the FTC interpretation is to discourage larger backhaul allowances and thus backhauling itself.

H.R. 1681 will permit the seller to grant an allowance which reflects the cost savings to the seller. The allowance cannot be greater than the actual transportation costs saved, and such allow-

ances must not be discriminatory. In other words, if the seller wishes to allow only one half of his savings to one customer, he must offer one half to all others.

The very title of this bill, the "Diesel Fuel and Gasoline Conservation Act of 1979," indicates the potential of this legislation for reducing energy consumption. We are presently in the midst of our greatest fuel shortage since the 1973 embargo. One look at the gas lines in Washington, Miami, or New York should convince us that greater measures need to be taken in order to conserve fuel. Both gasoline and diesel fuel are in short supply. I certainly would not claim that H.R. 1681 would put an end to gas lines or to the truckers' anger, but it is one of the many steps that can be taken as we try to solve our energy crisis.

In 1975, the Transportation Task Force--Food Service Advisory Committee of the Federal Energy Administration provided the FEA with a study indicating that 100 million gallons of fuel could be saved each year if this barrier to backhauling were removed. Unfortunately, I do not have a more recent estimate of fuel savings which would result from passage of H.R. 1681, and I recognize that actual savings may well differ from such estimates. The point to be made, however, is that substantial savings are there to be made.

Although many industries make use of zone delivered pricing, it is my understanding that the food industry would be the prime beneficiary of H.R. 1681. Much anger over high food prices has been directed at the so-called "middlemen" who process, package, and sell our food from the time it leaves the farmer until it reaches the consumer. Although many accusations are made concerning unjustified price increases, it is a fact that prices increase

are due to increasing costs within the industry. H.R. 1681 provides us with an opportunity to reduce some of these costs. These are savings that could be passed on to the consumer. We all talk about the need to fight inflation. Here is an opportunity to do something about it.

In testimony before the House Small Business Committee in 1977, Mr. Louis Fox of Associated Wholesale Grocers told of the savings potential in his company, a retailer-owned cooperative wholesale food distributor:

At present in our Company backhaul amounts to approximately a two million dollar reduction in total delivery expenses. We calculate at the present time we are receiving in backhaul only about 40% of our full potential and feel very confident that if cost-justified backhaul is permitted, we can reach the full potential of backhaul, thus realizing savings in our transportation department amounting to approximately five million dollars, most of which can be passed back to our members, who in turn will pass most of this saving on directly to the consuming public.

Downward pressure on prices would also result from greater competition among grocery wholesalers. Since deregulation of the airline industry, we seem to have rediscovered the many benefits of encouraging competition. We should continue to make use of this lesson in other sectors of our economy.

In the last Congress, two committees in the Senate held hearings on this legislation. The Committee on Energy and Natural Resources reported the bill, but without recommendation. Members of the Committee were concerned about the small buyers who feared price discrimination in favor of large buyers. I would certainly not support measures which would harm small businesses, and I believe that these fears are not warranted.

Small buyers generally buy through cooperative wholesale food

distributors which have their own truck fleets. To refer once again to Mr. Fox's testimony, it is important to note that he spoke as a representative of the "independent small 'mainstreet grocers.'" He emphatically stated that this issue is not one of "the small independent food retailer aligned against the food chains." His members are in favor of backhaul because it "in several ways lowers the cost of goods they sell in their stores."

Mr. Chairman, I was very pleasantly surprised last week to find a New York Times editorial supporting this bill. I am attaching a copy of the editorial, entitled "Deliver Lower Food Prices," to this testimony. The Times notes that it is "up to Congress to take a stand on behalf of energy conservation--and common sense."

Mr. Chairman, we cannot afford to waste more time, money, and fuel. The present energy and inflation crises cry out for action on all fronts. I urge your favorable consideration of H.R. 1681, the "Diesel Fuel and Gasoline Conservation Act of 1979."

Thank you for your time and attention.

[From the New York Times, July 4, 1979]

DELIVER LOWER FOOD PRICES

Diesel fuel shortages and rapidly rising prices are increasing shipping costs—and thus the cost of almost everything delivered on wheels. Yet the Federal Trade Commission, that sometime champion of consumers, is forcing truckers to waste hundreds of thousands of gallons of fuel each day in handling the nation's groceries.

The commission seems determined to stick by a 12-year-old opinion declaring certain pricing practices by food manufacturers to be illegal. The manufacturers are forbidden to give adequate financial incentives to wholesalers to pick up food shipments at the plants, rather than wait for the manufacturers to deliver the food in their own trucks. As a result, the wholesalers' trucks run empty about four miles out of every ten.

Many food processors offer their wholesale customers a single price for goods, including delivery anywhere within a fixed geographic zone. A wholesaler may pay the same for a case of stuffed olives whether his warehouse is five miles from the cannery or 500. This "zone delivered price" system passes muster with the F.T.C. What makes bells go off at the commission are individual agreements between manufacturers and wholesale customers to rebate part of the zone price if the wholesaler provides delivery. Such a cash allowance often makes sense for the manufacturer because it saves the cost of carting goods to warehouses on the distant fringes of the zone. It often makes sense for the wholesaler because it allows his truck to pick up freight bound for the warehouse on the way back from a supermarket delivery. And it makes sense for the consumer because it saves fuel and lowers costs.

But it apparently doesn't make sense to the staff lawyers at the Federal Trade Commission. They argue that a delivery allowance to a distant customer is a form of illegal price discrimination unless an identical allowance is offered to all customers within the same zone. If everyone must receive the same allowance, however, no one can. A cash incentive large enough to induce a wholesaler to haul those stuffed olives 500 miles must inevitably be greater than the cash a manufacturer would offer the wholesaler in lieu of delivering olives to within sight of the factory gates.

If called upon to rule afresh, the current commissioners would be unlikely to interpret the law so unreasonably. But they are reluctant to break precedent in a sensitive realm. Politics traditionally supersedes reason when it comes to interpret-

ing the Robinson-Patman Act's strictures against price discrimination and the commissioners fear that any change in policy, no matter how justified, would generate opposition. That leaves it up to Congress to take a stand on behalf of energy conservation—and common sense.

A bill has been introduced in the House giving manufacturers discretion to offer allowances in exchange for delivery, as long as these discounts are available to all their customers and the amounts can be justified by transportation savings. The bill deserves swift passage. The gas we save will be our own.

Mr. OTTINGER. Our next witness was to have been our colleague, Hon. Paul Simon of Illinois. Unfortunately, due to a conflict of schedules, he is unable to appear. Therefore, without objection, his statement will appear in the record at this point as though read.

**STATEMENT OF HON. PAUL SIMON, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF ILLINOIS**

Mr. SIMON. Mr. Chairman, I offer my support for H.R. 1681 because it's a proposal that makes sense. For our Government to continue any policy that wastes energy in times such as these is wrong.

I've long been in favor of allowing loads on empty trucks which are returning from deliveries. We still have far too many wasted miles being added to the drain on our fuel supplies by complicated trucking regulations. But with this legislation we can at least take a small step toward cutting some of that waste.

Mr. Chairman, the New York Times editorial of July 4 states that case for H.R. 1681 far better than I can. I would hope the committee would act swiftly in approving the bill.

Thank you.

[See attachment to Congressman Lehman's prepared statement.]

Mr. OTTINGER. I would like to congratulate our colleague on a very important contribution to try to remove a problem that this subcommittee has unsuccessfully wrestled with a number of times over the years. I want to assure you that we will give your bill the most careful consideration. There are some problems that I would like to explore with you, but first I would like to recognize my colleague, Mr. Shelby.

Mr. LEHMAN. He is my Congressman.

Mr. SHELBY. I am always glad to have Congressman Lehman here. I represent the district in Alabama that he claims is his home; they still claim him down there, although he has moved to Florida and does what a lot of us think is an outstanding job.

Bill, you are talking about saving 100 million gallons of diesel fuel a year. Does that include gasoline too?

Mr. LEHMAN. Most of the trucks that would be involved in this would be diesel operated. That is where the heaviest crunch is now. To my knowledge we are talking in terms of diesel rather than gasoline. I think that this is basically a diesel conservation measure and whatever fringe benefits we get from gasoline would be extra.

Mr. SHELBY. Down the road this would be a saving not only on the fuel—we would be economizing on the fuel that we certainly don't have now but that should be passed on down into the lower prices somewhere down the line, shouldn't it?

Mr. LEHMAN. It should. At this time when we are trying to make people in this country realize the credibility of the energy crisis

and when our own Government regulations force trucks or taxi cabs or whatever to backhaul empty or to do something that is fuel wasteful, we are sending the reverse signal that we want to send with regards to the necessity to conserve our fuel.

Mr. SHELBY. As a practical matter, assuming this legislation passed, and let's hope it does, what will be the mechanics? How would this work? In other words, let's say if I were a trucker and I were running from Portland, Maine, to Los Angeles, Calif., carrying something, rather than coming back empty, how would I negotiate my deal out there?

Mr. LEHMAN. I think the explanation is at the bottom of page 2 where it talks about what this bill will do to permit the seller to grant an allowance which is not now allowed under the FTC interpretation of the opinion on the Robinson-Patman Act.

Mr. SHELBY. Are you talking about page 2 of the bill?

Mr. LEHMAN. No, page 2 of my testimony. I think the way this works and the way it should work is through the incentive it would provide by permitting the allowance to the person that is hauling the goods. He can save up and pass on this transportation cost allowance to his customer so that he in turn can pass it on to those who can buy the goods cheaper. Under the present interpretation of FTC, this allowance cannot be given, so there is no incentive there.

Mr. SHELBY. But this legislation you are proposing here would correct that and bypass the Federal Trade Commission?

Mr. LEHMAN. Yes. It would eliminate the Federal Trade Commission's opinion that prevents this allowance which reflects the cost of saving to the seller to be passed on to the buyer.

Mr. SHELBY. Now you have got some figures that it would hopefully save at least 100 million gallons of diesel fuel a year. In dollar savings, do you have any cost figures on what it would mean to the American people?

Mr. LEHMAN. This 100 million gallons of fuel was a 1975 figure and I cannot translate this into dollar savings at this time, but I am sure that we could translate this into these figures at the present fuel costs which are quite higher than they were in 1975.

Mr. SHELBY. But aside from the savings on diesel fuel which we are all interested in, should this not also cut some of the freight rates?

Mr. LEHMAN. It would save on the cost of distribution because this provides us with an opportunity, as it says on the top of page 4 of my testimony, to reduce some of the costs especially in the food industry. These are savings that could be passed on to the consumer. In other words, as it says here, the savings from the allowance of using backhaul to haul food is passed on first to the wholesaler, then on to the retailer, and then on down to the consumer.

Any time that you are forced to deadhead through Government regulations, you are going to have to hire additional transportation to haul the same product. This bill prevents duplication of one truck running the same route and another truck tailgating him with a load of goods because the first truck could not haul according to the regulations of the FTC.

Mr. SHELBY. Thank you Mr. Chairman.

Mr. OTTINGER. Bill, the FTC says that there is no problem, that under advisory opinion 147 the backhaul allowance can be offered as long as they are the same for all purchasers buying the same amount and type of goods.

The FTC has maintained that only backhaul allowances which are uniform can be nondiscriminatory. They say that any other type of allowance would be a violation of the Robinson-Patman Act.

Supporters of the bill, however, have argued that nondiscriminatory means available to all on a consistent basis, which is an allowance equal to the cost that the seller will actually incur in delivering the goods to the buyer. The FTC argues that an allowance equal to actual delivery costs would discriminate unfairly because the uniform delivered price was calculated on the average of prices in the first place. Those whose actual costs would exceed the average cost would be able to purchase goods at much less than that charged to other buyers.

Two other ways have been suggested to attack this problem and I wondered if you would like to comment on both the problem that I have just mentioned and these other two suggestions. One way was suggested in a proposal to then FTC Chairman William Engman by Chairman Dingell in 1973 that would require manufacturers who offer uniform delivered prices to offer uniform discounts to any buyers who would prefer to pick up their own goods. Members of the FTC staff endorsed that approach in the testimony to the Senate last year.

Under such a system, wholesalers whose delivery costs were less than the average costs would have an incentive to avoid deadheading. That would be the reverse situation under H.R. 1681 which favors wholesalers whose costs exceed the average costs. Under this second proposal, unlike H.R. 1681, all buyers would be charged the same price at the loading dock.

Another solution would be to ban uniform zone prices which a considerable body of evidence suggests may be anticompetitive.

Mr. LEHMAN. Well, I think the problem the way I see it, is the difference between how this is benefiting the close-in customers versus the long. On page 2 of my statement it says:

In subsequent interpretations, the FTC has stated that a violation would probably not occur if the seller offered the same backhaul allowance to every customer for the identical amount and type of goods. Because the allowance would be the same regardless of the distance traveled by the customer, the close-in customers would have more incentive to backhaul than would those customers farther away within the same zone. The seller, faced with the prospect of, in effect, having to subsidize deliveries to the distant customers, is naturally reluctant to offer the maximum economically feasible allowance. The end result of the FTC interpretation is to discourage larger backhaul allowances and thus backhauling itself.

So I think that what we are trying to do in this legislation is to circumvent the FTC regulation that provides no incentive for backhauling by being able to encourage backhauling and let that particular benefit be equitably distributed to both the wholesalers, retailers, and on down to the consumer.

I don't know whether I have answered your question exactly but when you get right down to the bottom line if the regulation to provide equity in prices is providing an equity in prices at a level above what we could work out with the economic utilization of our trucking facilities, then it is not doing the job for the consumer.

Mr. Ottinger, I certainly agree that we ought to attack the problem of encouraging backhauling. I don't know quite what the best system would be. It strikes me that if the uniform zoning system were eliminated, you would achieve the minimum price all together. Now what problem that poses in the industry I am not quite sure.

Mr. LEHMAN. I have not explored whether the elimination of the uniform zoning would really motivate the kind of savings this bill would mean. It would certainly motivate the close-in people more than it would the more distant people. I think that we are going to have to provide the mechanism so that the incentive would be basically across the board and whether you do that by eliminating the zoning regulations or not would be something that has to be worked out by this committee and the administration.

Mr. OTTINGER. Mr. Gramm?

Mr. GRAMM. Thank you, Mr. Chairman.

I would like to just ask one question. I was late and didn't hear your testimony, but in the discussion of incentives I would like to expand the scope of what we are talking about a little bit and ask if you support deregulation of the trucking industry.

Mr. LEHMAN. Yes, sir.

Mr. GRAMM. Is it your opinion that if we had a full-scale deregulation that competition would create the proper incentive so that we would not have to worry about the failure of current regulation or adjustments to that regulation to eliminate backhauling?

Mr. LEHMAN. Well, it is my understanding that deregulation itself would not particularly attack this problem, that under the Federal Trade Commission's ruling, that would still be the ruling by which backhauling would be prevented.

Mr. GRAMM. So you are saying that even with deregulation we need your bill.

Mr. LEHMAN. The way I understand it is that deregulation would not get to the problem that is caused by the Federal Trade Commission's opinion on the Robinson-Patman Act.

Mr. GRAMM. Thank you Mr. Chairman.

Mr. OTTINGER. As I understand it the problem is with the anti-trust laws and, therefore, would not be affected.

Mr. LEHMAN. The FTC interpretation is everybody is equal, but the price is higher.

Mr. OTTINGER. Mr. Kitzmiller.

Mr. KITZMILLER. Mr. Lehman, I have just one question. Is there any particular function that you see that is served by the uniform zone delivered pricing system? Would the problem not just as well be addressed by eliminating that and requiring that everybody allow the deduction of the actual cost of transportation?

Mr. LEHMAN. Well, I would be willing for it to be solved in that manner, but I am not sure the Federal Trade Commission would like it to be solved in that manner. That is the whole problem.

Mr. KITZMILLER. But you don't see any inherent objection—

Mr. LEHMAN. If we could resolve the problem by doing that with the advice and consent of the Federal Trade Commission, then you would not need this legislation.

Mr. KITZMILLER. Thank you, Mr. Chairman.

Mr. OTTINGER. Thank you very much. We really appreciate your bringing this problem to the attention of the subcommittee and your help in resolving it.

Mr. LEHMAN. Thank you, Mr. Chairman.

I just would like to reiterate that when the people in this country see regulation that forces waste of fuel, we are sending an adverse signal, and that is reflected in the public's opinion on whether we really have an energy crisis or not.

Mr. OTTINGER. I certainly agree, and thank you.

Has Mr. Simon arrived?

If not, we will call next upon the Honorable A. Daniel O'Neal, Chairman of the Interstate Commerce Commission.

Mr. O'NEAL. Good morning, Mr. Chairman.

Mr. OTTINGER. Mr. O'Neal, we welcome you before the subcommittee. Without objection, your statement will appear in full in the record and you may summarize it or read it as suits you best.

STATEMENT OF HON. A. DANIEL O'NEAL, CHAIRMAN, INTERSTATE COMMERCE COMMISSION, ACCOMPANIED BY ERNEST OLSON, ASSOCIATE DIRECTOR, OFFICE OF POLICY AND ANALYSIS

Mr. O'NEAL. I do have a long statement I would like to submit for the record and a summary statement I would like to run through at this time.

With me is Ernest Olson who is the Associate Director of the Office of Policy and Analysis at the Commission. He is also in charge of the Commission's staff energy task force and has been very busy lately working on the truckers' strike. Let me talk first a little bit about that.

In recent months, as fuel supply instability and price hikes increased, the Commission began to review a variety of options to deal with different levels of a fuel emergency. The dramatic rise in fuel prices called for a special procedure to allow carriers to quickly recover fuel cost and, on April 19, we activated a procedure designed originally in 1975 especially to address such fuel cost problems. That procedure provides for a surcharge on existing rates to cover the increased cost of fuel as demonstrated by the carriers.

The Commission supplemented that decision with a much more streamlined version on June 15 whereby the ICC determined an average allowable surcharge. At this time that surcharge, updated weekly through ICC monitoring to reflect diesel prices at the truck-stops, stands at 7 percent for truckload operations. The surcharge compensates those who pay for the fuel fully for their increased fuel costs. The fuel price monitoring activity will continue as long as the fuel crisis continues.

Throughout this period, in an effort to disseminate information on the fuel shortage and our actions, our Commission hotline, manned 7 days a week, provided interested parties and the public with firsthand information. In order to inform the involved parties of this hotline, we made special efforts to broadcast on CB channels and on radio stations information as to its existence. In addition, we have worked closely with individual Members of Congress as well as the White House, the Department of Transportation, the

Department of Agriculture, and the Department of Energy in attempting to cope with the current fuel shortage and with the communications gap. We will continue those efforts and are continuing to review other options to help in dealing with the situation.

A major concern of the Commission relating to energy conservation is the maximum utilization of equipment. The increasing need for energy efficient operations has caused the Commission to take action on various fronts. Those actions are detailed in the longer statement and I would like here just to mention some general points.

First, in April 1977 the Commission released a study of empty- and loaded-truck miles. The study was based on a survey of 13,000 trucks taken at over 400 checkpoints during the course of a year. The study revealed that the percentage of truck miles generated by entirely empty three or more axle trucks on the Interstate Highway System was 20.4 percent. The percentage of empty-truck miles for refrigerated vans was 14.8 percent. That is, of course, relevant to the concern about the movement of food and this compares to tank trucks that move at about 38-percent empty.

The percentage of empty-truck miles for ICC authorized carriers was about 16 percent, for exempt carriers about 21 percent, and private trucks were about 27 percent. The percentage of empty-truck miles for intrastate trucks was about 32.9 percent, compared to 17.6 percent for interstate trucks. The percentage of empty-truck miles for trucks which were leased with their drivers, owner operated, under long-term leases—30 days or more—was 18.1 percent, and under short-term leases 7.6 percent. For nonowner operated trucks it was 21.5 percent.

Mr. OTTINGER. Could you submit that study?

Mr. O'NEAL. Yes; we could. We do have some copies of it with us if you want to talk about it at this hearing.

[The study referred to may be found in the subcommittee files.]

Mr. O'NEAL. There are a number of reasons identified in the report as to why empty trucks travel on the highway. One important factor is the overall traffic imbalance which results in a difference in the number of loads going into and coming out of an area. The District of Columbia is a good example of an area which consumes much but, due to the absence of manufacturing output, generates little outgoing traffic. Thus, inbound shipments far outweigh outbound shipments.

A second important cause for empty mileage is the use of specialized equipment, such as tank trucks and auto carriers. For example, in the Detroit area outgoing traffic—automobiles—move on very special vehicles, and those vehicles can't really accommodate anything except automobiles and therefore can't really move much traffic back into the area.

One conclusion would thus seem to be that there are inherent structural barriers to reducing empty backhauls below a certain level. Now that is not to say that empty backhauls cannot be reduced. Indeed, the Commission is making efforts to reduce unnecessary empty-truck miles and to improve fuel efficiency to the extent that regulations have a bearing on that area.

We have taken a number of actions to reduce empty backhaul problems. One of these has been a recent decision to allow private carriers to obtain authority as regulated carriers which reverses a very longstanding policy of the Commission. In another area we do have a requirement that carriers show an operational feasibility when they apply for authority. What that means is that they have some backhaul opportunities and that we are not just granting one-way authority. We are looking at what we can do in some other areas, such as a program that is being devised by the American Trucking Association called CALM and CISS. These are computer operations that are designed to find empty trucks and match them with a load. There are some other things we are looking at that we could go into if you want.

The Commission has also taken action to eliminate unnecessary circuitry in truck movements and has taken action to facilitate intermodal movements.

A few years ago we eliminated gateways, for example, for irregular route carriers, and we have taken some steps to make it easier for carriers to take shorter, more direct routes, even though their operating authority and their responsibility under the act would require them to provide for circuitous service.

With regard to intermodal movements, we are looking at trying to encourage the movement of vans or trailers on railroads for longer hauls. We have taken some steps that should encourage that type of movement, and there are some additional areas that we are looking at.

We are also considering taking action with respect to the intercity bus industry to aid bus carriers in responding to the increasing passenger demands during the period of fuel scarcity.

Turning now to H.R. 1681, we are unable to make an overall judgment on its merits. This is partly because it deals with questions of industry marketing practice that are beyond the jurisdiction and expertise of the Commission and we have not really spent a lot of time looking at some of those questions. Many of the questions I might add, though, are similar to questions with which the Commission deals.

Looking at the proposals we wonder if maybe an alternative worth exploring would be to require the seller to make an f.o.b. price option available so that everyone has a chance to obtain the commodity at the same price at the seller's terminal.

Beyond that, we do not have sufficient information to determine the probable effects which the bill might have on ICC regulated carriers. The issue here, of course, is whether this would reduce the amount of traffic available to regulated carriers. We are not so sure that it would have much impact, but on the other hand we have not done a definitive study and can't really say for sure. So we are not certain what fuel savings could actually be expected to result from this bill's passage.

That concludes the summary of the longer statement. We will be happy to try to answer any questions that you might have at this time.

[Testimony resumes on p. 38.]

[Mr. O'Neal's prepared statement follows:]

STATEMENT OF
A. DANIEL O'NEAL, CHAIRMAN
INTERSTATE COMMERCE COMMISSION
BEFORE THE SUBCOMMITTEE ON ENERGY AND POWER OF THE
HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE
ON ISSUES OF FUEL CONSERVATION IN THE SURFACE
TRANSPORTATION INDUSTRY AND ON H.R. 1681, THE
"DIESEL FUEL AND GASOLINE ACT OF 1979"

July 9, 1979

Mr. Chairman, Members of the Subcommittee:

I appreciate the opportunity to appear today to present the views of the Interstate Commerce Commission on issues of fuel conservation in the surface transportation industry, and on H.R. 1681, the "Diesel Fuel and Gasoline Conservation Act of 1979".

First I will discuss some recent actions which the Commission has taken to alleviate the fuel problems which the country has faced in the last few months. I will then outline some of the Commission's past actions and some proposed actions to improve fuel efficiency and conservation. I will conclude by offering some brief comments on the bill, H.R. 1681.

What follows is a breakdown, into five general areas, of those actions already taken by the Commission and in some cases possible future actions. The areas of effort are fuel-cost passthrough, backhaul, circuitry, facilitation of intermodal movements, and general. Of course, while the actions discussed below have energy implications, the

decisions leading to these actions have been based on a thorough balancing of competing goals and objectives, of which energy, although highly important, is not the only consideration.

A. FUEL COST PASSTHROUGH

The Commission has been alert to the need to conserve fuel and has monitored the price of diesel fuel since 1974. As fuel supply instability and price increases began to develop last year and intensified with the Iranian political crisis, our price monitoring efforts were expanded. We felt we needed to have accurate measurement procedures and needed to anticipate possible changes in our regulation in order to ameliorate fuel related problems faced by the transportation industries in providing satisfactory service to shippers.

Early in April the Commission reviewed a variety of options to deal with different levels of fuel emergency. Recognizing that the dramatic rise in fuel prices called for a special expedited procedure to allow carriers to recover fuel costs quickly, the Commission on April 19, 1979, activated a procedure designed in 1975 especially to address such fuel cost problems when they might arise; Ex Parte No. 311, Expedited Procedures for Recovery of Fuel Costs, 350 ICC 563 (1975).

In this proceeding we provided a simplified procedure for regulated carriers to show fuel costs and allowed departure from tariff publishing rules so that increased rates could become effective on 10 days notice rather than 30 days. At the same time, the Commission requested comments from the public on possible modifications of Ex Parte No. 311 procedures--and specifically on whether the Commission should consider authorizing a fuel-based surcharge and guaranteed pass-through to those actually incurring the increased fuel costs.

The comments developed in Ex Parte No. 311 highlighted some of these concerns, and informal discussions with independent owner operators confirmed them.

Even with the expedited simplified procedures, it soon became apparent that special problems were faced both by owner operators who lease themselves to regulated carriers and also by those who haul perishables and other commodities free of regulation. The combination of short fuel supply and swiftly increasing prices in May and early June (added to other long standing concerns) highlighted a growing cost squeeze that faced them in their operations and which resulted in a spontaneous job action.

Therefore, we took a number of actions to expand the provisions of Ex Parte No. 311 in an effort to be fully

responsive to the energy needs of regulated motor carriers and the many leased independent owner operators.

- ° Beginning June 15, the Commission made it mandatory for carriers employing owner operators to reimburse them for the increased cost of fuel (based on the price increase from January 1, 1979) determined to be an amount equal to 5.6 percent of the total freight charges on individual shipments.
- ° The Commission committed itself to monitor diesel fuel prices and to announce a new surcharge percent figure by Tuesday noon of each week. The new surcharge figure would be applicable as of Tuesday and until changed by a succeeding weekly surcharge determination.
- ° The Commission authorized carriers to recoup the surcharge amount by publishing a surcharge tariff on one day's notice without further justification of costs.
- ° The Commission made a special effort to communicate the surcharge amount and the calculations from which it was derived to a broad audience including those providing transportation in the exempt area so that it could be used as a measure of fuel cost in negotiating for transportation at a fair price.

The Commission, since this initial decision, raised the surcharge to 6.0 percent on Tuesday, June 19 and to 7.0 percent on Tuesday, June 26. The fuel price monitoring activity will continue as long as the fuel crisis continues.

As part of the process of developing these procedures, the Commission made a substantial effort to work with and learn of the special problems of the independent owner operator in a wide ranging program. Commission activities included interviews and dialogues with a variety of owner operator groups; discussions with State Governors (together with owner operators); appearances and discussions with Congressional delegations; and sharing of ideas, concerns and information with a variety of Federal agencies. We were also active participants in the White House Energy Task Force and in the final negotiations with the owner operators which led to the President's statement of June 22 indicating remedial actions the Federal government would take, and the final agreement with the owner operators announced by the Vice President on June 29, which settled the owner operator job action. The final resolution included the ICC surcharge plan which was the key factor in persuading the owner operators that the Federal Government understood their concerns, had addressed them to the extent that they could be immediately resolved, and would work with determination toward remedial actions on the remaining issues. The ICC will continue to be involved in

the joint Federal/owner operator working group which is now being organized to deal with those issues.

Throughout this period in an effort to disseminate information on the fuel shortage and our actions, our Commission hotline provided interested parties and the public with first-hand information. In order to inform the involved parties of this hotline, we made special efforts to broadcast on CB channels and on radio stations information as to its existence.

We believe that our recent efforts have been of considerable use to the public in general in attempting to cope with the current fuel shortage. We will continue these efforts, and will seek out new ways to assist in dealing with the situation.

B. BACKHAUL

Another concern of the Commission relating to energy conservation is the maximum utilization of equipment, which is commonly referred to as the backhaul problem. The increasing need for energy-efficient operation has caused the Commission to place added emphasis on coordination between the various forms of public and private transportation. In response to those and other considerations, the Commission reversed its previous policy of limiting the scope of private carriage in Toto Purchasing and Supply Co., Inc., 128 M.C.C. 873 (1978), discussed and confirmed in the policy statement in Ex Parte No. MC-118, served November 20, 1978. The decision allows

grants of for-hire authority to private motor carriers. Put another way, it allows private carriers to obtain operating authority to perform backhaul operations.

We stated in that decision: "that the high cost of energy, now and into the foreseeable future, requires us to pay close attention to the need for greater operating efficiency, not only in the for-hire sector, but in all interstate surface transportation. Energy efficiency and environmental preservation are best achieved by integration of all the existing systems of surface transportation, not by continued segregation of the private trucking sector. Furthermore, as is the case with all applications for motor carrier authority, each application filed for authority by a private carrier will be closely evaluated to determine the energy and environmental impacts of the proposal."

In a related area, while there has not yet been final resolution of the issues, the Commission is actively considering a proposal to relax current restrictions against intercorporate hauling or the transportation performed by the parent or a related company at least 80 percent of which is owned by the parent (Ex Parte No. MC-122).

Earlier, on November 15, 1973, the Commission issued a General Policy Statement Concerning Motor Carrier Licensing Procedures (Operational Feasibility) in which it reminded carriers and their representatives that evidence with respect to

how equipment is expected to be returned to an origin point, as well as other data relating to the operational feasibility of their proposals, must be presented as part of an applicant's initial evidentiary presentation in applications for new authority. This policy statement, along with the applications granted where applicants seek to balance their operations, is designed to promote more efficient operations and minimize empty mileage. Thus, operational feasibility is definitely a material consideration in individual applications.

The Commission's Bureaus of Economics and Operations completed a report entitled Empty/Loaded Truck Miles on Interstate Highways During 1976 in April, 1977, which was an attempt to measure the magnitude of empty truck miles. The report was based on a survey of over 13,000 trucks stopped during a one-year period at over 400 checkpoints in the United States. Although the report is quite lengthy, certain highlights are of general interest.

The percentage of truck miles generated by entirely empty 3-or-more axle trucks on the Interstate Highway System was 20.4 percent. The percentage of empty truck miles for refrigerated vans was 14.8 percent, but for tank and other bulk trucks it was 38.0 and 39.3 percent, respectively. The percentages of empty truck miles for ICC authorized, exempt (for-hire carriers without ICC authority), and private

trucks were 16.2, 21.2, and 27.3 percent, respectively. The percentage of empty truck miles for intrastate trucks was 32.9 percent compared to 17.6 percent for interstate trucks. The percentage of empty truck miles for truck miles for trucks which were leased with their drivers (owner operated) under long-term leases (30 days or more) was 18.1 percent, and under short-term leases 7.6 percent. For non-owner operated trucks it was 21.5 percent.

There are a number of reasons identified in the report as to why empty trucks cannot be entirely eliminated from travel on the highway. One important factor is the overall traffic imbalance which results in a difference in the number of loads going into and coming out of an area. The District of Columbia is a good example of an area which consumes much, but due to the absence of manufacturing output, generates little outgoing traffic. Thus, inbound shipments far outweigh outbound shipments. A second important cause for empty mileage is the use of specialized equipment such as tank trucks and auto carriers. The Detroit area is a good example where outgoing traffic, automobiles, is carried on special vehicles that cannot accommodate any traffic moving into the area.

One conclusion would thus seem to be that there are inherent structural barriers to reducing empty backhauls below a certain level. This is not to say that empty backhauls cannot be reduced. Indeed, as outlined here, the Commission is making efforts to reduce unnecessary empty

truck miles and to improve fuel efficiency. We do feel some improvement can be made. However, these issues are not amenable to simple solutions. For example, maximizing energy efficiency may at times be inconsistent with ensuring maximum service responsiveness. In reconciling such competing interests the Commission must balance conflicting goals in light of the needs of the entire system and its users. This means that we must take steps that we believe to be justified in light of today's needs. Throughout, we are taking into account the importance of energy conservation, and should we discover that our actions are having an adverse effect upon energy, then we can adjust them.

In the area of empty backhauls, the Commission is considering a number of further policy actions. It has expressed interest in those items identified as policy actions under development and has directed the staff to prepare more specific proposals. These actions include:

- ° An effort to work with industry initiated programs, such as "CALM" and "CISS"--Computer Assisted Load Matching (CALM) for irregular route carriers and Computerized Interchange Substituted Service (CISS) for regular route carriers. These are industry sponsored subscription services designed primarily to match and fill empty backhauls.

- ° Permit free commodity mixing (e.g., exempt and non-exempt in the same truck).
- ° Issue a General Temporary Order which would be available during the emergency to permit carriers holding "one-way" authority to transport return loads moving within the scope of their commodity and geographic restrictions. The rationale for this action is that it would eliminate during the crisis period one-way fuel inefficient operations.

C. CIRCUITY

Another area of energy concern is the problem of excessive circuitry of motor carrier operating routes. One of the most prominent measures the Commission has taken in the area of energy conservation involving circuitry, was in Ex Parte No. 55 (Sub-No. 8), Gateway Elimination, 119 M.C.C. 350 (1974). Under prior practice, an irregular route motor carrier was permitted, not required, to join two irregular route authorities to provide service between termini if the carrier passed through a common point of service in both certificates-a gateway. These joined authorities often produced circuitous carrier routing, but in past years this had not been viewed as undesirable in the interest of making expanded service available to the public.

The modified regulations (at 49 C.F.R. 1065) provide, in general, that when an irregular-route motor carrier can

save up to 20 percent of the distance it would travel in observing a gateway by operating over the most direct route between authorized service points, the gateway need not be observed if simple notice requirements were met. Where the most direct route is more than 20 percent shorter than the longer gateway route, elimination of the gateway is permitted where the carrier shows a public need for this service based on prior operations through the gateway. Otherwise, joinder is not permitted. A follow-up survey by the Commission's Bureau of Economics estimated overall annual savings among irregular-route carriers resulting from this action of approximately 100 million vehicle miles, 21 million gallons of fuel, 58 million dollars in carrier costs, and 2.7 million man-hours.

We have also established superhighway and deviation rules, which enable regular-route motor common carriers of property to traverse routes (including those on the Interstate Highway System) which are up to 20 percent shorter than those specified in their certificated authorities. At present, no statistics are available to demonstrate fuel savings arising from these measures.

In the area of policy actions which are under consideration involving circuitry, the Commission is considering the following:

- ° A proposal to fill-in regular route intermediate point authority, e.g., authorize regular route

carriers to serve all intermediate points between authorized points during defined energy emergencies.

- ° A measure which would permit, during the fuel crisis, all regular route carriers to operate over the most direct routes in moving fully loaded trucks between key cities in their system. The rationale for this procedure is that it would allow carriers to eliminate circuitous routing imposed by their current certificate.
- ° A proposal to encourage carriers to offer additional rate incentives for multiple shipment tenders. The consolidation of shipments could minimize pickup and delivery costs and fuel consumption.
- ° Possible endorsement of a proposal to bring size and weight specifications for the Interstate System in all States up to the uniform limits of the Federal Highway Administration. This action would likely make the movement of over-the-road freight more fuel efficient.

D. FACILITATION OF INTERMODAL TRANSPORTATION

Another area of possible energy savings lies in the facilitation of intermodal movements of freight. In this connection we have established trailer-on-flatcar (TOFC) service rules which permit the linehaul transportation of loaded truck trailer equipment on railroad flatcars (piggyback

service). We should note that some controversy exists as to the degree of relative fuel efficiency between piggyback service and line-haul motor carrier service. Nonetheless, in Ex Parte No. 230 (Sub-No. 3), Petition for Enlargement of the Amount of Operational Circuitry Reduction Permitted Motor Carriers of Property Under Certain Provisions of the Trailer-On-Flatcar Service Rules, decided August 24, 1976 (353 I.C.C. 1), the Commission adopted a liberalizing modification relating to the amount of operational circuitry reduction permitted motor carriers in using piggyback service. In a subsequent proceeding, Ex Parte No. 230 (Sub-No. 4), Investigation to Consider Further Modification of the Piggyback Service Regulations, decided October 13, 1977 (355 I.C.C. 841), the Commission eliminated all circuitry limitations on TOFC service. This action allows motor carriers to reduce substantially their linehaul operating mileages through the utilization of the most fuel-efficient mode available.

In a proceeding entitled Ex Parte No. 325, Substituted Service--Water-For-Motor Service (Fishyback Service)--Alaskan Trade, 361 I.C.C. 359 (1979), the Commission decided to allow "substituted service". That is, movement of truck-trailers over water routes, on water carrier equipment in lieu of through-overland transportation. The regulations

adopted in this case allow any irregular-route motor carrier with rights between the Continental United States and Alaska to participate in these operations, and to interchange with a water carrier at whatever seaport is the most convenient and accessible. This could result in the consumption of less fuel for transporting a given amount of freight, inasmuch as substituted service is generally more energy efficient.

In addition, the Commission encourages the maintenance of through routes and joint rates, domestic as well as international, within one mode and between all modes, whether rail, motor, water, or air. The promotion and encouragement of intermodalism manifests itself in Commission rulings with respect to grants of operating authority to provide intermodal service, and with respect to such actions as approval of specified tariffs, reduced rates, and joint rate agreements.

In the area of policy actions relating to intermodal transportation which are under development, the Commission is considering the following measures:

- ° A proposal to provide for Commission-directed pooling, interlining, and free use of piggyback service as appropriate. A proposed rulemaking is being developed addressing these concepts on a comprehensive basis;

- ° The issuance of a General Temporary Order which would ease current restrictions with respect to "prior or subsequent" movements in conjunction with rail or water service. The staff is currently developing this concept in Ex Parte No. 346 (Sub-No. 3), Exemption of TOFC/COFC Rail Transportation From Regulation. Ideas include proposals:

1. To relieve motor carriers from the certification requirements for movements prior or subsequent to rail or water.
2. To limit rate regulation for the motor carrier portion of prior or subsequent movements to a prohibition against predatory pricing; and
3. To exempt the rail portion of TOFC/COFC transportation from regulation.

E. GENERAL

In addition to specific actions and studies of energy concern, we have undertaken several efforts of a more general energy-related nature. For example, in compliance with the Energy Policy and Conservation Act of 1975 (EPACA), the Commission issued its final decision in Ex Parte No. 55 (Sub-No. 22), Implementation of the Energy Policy and Conservation Act of 1975, 357 I.C.C. 599 (June 8, 1978). As part of this decision the Commission stated as policy that "the goals of furthering energy conservation and energy efficiency

are integral parts of the Commission's overall regulatory mandate. Energy considerations are weighed with other relevant considerations in determining whether a proposal is consistent with the public interest or required by the public convenience and necessity."

In the area of policy actions which are under development, the Commission is considering proposals which would:

- ° Initiate and/or coordinate conferences and other exchanges of data or information involving other agencies and segments of the trucking industry, such as owner-operators and bulk carriers. These contacts could be used to develop the best ideas, evaluate alternatives, and reduce duplication of effort. This activity has been necessary in developing our knowledge of current industry action and has been expanded to cover the National Truck Stop Operators, DOE, selected carriers, and the news media.
- ° Continue a system for monitoring fuel price increases closely. Relevant data or indices from the Department of Energy, the American Trucking Associations, the Association of American Railroads and the National Association of Truck Stop Operators has been collected to augment current Commission indices.

- ° Employ special permission to depart from tariff publishing rules to encourage or compel such measures as convenience interlining, substituted intramodal motor carrier service, and carrier pooling in remote or congested areas.

In another area of proposed policy change, the Commission is considering a proposal to relax the standards for entry into motor carrier transportation of small shipments weighing 500 pounds or less. This proposal is currently being considered in Ex Parte No. MC-120,

Finally, the Commission is actively considering action which is proposed as a response to the fuel shortage. In this proceeding, Ex Parte No. MC-126, the Commission will decide whether to grant a General Temporary Authority to motor carriers of passengers to enter new markets freely while charging prevailing fares for a limited period. It is argued that this freedom is needed by bus companies to deal with the increasing demand for intercity bus travel resulting from reduced usage of private automobiles.

F. H.R. 1681

Let me now discuss briefly H.R. 1681, the "Diesel Fuel and Gasoline Conservation Act of 1979". As we understand the provisions of the bill, it is intended to address a situation created by the Robinson-Patman Act as administered by the FTC. The bill would expressly permit a seller to provide a

buyer with an incentive in the form of an allowance should the buyer actually provide the transportation of goods which are priced by the seller to include a transportation charge. One of the arguments advanced in favor of the bill is that it will lead to a reduction in the number of empty backhauls by trucks and will thus result in fuel savings.

We are not able to make an overall judgment as to whether this is a valid approach to take in attempting to conserve fuel, but we do have some observations about the bill. First, the bill deals basically with marketing questions--questions of discrimination and of industry practice which are beyond the jurisdiction and expertise of the Commission. It does appear, however, that a difficult question of balancing somewhat conflicting objectives is presented. Small business may be unfairly disadvantaged by large companies able to take advantage of their private trucking fleet. At first blush it would appear that there may be alternatives available that could accommodate both objectives at least partially. For example, it might be useful to explore requiring that an F.O.B. price and uniform delivered price be made available to everyone.

Second, we do not have sufficient information to determine the probable effects which the bill might have on ICC-regulated carriers. Some have maintained that ICC-regulated common carriers could be injured by this bill, in that those

carriers sometimes perform transportation of the manufacturers' goods to the buyers' locations within the uniform delivered pricing area. Thus, it is claimed, backhaul transportation by the buyer as a private carrier could have an adverse effect on common carriers. However, this is extremely difficult to quantify. First of all, much of the transportation of the manufacturers' goods to their various buyers is by private carriage in any event. Also, we are not in a position to know the extent to which allowances permitted under the bill would be used as opposed to how much the standard allowances available under present law and FTC rulings are used. We are not aware of statistics relating to either of these questions which would enable us to give a useful assessment of the potential effect of the bill on common carriers.

In addition, those uncertainties make meaningful estimates on fuel savings arising from the bill extremely difficult to determine. And, we have discovered in many of our own energy-related initiatives that there is much disagreement over energy savings and the relationship between energy-saving and other regulatory goals. Nevertheless, we have gone ahead cautiously in some areas, as I indicated earlier, at the same time watching closely the effects of our initiatives. We believe a similar approach is needed with respect to this bill.

This concludes my prepared statement. I will be glad to try to answer any questions you might have.

Commissioner Stafford was absent and did not participate in the disposition of this proceeding.

Mr. OTTINGER. Do I understand correctly that you neither support nor oppose H.R. 1681?

Mr. O'NEAL. Well, I think that is right. We just don't feel that we are in a position to take a stand one way or another on that bill. We tend to favor, at the Commission, prices that are cost related and obviously the system that is set up is a marketing system which is an average pricing system; some people are going to benefit from that system and some aren't. We would want to have a better idea of what the implications of that system are for the entire industry, probably, before trying to make a judgment.

Mr. OTTINGER. Well, the question arises, if you don't understand what impact this is going to have on regulating carriers, who will?

Mr. O'NEAL. I don't think anybody can give you a definitive answer, frankly, at this stage. The question is whether any of this traffic that is not being carried by private carriers—or, let's say, the private carrier of the buyer—is actually moving today by regulated carrier. If it is moving today by regulated carrier and the effect of this bill would be to shift that to a private carrier, there may be some adjustment in the amount of traffic available to the common carrier, but that still does not answer the question of whether there is actually a fuel saving.

Mr. OTTINGER. Are most of the grocery truck movements by regulated carrier?

Mr. O'NEAL. Well, there is a mix. Many of the commodities that move to grocery stores are exempt commodities—agricultural commodities of various kinds. Many other commodities, like frozen foods, are processed commodities and therefore would be regulated, so there is a mix and I guess we would say about half and half.

Mr. OTTINGER. I think it is the subcommittee's disposition to act in this area. What would it require for you to be able to obtain the information that you need to be able to have an opinion on the legislation?

Mr. O'NEAL. Well, one of our problems is we were notified of this hearing about a week ago. We have not really looked at this question very closely; there are several other questions that the agency is engaged in. I would like to be able to go back and try to come up with something in about 30 days or so. At least at that time we could tell you whether we need to go at it more extensively or what.

Mr. OTTINGER. Could you do it in less than 30 days?

Mr. O'NEAL. Certainly we can give you an answer in less than 30 days. I won't say the quality would be as good as one at 30 days, but we will give it a try.

Mr. OTTINGER. I think we would like to have your considered opinion on the legislation and on the alternatives that I suggested and that you suggested as quickly as possible. I don't think 30 days would be any tragedy, but if it took any longer than that I think it would cause us some problems.

Mr. Shelby.

Mr. SHELBY. Thank you, Mr. Chairman.

Mr. O'Neal, as Chairman of the Interstate Commerce Commission, you said just a minute ago in answer to questions of Chairman Ottinger that you had not worked up a definitive statement or

position on this legislation by Congressman Lehman at this point. Is that right?

Mr. O'NEAL. That is right.

Mr. SHELBY. How does this fit in the overall scheme of regulation, if it does? Isn't it sort of part and parcel of all of this if this legislation passed where you could backhaul?

Mr. O'NEAL. Well, it would remove one of the restrictions on backhaul and, to the extent regulations cause problems for picking up a backhaul, it would have that effect. Now I hesitate to go on beyond that point but I could see some other impact perhaps on marketing by the sellers.

Mr. SHELBY. If this legislation passed where you could permit a backhauling trip, would this compound some of the other regulations that you have through the Interstate Commerce Commission?

Mr. O'NEAL. I really don't see how this would have any real effect on us. It might have some effect on the carriers, but let's face it. This traffic is moving right now. The question is who is moving it and what price are they moving it at? We are really talking probably about shifting it to another carrier. Who is carrying it today? That is the question. Would their operations be affected if a regulated carrier is using this particular movement as part of its system?

If the carrier loses its traffic, then it may have to make some adjustments in its system otherwise, but that does not necessarily mean to me that that carrier is going to move empty. I feel that the carriers that have enough ingenuity are going to find a load and, indeed, our experience with these carriers indicates that they don't move very far with an empty truck.

Mr. SHELBY. Would it be your philosophy as Chairman of the Interstate Commerce Commission that they should not move empty at all like on these long hauls?

Mr. O'NEAL. Well, I think that is a reasonable philosophy, certainly. I don't think from what we have seen that trucks are moving long distances empty. Now what they do is they scramble to find a load. If you look at one thing that the study indicates, for example, it is that where there is an empty movement, the loaded part of the movement tends to be much longer than the empty part of the movement. So what that seems to suggest is that they are looking for a load someplace, and they are finding it somehow.

Mr. SHELBY. Would this in any way introduce more competitive market pressures into the trucking business?

Mr. O'NEAL. I would think so.

Mr. SHELBY. Thank you, Mr. Chairman.

Mr. OTTINGER. Mr. Gramm?

Mr. GRAMM. Thank you, Mr. Chairman.

Commissioner O'Neal, I would like to start by trying to get a clarification of the intent of the Interstate Commerce Commission. I don't want to put you in the position of having to second guess past legislation and past rulings of the Commission, but I think the American people quite legitimately would like to have some explanation of why the Commission ever thought it advisable to restrict backhauling.

Mr. O'NEAL. Well, I am glad you asked that question because the Commission does not restrict backhaul. The way this works is that

a carrier applies for authority and is granted authority. Now in the past, before the Nation was concerned with energy problems, the Commission looked only at that particular haul from A to B, let's say, and if the carrier was able to show it could handle that traffic and could satisfy the regular public convenience and necessity test, then it would obtain a grant of authority.

Nothing was said about B to A—going back the other way. There was no restriction, there just was no authority. Today when we look at an application for authority we look at whether that carrier has some opportunity for a backhaul. Now that backhaul may be an exempt commodity, such as unprocessed agricultural commodity, it might be regulated commodities in the opposite direction, or the carrier may be applying for a round trip authority.

It is really a misnomer to say there are restrictions on the backhaul. There may not be the same opportunities on the backhaul as there are on the fronthaul, but looking at the fact that a carrier has authority to carry widgets from A to B does not say, you know, that he might be able to carry auto parts from B to A.

Mr. OTTINGER. Would the gentleman yield?

Mr. GRAMM. Yes.

Mr. OTTINGER. Don't you restrict your unregulated carriers from carrying regulated goods which a regulated carrier is licensed to carry?

Mr. O'NEAL. The carrier has to have the authority to carry the commodity.

Mr. OTTINGER. So an unregulated carrier going from New York to New Jersey to pick something up could not pick up an item which is subject to your backhaul regulation?

Mr. O'NEAL. He might very well be able to pick it up. There are many carriers that haul exempt commodities as well as regulated commodities. A lot of the large regulated carriers or even small regulated carriers haul commodities to the west coast, for example, pick up fresh fruits and vegetables and haul them back. Fresh fruits and vegetables are exempt.

Now certainly if you are an exempt carrier and you don't have authority, you are going to have more difficulty obtaining a load. What do they do? Well, frequently they work out an arrangement for a backhaul trip with a regulated carrier under a lease-type agreement. The big issue that has been presented to us, certainly in this latest truck strike, is the compensation to the exempt hauler going back a fair compensation? Many of them have argued, "Wait a minute; we are getting a very small amount for this transportation." Again, they are moving with a load. The question is how much they are getting compensated. That is something that we are looking at.

There are a number of other things that we are looking at. The whole question of a carrier having the authority, for example, to carry widgets from A to B and not having the authority to haul widgets from B to A. Now maybe he never applied for that authority. We are looking at the suggestion of simply granting him authority to haul back the same commodity from B to A. I doubt whether it will have a big impact on the movement of trucks empty, but I also have some question in my own mind about why they should not have that authority.

Now because of recent court actions I want to be careful about what I am saying here. I am not saying that we are about to do this or that I am unequivocally in favor of doing this sort of thing. I am saying that we are looking at these various issues and we have taken a number of steps. I hope we can take a few additional ones here in the next several weeks.

Mr. LOEFFLER. Would the gentleman yield?

Mr. OTTINGER. Mr. Gramm has the time.

Mr. GRAMM. I yield to my colleague from Texas.

Mr. LOEFFLER. I hear you respond to the gentleman's question but I don't hear you give us any specifics. I could certainly come up with the very general statement that you have given us.

Do you have any statistical data to back up basically what you said when you spoke about widgets going from A to B or from B to A, and so forth? I understand the general concept—we all do—but to answer the question, can you answer it more specifically?

Mr. O'NEAL. You mean could we plot out how many carriers have a load going one way and a load going back?

Mr. LOEFFLER. And also what the cost to the consumer is as to the effect of that backhaul which is empty. That is the bottom line, I thought, for which the ICC was established although I have seen over the course of my time involved in Government that in fact it is not. I would like to see you support the fact that it is through numbers, and I think this is the question that the gentleman asked.

Mr. O'NEAL. OK. Let me say we do have this empty-loaded mileage study which I think represents an effort by the agency to look at this very question. Frankly, we do not have the capacity right now to look at carriers and identify who is moving in one direction and who is moving in the other direction because of the huge number of carriers, the huge number of movements in the United States, and the fact that very little of this information is on anybody's computers. All these factors would make that extremely difficult.

So instead of trying to go out and look at a lot of individual movements, we made an effort to survey actual movements on the highways. Of course this was just interstate highways. I want to make that clear as well.

The survey demonstrated, as I pointed out in the statement, that at any one time about 20 percent of the trucks are moving without a load, and there are a whole lot of reasons for that. Regulations are one, the movement of traffic throughout the United States is another, the fact that some trucks are just not going to be able to carry all kinds of commodities. If you have an auto carrier, it is good for carrying autos. It is not good for carrying anything else.

So really I guess the key statistic may be looking at those vehicles which tend to be more generally useful, that can be used for carrying a lot of different commodities. I believe the statistic for those was about 18 percent and that varies depending on what kind of trucker you are talking about. If it is a large general commodity carrier, about 9.6 percent of the miles are empty. For other carriers the percentage goes up. For refrigerated vans, the number is about 14.8 percent. It really depends on what kind of carrier you are looking at and what kind of equipment you are looking at.

Mr. GRAMM. If I may, I have two more questions. You say in your testimony:

Maximizing energy efficiency may at times be inconsistent with insuring maximum service responsiveness. In reconciling such competing interests the Commission must balance conflicting goals in light of the need of the entire system and its users.

Now I guess the question I have is that in trying to maximize efficiency and taking into account the relative economic importance of backhauling as an expense to the consumer versus service and delivery to the consumer, and in light of your statements about your basic lack of information about what is going on, it seems to me that we come down to the question of whether you can do this more efficiently or whether the market can do it more efficiently. I would like to ask you, what is your view as Chairman of the Interstate Commerce Commission on deregulation of trucking?

Mr. O'NEAL. Well, that is the position that we have advanced in many statements. As I have indicated, I feel that there are areas of the trucking industry that ought to have less regulation. I guess that is deregulation. There are certain areas of the trucking industry that I have some concerns about less regulation. One of those areas involves the general commodity carriers. There seem to be some economies of scale and a trend toward concentration in that section. So it depends really on the kind of trucking we are talking about.

In the truckload area, we have several proposals being considered at the Commission right now for reducing substantially the regulation of those carriers. I can't say what will happen with those administrative proposals, but they are under active consideration right now.

I want to make one comment to elaborate on that part of the statement that talks about the balancing of competing interests. One of the requirements of the Interstate Commerce Act is that a carrier fulfill its common carrier obligation. So a carrier comes in and applies for authority to serve, let's say, points A, B, C, and D, but the most direct route is A to D—this is a regular route common carrier. His obligation is to provide service to all comers on this particular route at reasonable prices on a regular basis.

Now that seemed to make a lot of sense, let's say, before the energy crunch. The argument is that this is one way of insuring that there is some service to small communities and that those communities might not receive service if there were not this common carrier obligation. This may mean that carriers are moving with a load over a distance that is longer than between points A and D, but at the same time it may mean that service to those communities is better than it would be if the carrier just provided direct service between two points.

That is what the statement means when it says there are these conflicting public policy goals that are set forth in the statute. We are looking at questions like: Should a carrier that has a full load be required to stick to the route that they have authority to cover if they are actually not going to be delivering or picking up along that route? We are also looking at various other ideas in this area. It is a classic case of conflicting policy objectives.

Mr. GRAMM. Let me respond, if I can have your indulgence, Mr. Chairman.

No. 1, if the truck is full, it can't provide service by going out of its way to go to another town. I don't see any violation of conflicting objectives by having that truck go direct. In fact, you are doing a disservice to my little town, College Station, by sending a truck full from Houston to Dallas. It is tearing up our highways; it is using up our gasoline; it is obstructing traffic. To say that by indirect routing on a full load that you are providing a service that is in conflict with fuel economy is just, in my mind, crazy.

Mr. O'NEAL. Well, that is why we are looking at that proposal.

Mr. GRAMM. Well, I hope you are speeding the process.

Another problem, I have had tremendous lobbying from the trucking industry against deregulation, and one of their arguments is that nobody argues that the current regulatory system is good. Everybody admits it stinks. It is inefficient; it is anticompetitive. Even the trucking industry admits that, but they argue that small cities and towns such as those in my district are going to lose by deregulation because they might not be served.

One of the things that I have tried to get data on and have obtained some data on has to do with shipment of commodities that are not covered by your regulation—certain agricultural products. In looking at my district, which I think is typical of most rural districts in this country, I don't find the problems in the distribution of the exempt agricultural products. I don't find anybody in my district unable to get eggs, for example.

So again I just recommend to you that we look at existing facts on what services are available on a unregulated basis and find out if indeed these assertions are true. I think these are answers that the American people and the Congress expect from the Interstate Commerce Commission. I think, second, we must not look at trucking in isolation. We brought in the Interstate Commerce Commission because railroads were engaged in price rebates which were a formal price competition. Railroads were supposedly a monopoly. In 1887 we brought trains under regulation, and then trucking came in as competition.

So what do we do? Do we deregulate the trains? No. We deregulate the trucks. Then we bring intercoastal waterways under regulation. Then we bring air freight under regulation. It seems to me that one of the things we need to look at is not only the question of can trucking be competitive. If it can, then there is no justification under our system for your regulations; but we need to look at the whole transportation system, not just trucking.

Is there sufficient competition when you look at the whole package that would justify our allowing that competition to occur? I think that is a question that the energy crisis has focused on, but I think it is an important question, quite aside from diesel fuel or gasoline.

Mr. O'NEAL. Well, your statement raises a lot of questions that we are involved in addressing right now. Certainly we have looked at the kind of service that small communities are receiving and, if you are talking about truckload transportation, I think I would have to agree. I would have real questions in my mind as to

whether regulation is necessary to provide that kind of transportation.

If you are talking about other kinds of trucking transportation, I think it is a different question. I think you would see some prices go up to small communities and you might see some effect on service but it depends on what you are looking at. As far as looking at the railroad system and the trucking system as a whole, the Commission is trying to do that. In the deregulation proposals that are before us right now, an effort has been made to compare or to balance those suggestions against the impact on the railroads, if any.

Recently the Commission acted to deregulate the movement of fresh fruits and vegetables by railroad. As a result of action taken in May, we do not today regulate the movement of fresh fruits and vegetables by railroad so they are on a totally comparable basis in terms of regulation with the trucks that are also carrying those exempt commodities. You know, this process is something we are well into at this time and of course there is legislation up here on the Hill now to address the questions legislatively.

Mr. GRAMM. Thank you, Mr. Chairman.

Mr. OTTINGER. Mr. Loeffler?

Mr. LOEFFLER. Thank you, Mr. Chairman.

Mr. Chairman, I would like to pursue the answers that you gave with respect to Congressman Gramm's initial inquiry. You were talking again about certain regulations being a problem. We have the figures here, the ones you are alluding to, that deal with the percent of empty trucks on interstate highway systems passing sample checkpoints in 1976.

I would like to know, once you have obtained this percentage through your random sampling, what regulations are the ones that are bringing these deadheading practices about and what is the ultimate effect on the consumer?

Mr. O'NEAL. Well, as the study shows, there are many more causes of empty mileage than just regulation.

Mr. LOEFFLER. Delineate these causes; give a general synopsis of them.

Mr. O'NEAL. One of them relates to the kind of traffic being carried. If you are delivering paper products into Washington, D.C., what are you going to carry out of Washington, D.C.? There is not much manufactured here, you have to go somewhere to get it. If you are carrying automobiles out of Detroit, you are probably going to have to go into Detroit empty because here it is the kind of equipment you are using. Another example: Tank trucks haul chemicals. You cannot put potatoes in tank trucks. There are these kinds of restrictions that are built into the trucking industry.

Mr. LOEFFLER. I think that is rather clear and obvious.

What about the regulations that caused this curtailment?

Mr. O'NEAL. Well, in looking at the regulations we have tried to—I can tell you it is very difficult to identify any specific regulation that causes problems. We do know, of course, that if you are an exempt carrier and you are coming to the east coast and you don't have authority going back, you will have some difficulty in getting a load. That may mean you travel around a bit trying to

find a load, although how far you travel is a function of a lot of things.

Mr. OLSON. Congressman, why don't you turn to page 26 where there is a set of reasons that we received from the truck drivers when we stopped them?

Mr. O'NEAL. I would not want to give you an impression that this is a definitive statement on why these trucks are empty. It is not asking a question like, "Why is the truck empty?" It is not necessarily going to elicit the best response because you are talking to the person who is actually driving the truck but it does at least give you some idea of some of the problems that the truckers see.

Mr. LOEFFLER. Once you have all of these figures drawn together, what is the impact on the consumer? What is the additional dollar impact you and I pay as a consumer? We have our beef wrapped up with cellophane that we pick up at the grocery store. How much is involved in the purchase of that package of beef?

Mr. O'NEAL. I cannot give you that kind of number.

Mr. LOEFFLER. It would seem to me if your Commission is going to regulate on behalf of the ultimate purchaser in America you should have something along these lines to satisfy the fact that there is some rationale that the Commission even exists.

Mr. O'NEAL. Well, you know, you are asking to quantify the impact of some pretty general numbers. We don't know, and we cannot really identify here the relative prices that would be paid under a different set of circumstances.

Mr. LOEFFLER. Qualitative basis rather than a quantitative basis?

Mr. O'NEAL. No; I am saying that in trying to relate the impact of energy or the impact of empty mileage on the consumer I don't feel like we are really able to come up with a meaningful number. But as far as looking at our regulations, it is quite a different matter. I mean there is an area that can be examined, though that is extremely complicated. I don't think anybody can give you any really hard numbers.

Now back a few years ago when the Commission eliminated gateways for the movement of truckload transportation, the Environmental Protection Agency came up with a figure that said that by taking this action we would save 300 million gallons of diesel fuel in a year. The Commission took the action and then we tried to get some sort of reading of the impact of the action. We had to conclude from the information we had that the saving was probably more on the order of 25 million gallons of diesel per year.

It is very hard to project accurately just exactly what sort of savings might flow from these things. Our experience has demonstrated, I think, that it is important to be fairly cautious. I think it is very important not to overstate the impact of these various actions because I think that would be misleading to the Congress and it would be misleading to the American public to try to give them an impression that more is going to be accomplished than really will be.

Mr. LOEFFLER. I would like to ask one final question if I might, Mr. Chairman.

What effect has the Department of Energy's recent changes in the allocation system with regarding the availability of diesel fuel

had with respect to hauling and backhauling and deadheading practices in the trucking industry?

Mr. O'NEAL. What the Department of Energy has done is eliminate rule 9, which basically required a 100-percent allocation to the agricultural community and some aspects of transportation. Now by terminating that allocation we have seen that there is much more fuel available at the truck stops.

Mr. LOEFFLER. How much more?

Mr. O'NEAL. Nobody has a number.

Mr. LOEFFLER. How do you know there is much more?

Mr. O'NEAL. We know because we have sampled about 400 truck stops around the country. We have not checked them all, but we checked many of them. In fact, we check a number every week to obtain the price of diesel fuel so that we know whether the carriers should have an increase in their surcharge. In checking around the country we have found that in many parts of the country where diesel fuel was either not available or available only in limited quantities—that in many of those instances, most at this time, the fuel is available and there are no limitations on the amount of diesel that can be obtained by a trucker.

Mr. LOEFFLER. What is your projection with respect to 6 months or 1 year from now, both as to the effect on the trucking industry as well as the producers of the commodities, if adequate fuel is not available for the truck force? What do you project as far as the supply situation?

Mr. OLSON. That is really out of our area and I am sure that representatives from DOE can give you a better perspective, but from our position and our experience in the last several months in reviewing the problem it appears to us we are going to all have a tight supply on diesel fuel and there is going to have to be a sharing of a tight supply. Up to this point, however, there seems to be enough on the spot market if you are willing to pay for it.

Mr. O'NEAL. Again I think you should ask this question of DOE, but I believe they feel that about 95 percent of the diesel fuel is now available at the truck stops.

Mr. LOEFFLER. How well does DOE work with your agency? Do you have daily communication or just on an as-needed basis? On what basis is an intermingling of the distribution of data accepted?

Mr. O'NEAL. I would say up until this last problem the communications were on an as-needed basis. Since the White House stepped into the situation and has drawn the agencies together, the communications are much more frequent and indeed there is a task force set up. Mr. Olson is our member on the task force, and each agency has a representative. So I hope that our communications are now going to be much improved over what they were and we will all have a better idea of what everybody is doing.

Mr. LOEFFLER. Thank you, Mr. O'Neal.

Thank you, Mr. Chairman.

Mr. OTTINGER. We thank you for your assistance and we will be looking for the material you are going to supply as soon as you can make it available.

Next we have a panel made up of Mr. Alfred F. Dougherty, Director, Bureau of Competition, Federal Trade Commission; Dr. Maxine Savitz, Deputy Secretary, Conservation and Solar Applica-

tions, Department of Energy; and Dr. John J. Fearnside, Deputy Under Secretary, Department of Transportation.

We will hear first from Dr. Fearnside.

STATEMENT OF JOHN J. FEARNSIDES, DEPUTY UNDER SECRETARY, DEPARTMENT OF TRANSPORTATION

Mr. FEARNSIDES. Thank you, Mr. Chairman.

I am happy to be here this morning. The administration is very happy that the committee is giving consideration to reforming trucking regulation, especially with the goals to make that industry more efficient, reduce needless energy consumption, and reduce the cost to the consumers.

The specific legislation before the committee today is H.R. 1681, which is designed to conserve fuel in certain movements of trucks which are not subject to ICC regulation. However, per the committee's letter inviting us to testify today, I intend to discuss not only H.R. 1681, but the potential for conserving energy in those other segments of the trucking industry which would not be affected by H.R. 1681. I will also explain how the administration's proposed Trucking Competition and Safety Act of 1979 would realize that potential for energy conservation.

Mr. Chairman, I will submit my statement for the record; it is a rather long explanation of H.R. 1681 and how it would work and the transportation economics considerations involved. With your permission I could probably explain it very quickly with the aid of a couple of charts which I have right over here.

Mr. OTTINGER. The subcommittee would consider that a blessing. Without objection, it is so ordered.

Mr. FEARNSIDES. Let me say first, Mr. Chairman, that so-called uniform zone delivered pricing systems are permitted without any specific regulations; they are just based on interpretations that they are not illegal.

Now the essential dynamics, if you will, of this system are as follows. Suppose a manufacturer has a product that he is selling to customers B and C and which costs him about \$90 on the dock, perhaps, including \$10 profit for him. Now suppose that the transportation cost—and this is the round trip transportation cost—from A to B is \$8 and the round trip transportation cost from A to C is \$12.

The effect of the uniform zone delivered pricing system is obviously to charge a \$10 average price, allowing B and C both to have the same delivered price. It is clear that in this system B cross-subsidizes C by a \$2 premium, if you will, and there is the possibility for four empty backhauls; that is, the possibility for an empty backhaul from B to A, from C to A, and given that A is a manufacturer and B and C may be wholesalers with their own trucks, it is possible that they are going to retailers and then returning empty as well. So the notion of the bill would be to allow B and C, in the process of serving their retailers, to come over to A and pick up the product on A's dock, save some money, save some backhauls, and reduce energy consumption.

There are two ways that you can approach this. The philosophy behind H.R. 1681 is as follows. What should be permitted is either a full backhaul discount, if you will, that reflects the total cost

from A to C or from A to B or any other destination, or some kind of fraction of this, like half.

Now notice that what would really happen if you did this and the discount for C was \$12. C would see an \$88 f.o.b. price, and the discount for B being \$8 would give B a \$92 f.o.b. price. The issue here is whether this will give the proper incentives, which I can explain in the next chart a little bit better, for both B and C to want to get these backhauls. The problem, as I am sure that you have heard and that Mr. Dougherty will address in greater detail, is that the FTC feels that the different f.o.b. prices at the dock are probably violations of the Robinson-Patman amendment to the Clayton Antitrust Act.

What the FTC has recommended in this particular situation is as follows. If you are going to have a uniform zone pricing system, what you ought to do is have a uniform discount. For example, if you just allowed a \$10 discount, then both people would get the \$90 f.o.b. price. The problem with that, according to the framers of H.R. 1681, is that if B then has a real incentive to come out and pick up A's product and go back—now he could conceivably be coming out empty, but it is possible that he would not—but even if the full cost of coming out and going back was \$8 he would be able to realize a \$98 delivered price, f.o.b. plus transportation, and really have an incentive to do this.

On the other hand, C, if he picked it up, would have a \$102 price; therefore, C would not have any incentive to take advantage of this. Further, A, rather than allowing B to pick it up—B would be the only one who was going to pick it up because C would not pick it up—then he will not offer a discount at all. This is because with the real cost of transportation \$12, the \$10 delivery charge would require A to subsidize the transportation to C instead of having B subsidize it, as happens under the uniform zone pricing system.

Mr. OTTINGER. I don't understand your logic there. It seems to me that C has the incentive to pick up a load because he is not going to be able to make it if he does not.

Mr. FEARNSIDES. No, Mr. Chairman. If C can get it for \$100 at the uniform zone delivered price from A, it is cheaper. This is the logic of the bill now. The logic of the bill says that C, especially if he is going to come all the way over here and go back, would not be inclined to pick it up with his own truck.

I don't think that it is profitable to go too deeply into this because we could probably spend all day on it, but there are incentives for C if you look at it in a different way, and I will do that in just a minute. What I am trying to explain right now is what the framers of the bill suggested was the problem; that is, if there were just a \$10 rebate, if the cost of transporting to C were \$12, then C would not have any incentive if he could get it for \$100 from A; C would not have any incentive to pick it up at A and take it back and have a \$102 charge. This is the problem.

Then if C didn't want to pick it up, the thing is that if it does not work for everybody, the framers of the bill suggest that A then would not be interested in doing it for anybody; because A would be required then to subsidize this extra cost of transportation itself rather than having it being cross-subsidized by the people for whom transportation costs less.

Now what I have are two examples here and I would like, if I may, to have our staff work with the committee staff and go over them. What they show is that when you treat the problem the way it probably really would happen, that is, if B had a customer out here and C had a customer somewhere out here, that their opportunity costs of coming to A and picking it up rather than going back empty could be very low; that is, maybe an extra couple of dollars.

Since it is farther away, C may be able to come back and pick up the goods at A for \$2 and maybe B, being even closer, could pick it up for \$1. If you go through the transportation economics, you can show that it really does not amount to very much difference whether you have an H.R. 1681 approach, which would give proportional discounts, or whether you have a Federal Trade Commission approach that would give, for example, \$5 discounts to both of them.

The thing that would happen in both cases obviously is that A has the possibility for making even more profits since it can, if you will, cut a deal with B or C and maybe even charge \$95 f.o.b. and still make everybody happy. But the transportation costs being reduced as they are, they would eventually still wind up in both cases with a \$96 or \$97 charge for the consumer or for the retailer, which would then be passed on to the consumer, instead of the \$100.

I have another case which gets even more complicated where C does not have a truck and is not a private carrier. So if I may, I would just like to have our economists come up and talk it over with the committee staff. I would really encourage you to get these kinds of examples from the affected industries because these are the kinds of complications that Dan O'Neal mentioned a little bit earlier, that make it very, very difficult to measure what the true effect of such bills are.

We had not really considered this particular approach, but if we could find that there was a substantial energy saving, I think we would be encouraged to talk to the FTC and find out the pros and cons of allowing different f.o.b. prices, but we are still in the process of looking at this very complicated problem and we are not really sure how much fuel it will save.

If I may, Mr. Chairman, I would like to go on and mention just a couple of things about the administration's trucking deregulation bill, which we think has a substantial possibility for saving fuel and which, as you know, is before the Congress now. Before I do that, I would just like to make a couple of technical points regarding H.R. 1681.

First, while it is clear that the bill is designed to overcome an FTC interpretation of the Robinson-Patman Act which limits the ability of sellers to provide incentives for backhauling by buyers, the bill would not amend the Robinson-Patman Act but the Energy Policy and Conservation Act of 1975. Obviously, the committee should consider whether the legislation, unless styled as an amendment to the Robinson-Patman Act, would indeed have its intended legal effect. I obviously would be interested in what Mr. Dougherty would have to say about that.

We also note that we interpret the bill as allowing an f.o.b. price to be quoted to small buyers who themselves do not have backhaul

capacity but would have to arrange for another carrier to backhaul goods from the seller. While we feel the phrase "or an authorized carrier serving the buyer" accomplishes this objective, we recommend that, should the committee take further action on this bill, explicit legislative history on this point be developed. Clearly, it is desirable for the small buyer, which does not own trucks, to have the same opportunity to take advantage of an f.o.b. price as the larger buyer which has a private fleet.

At this time I just would like to give you a very quick overview of the parts of my statement which address the administration's trucking bill. In particular, I would like to address the energy efficiencies resulting from the present scheme of regulation of the trucking industry and how we feel that our bill would help to reduce this waste.

The fuel-saving aspects of our bill, with respect to regulated carriers, deals with reducing or eliminating the existing backhaul restrictions, eliminating existing commodity restrictions which are in some cases rather bizarre, and eliminating restrictions against stopping at intermediate points. For example, if a carrier is going directly through B and C on the way from A to D, the ICC has discretion to decide whether to allow the carrier with routing authority from A to D to actually serve B and C as intermediate points. Right now that is not allowed in almost half the operating certificates.

We are also proposing to expand the agricultural exemption and increase agricultural co-ops' ability to backhaul and get rid of many of the general certificate restrictions that we now see in the trucking industry. One of the interesting things that we found out, just to show you how commodity restrictions are wasteful, there is one person we found who has the authority to carry chop suey only, and while he clearly can carry chop suey from A to B, it is pretty hard to find the chop suey headed back from B to A.

We have also found where, for example, route restrictions exist between Denver, Colo., and Albuquerque, N. Mex., which are only 442 miles apart; the route is served by Garrett Freight Lines which is permitted to haul freight from Denver to Albuquerque, but only if it goes by way of Salt Lake City, a total distance of 730 miles.

Similarly, in 1974, during the height of that energy crisis, Consolidated Freightways was denied a request to travel directly between Minneapolis-St. Paul and Dallas. The carrier's route authority required it to travel 37 percent further on trips between the two points. Despite the company's desire to eliminate excessive mileage and save fuel, the ICC denied the request on the ground that the change in service would harm carriers already serving the route.

I think another point that we would like to make, dealing with the issue of private carriage as does H.R. 1681, is that private carriers right now are not permitted to carry commodities for subsidiaries that they have, and they are also not permitted to carry regulated carriage on the backhaul. The ICC has moved in both of these cases to eliminate these restrictions, but they will probably be held up in the court for quite some time. It is the purpose of our legislation to expand on and to profit from some of the things that Chairman O'Neal has initiated, to remove the situation where such reforms are held up in court for a long time,

to make clear what the rule is, and address some of the concern about administrative authority.

One other thing, Mr. Chairman—I have about five or six pages, maybe even a little bit more, showing examples of substantial backhaul opportunities for private carriers that do not now exist. I just got them before I came over and they are not yet in the record. If I may, I will submit those for the record to demonstrate to you that these are not just short distances or trivial backhaul opportunities that are being neglected.

As I mentioned, we will be very happy to continue working with your staff, not only on the details of H.R. 1681, which raises very interesting and important transportation economics issues but obviously also on any of your concerns dealing with the administration's trucking bill.

Mr. OTTINGER. Thank you.

Without objection, the additional materials will be included in the record.

[Testimony resumes on p. 77.]

[Mr. Fearnside's prepared statement, with attachments, follows:]

STATEMENT OF DR. JOHN J. FEARNSIDES, DEPUTY UNDER SECRETARY OF TRANSPORTATION, BEFORE THE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE OF THE HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ENERGY AND POWER, REGARDING THE POTENTIAL FOR ENERGY CONSERVATION IN THE TRANSPORTATION OF PROPERTY BY TRUCKS, JULY 9, 1979.

Mr. Chairman and members of the Committee, I am delighted to be with you this morning. The Administration is very pleased that the Committee is interested in a matter of great concern to us-- the need to reform the laws governing the regulation of the trucking industry. We simply must make the industry more efficient, thereby reducing needless energy consumption.

The specific legislation before the Committee today is H.R. 1681, which is designed to conserve fuel in certain movements of trucks which are not subject to ICC regulation.

However, today I intend to discuss not only H.R. 1681, but the potential for conserving energy in those other segments of the trucking industry which would not be affected by H.R. 1681. I will also explain how the Administration's proposed "Trucking Competition and Safety Act of 1979" would realize that potential for energy conservation.

H.R. 1681 is intended to reduce empty backhauling, the movement of empty trucks on a return trip, by improving incentives for the backhauling of goods which sellers choose to sell within a geographic zone at a uniform price (i.e., the price of the good plus a factor based on average transportation costs).

Let me begin by briefly describing how a uniform zone delivered pricing system works. When a seller chooses to market its products through such a system, that seller's customers pay the same price for the seller's product regardless of their geographic location, so long as they are within the same geographic zone. In other words, for products subject to a uniform zone delivered pricing system, the price of that product to a customer, which is uniform throughout a zone, includes a uniform component based on the seller's average transportation cost. Obviously, such a system discriminates among different customers. Under this pricing system, the cost of the product to a distant buyer reflects less than the true transportation cost of delivery; for a nearby customer the uniform price charged includes a transportation cost component that is more than the true transportation cost of delivery.

I want to emphasize that neither law nor regulation requires a manufacturer or other seller to establish such a pricing system. That is a decision which a seller makes after considering a variety of operating and marketing considerations.

H.R. 1681 is intended to promote the backhauling of goods which are sold under a uniform zone pricing system. The opportunity for a backhaul in such a system arises because a seller's customers often have the opportunity to fill an otherwise empty backhaul by transporting a shipment that the seller would otherwise have to deliver to that customer.

Specifically, the opportunity for a backhaul in such a system arises as follows. A wholesaler of a product subject to a manufacturer's uniform zone price delivers that product to a retailer. That retailer is geographically closer to the manufacturer of that product than the wholesaler. Upon delivery of the product to the retailer, the wholesaler's truck can either return empty to his place of business, or go on to the manufacturer's place of business and then return with a full truck. In cases where the wholesaler's truck returns directly to his place of business from the retailer's, the manufacturer must deliver the goods to the wholesaler, with the manufacturer's truck returning empty from the wholesaler's place of business. Thus, in the case where, upon completion of delivery to the retailer, the wholesaler sends his truck on to the manufacturer's place of business, two empty backhaul movements (the return of the wholesaler's truck from the retailer's place of business and the return of the manufacturer's truck from the wholesaler's place of business) are replaced by a single empty fronthaul movement (the movement of the wholesaler's truck from the retailer's place of business to the manufacturer's place of business).

If these situations were subject to market forces, those forces would act to reduce time and fuel costs by arranging for the backhaul of goods by the seller's customers. However, in uniform zone pricing systems, considerations of pure transportation economics are not allowed to shape events. Under a uniform pricing system, the seller's price to its customer already reflects a transportation component. Thus, there is no incentive for the customer to pick up the goods

from the seller unless the seller is willing to give the customer a discount (or "backhaul allowance") which will compensate the customer for the additional costs it will incur in transporting the goods.

While some sellers presently do offer backhaul allowances, larger backhaul allowances would create even further incentives. H.R. 1681 is intended to create these incentives by explicitly allowing backhaul allowances greater than those currently being offered. Specifically, H.R. 1681 is intended to permit sellers to grant buyers a backhaul allowance off the uniform zone delivered price of up to "the actual savings in delivery costs to the seller".

While there is no doubt that granting of such backhaul allowances would encourage more backhauling, the application of the language of H.R. 1681 would have certain side effects. For example, the bill would permit a buyer located far away from a seller to deduct more from the uniform delivered price than a competing buyer located closer to the seller. This would result in those two buyers paying differing prices for the same product at the same place, with the close-in buyer paying a higher f.o.b. (free-on-board) price than the buyer located farther away from the seller. The non-discrimination language in the bill would not prevent this result.

The Federal Trade Commission has noted that such pricing discounts would probably violate the Clayton Act (as amended by the Robinson-Patman Act), and raises a general policy question. As the Director of the FTC's Bureau of Competition has remarked in testimony before the House Small Business Committee:

"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."

Alfred Dougherty, Jr.
September 7, 1977

While we are aware of the FTC's expertise on questions concerning the Robinson-Patman Act, that Act is concerned with the pricing of goods, not with the pricing of transportation services. This compels us to look at this implication of H.R. 1681's provisions differently. When a seller chooses, for whatever reason, to use a uniform zone delivered pricing system, the price of products in that system distorts the true transportation costs of delivering the products to each buyer. To encourage energy conservation in such systems, this legislation would permit the seller's actual transportation costs to be reflected in backhaul allowances. However, as explained above, this would, result in what the FTC has indicated would be a violation of the Robinson-Patman Act.

Further, we are unaware of any way to devise backhaul allowances within a uniform zone pricing system which meet the FTC's concerns for fair pricing of goods without retaining a pricing system which distorts transportation costs. For example, the FTC has noted that backhaul allowances within a uniform zone pricing system are legal as long as the backhaul allowances granted are equal for all buyers,

so that they result in the same price f.o.b. to all buyers. However, in such cases buyers with differing transportation costs would be granted the same price allowance for transporting goods different distances, i.e., transportation price distortions would continue.

This does not mean that a system of equal backhaul allowances cannot provide incentives for backhauling. A seller does not have to offer its buyers a backhaul allowance greater than its average transportation cost in order to attract backhauling even from buyers within a zone who are relatively distant from the seller. This is because the opportunity cost to that distant buyer of picking up its goods from the seller can be less than the average cost to the seller of delivering goods to a buyer in certain instances. The most frequent such situation would be where the distant buyer's truck begins its trip to the seller's place of business from a point closer than the average distance of a buyer from the seller. However, it cannot be denied that a backhaul allowance of the seller's true transportation costs to that distant buyer would provide that buyer with an even greater incentive to backhaul than an allowance of the average transportation cost. Again, though, that larger allowance can result in what the FTC considers to be discriminatory f.o.b. pricing.

In sum, while transportation economics will act to conserve energy, a fact recognized by the drafters of H.R. 1681, uniform zone pricing systems pervasively distort economic considerations. Because of these distortions, H.R. 1681 cannot authorize backhaul

allowances in uniform zone price systems as great as a seller's transportation economics considerations would allow without running afoul of the Robinson-Patman Act, as interpreted by the FTC. Similarly, the FTC's concerns as to the pricing of goods by a seller cannot be met in a uniform zone system without maintaining transportation pricing distortions among buyers.

At this time, it might be useful to review the implications of this bill in terms of a specific example. Attached to my testimony is a chart and accompanying appendix which describe how this bill would affect the operation of uniform zone pricing system. Should you desire it, Mr. Chairman, I would be pleased to discuss that chart at this time.

Clearly then, Mr. Chairman, our problem with this whole situation is that uniform zone pricing systems pervasively distort transportation economics which, particularly in this era of escalating fuel costs, would otherwise operate to conserve energy. As to H.R. 1681, we note that application of its provisions to uniform zone price systems would allow for what the FTC has indicated would be a violation of the Robinson-Patman Act.

More importantly, though, the bill's provisions would further the important economic and energy objective of reducing empty backhauls, an objective which we fully endorse.

Before moving to a discussion of energy savings in other segments of the trucking industry, I would like to mention several possible technical problems with the wording of the bill.

First, while it is clear that the bill is designed to overcome an FTC interpretation of the Robinson-Patman Act which limits the ability of sellers to provide incentives for backhauling by buyers, the bill would not amend the Robinson-Patman Act, but the Energy Policy and Conservation Act of 1975. The Committee should consider whether the legislation, unless styled as an amendment to the Robinson-Patman Act, would indeed have its intended legal effect.

We also note that we interpret the bill as allowing an f.o.b. price (uniform zone price less backhaul allowance) to be quoted to small buyers who themselves do not have backhaul capacity, but would have to arrange for another carrier to backhaul goods from the seller. While we feel the phrase "or an authorized carrier serving the buyer" accomplishes this objective, we recommend that, should the Committee take further action on this bill, explicit legislative history on this point be developed. Clearly, it is desirable for the small buyer which does not own trucks to have the same opportunity to take advantage of an f.o.b. price as the larger buyer which has a private fleet.

At this time, I would like to address opportunities to improve energy efficiency in the trucking industry which do not raise Robinson-Patman Act problems. In particular, I would like to describe the energy inefficiencies resulting from the present scheme of ICC regulation of the trucking industry and how the Administration's proposed trucking legislation would reduce energy waste in all sectors of the trucking industry.

Actually, Mr. Chairman, a wide range of ICC regulations causes truckers to waste precious fuel. Most notable are those which specify routes that must be traveled, commodities that can be carried, and restrictions specifying "one way authority" only.

"Empty backhaul" may be caused by a number of these restrictions, acting either singly or in concert. For example, many certificates of operating authority award only one-way authority, or specify that a carrier may haul commodities to a point, but with "no transportation for compensation upon return unless otherwise authorized." As recently as 1975, only half the operating certificates awarded by the ICC contained authority for a carrier to haul goods on a return trip. Unless that carrier already has authority to operate from that newly authorized destination, empty backhauls will result.

In other cases, ICC certificates specify in mindboggling detail the commodities that a trucker can carry. These restrictions often follow no logical pattern and serve no purpose. Some certificates, for example, authorize the carrier to haul crated, but not uncrated, machinery; or allow paint hauled in 2-gallon cans, but not paint in 5-gallon cans. One recent certificate permits a carrier to haul bananas. The carrier may also haul pineapples, but only if mixed with loads of bananas. It is easy to imagine how these kinds of restrictions result in less than full fronthauls, as well as empty backhauls. Let say, Mr. Chairman, that you are a carrier with authority to carry only chop suey. It clear to me that you would have a hard

time finding a load of chop suey to carry in a town to which you just delivered a truckload of chop suey. As silly as this may seem, Mr. Chairman, we are aware of one carrier with authority to carry only chop suey.

Many certificates prohibit carriers from making intermediate stops between authorized points. This prevents carriers from maximizing their loads, increases costs, and keeps many towns, especially smaller ones, from receiving the best possible service.

Most certificates authorizing the carriage of general commodities specify the routes, that is, the actual highway the carrier must use. In some instances, carriers are required to take an indirect route or travel through a designated "gateway city" to reach their destination. For example:

- Denver, Colorado and Albuquerque, New Mexico, are only 442 miles apart. Garrett Freight Lines is permitted to haul freight from Denver to Albuquerque, but only if it goes by way of Salt Lake City, a total distance of 730 miles.
- In 1974, during the height of that energy crisis, Consolidated Freightways was denied a request to travel directly between Minneapolis-St. Paul and Dallas. The carrier's route authority required it to travel 37% further on trips between the two points. Despite the company's desire to eliminate excessive mileage and save fuel, the ICC denied the request on the ground that the change in service would harm carriers already serving the route.

In addition, there is the case of the unregulated truckers involved in private carriage and carriage of exempt agricultural commodities. "Unregulated" is actually a misleading term because, although they are not subject to ICC regulations, these carriers are restricted from carrying most types of commodities. For example, an unregulated trucker carrying a load of produce from Florida to New York cannot carry any freight back to Florida unless he leases himself to a regulated carrier (at a fee of 20-25%) who has operating authority to carry shipments moving into Florida.

Private carriers, non-transportation companies carrying only their own commodities, are subject to a host of restrictions which add up to a high probability of empty backhauls. Private carriers, for example, are not permitted to carry freight for their own corporate subsidiaries, nor are they permitted to "trip Lease" with certificated carriers for single trips -- any lease must be for a continuous 30 days or more. (A recent ICC ruling "softens" this regulation somewhat by permitting private carriers to also become common carriers but, between court challenges to the ruling and the expense and difficulty of securing common carrier authority from the ICC, there is understandably no rush of private carriers seeking to become common carriers.)

The net effect of ICC restrictions on "unregulated" truckers is that they are empty far more often than regulated truckers. An ICC study in 1976 showed that general purpose vans of exempt truckers and private carriers were empty 125 percent more often

(more than twice as often) than those of regulated truckers. A study done for DOT in 1974, which analyzed the private trucking operations of 40 firms, estimated that those firms would save 24 million vehicle miles each year (or about five million gallons of fuel) if they were allowed to haul for their corporate affiliates and subsidiaries. Obviously, the savings for all such firms would be a high multiple of this figure, and the more that such restrictions are relaxed, the greater the savings that would result.

While we support the intent of H.R. 1681, we note that it addresses only the "backhaul problem", and very possibly only part of it. H.R. 1681 would not, for example, address any of the problems associated with current restrictions on the ability of private carriers to carry goods for subsidiaries. Nor does it permit regulated carriers with only one-way authority to carry goods on their return trips. Finally, Mr. Chairman, H.R. 1681 does not address route circuitry or any of the other fuel wasting regulations I discussed above.

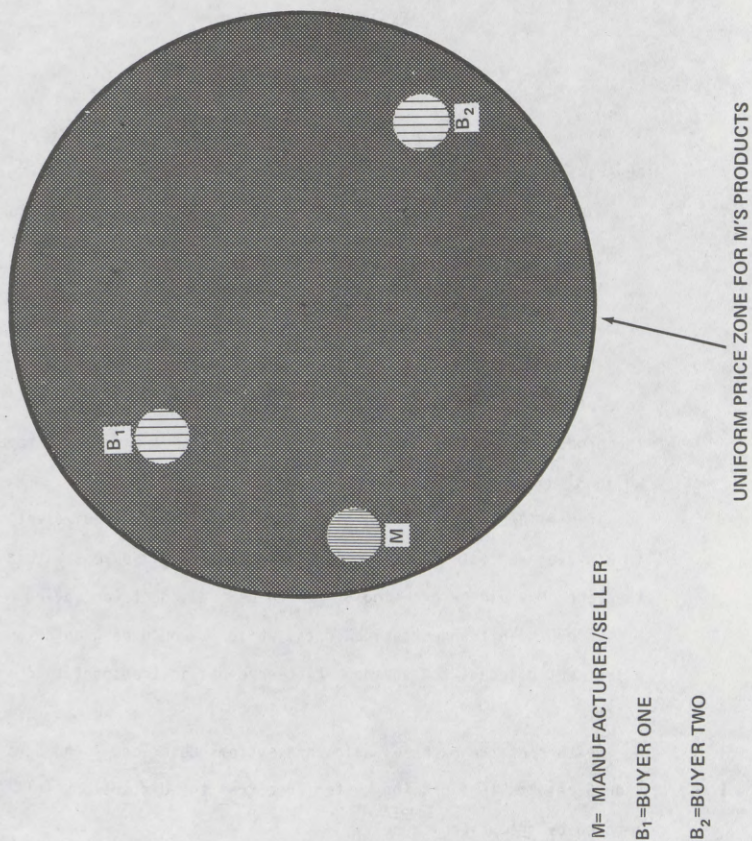
The Administration's proposed "Trucking Competition and Safety Act of 1979", H.R. 5865, addresses all of these wasteful regulatory practices, Mr. Chairman, and its enactment would not only save many millions of gallons of precious fuel, but also save consumers perhaps \$5 billion dollars per year in transportation costs. We hope the members of the Committee will support the Administration's bill and we would welcome the opportunity to discuss its provisions with each of you.

In closing, Mr. Chairman, I again want to commend the Committee for holding hearings on this important topic. We look forward to working with this Committee, as well as all other interested members of the Congress, in advancing legislation which will conserve fuel and improve the performance of the trucking industry.

At this time, I would be pleased to answer any questions that the Committee may have.

PRICE IMPLICATIONS OF H.R. 1681

65

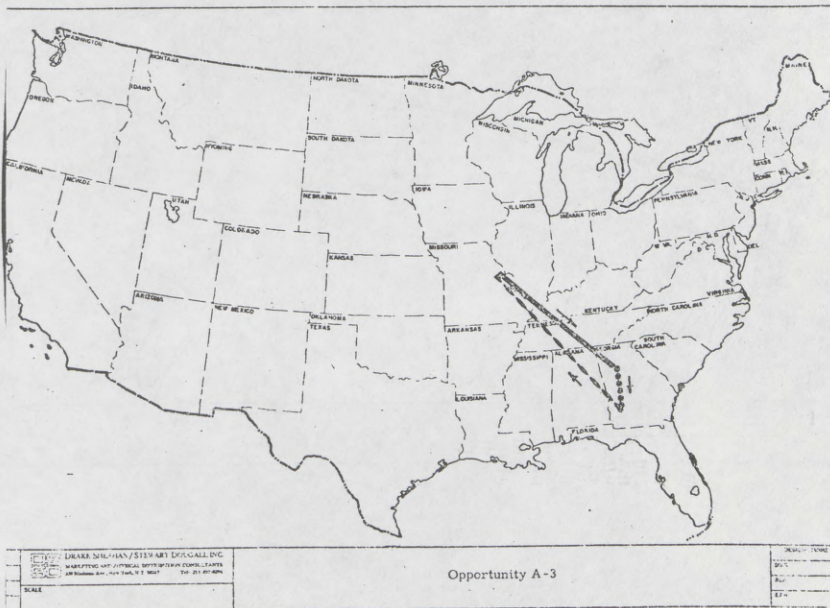


Explanation of Chart
Price Implications of H.R. 1681

1. Assume the uniform zone delivered price for M's product to all buyers is \$1.10.
2. Assume that M's price for the product, excluding transportation costs, is \$1.00.
3. Assume the true transportation cost to M for delivery of his product to B_1 is 5¢, and to B_2 15¢.
4. If M allows each buyer a backhaul allowance from the uniform zone price of his product equivalent to M's cost of delivery of the product to that buyer, B_1 would pay \$1.05 for the product f.o.b., while B_2 would pay M \$.95 for the product f.o.b.
5. If M allows each buyer an equal backhaul allowance equivalent to M's average cost of delivering his product to all buyers within the zone, M would be granting B_1 a ten cent discount for saving M five cents in transportation costs, while B_2 would be granted a ten cent discount for saving M fifteen cents in transportation costs.
6. Neither of the backhaul allowance systems described in numbers 4 or 5 results in a pricing system free from the distortions initially imposed by the uniform zone.

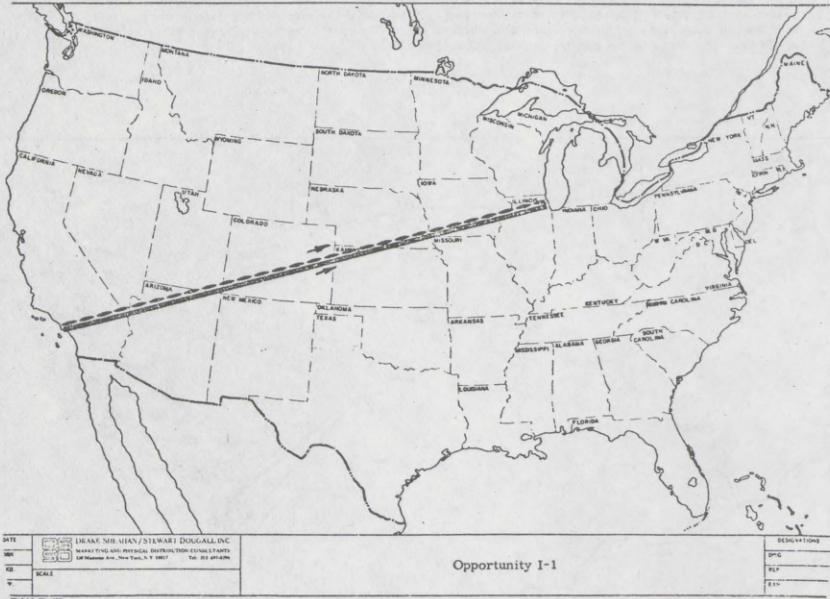
If intercorporate transportation were legal, the subsidiary fleet could transport its product from its Georgia plant to the St. Louis area; it could then pick up the parent company's product in St. Louis, transport it to Atlanta and deadhead back to the plant in southern Georgia. This would entail annual travel of 470,000 miles, 65,000 of which would be empty. This would result in a savings of 330,000 miles per year, or translated into fuel, a savings of 82,500 gallons.

This opportunity is treated as eliminated miles rather than a diversion from common carrier since the current arrangement is highly specialized and tailored to meet this particular company's needs. This company views the arrangement as a substitute for Private Carriage and compensates the carrier accordingly. As a result, the company does not view improved utilization of a subsidiary fleet as a diversion from a generally recognized definition of a common carrier. In addition, the involved specialized carrier has indicated that the proposed change would allow him to utilize his specialized equipment in other segments of his business where he can realize greater utilization.



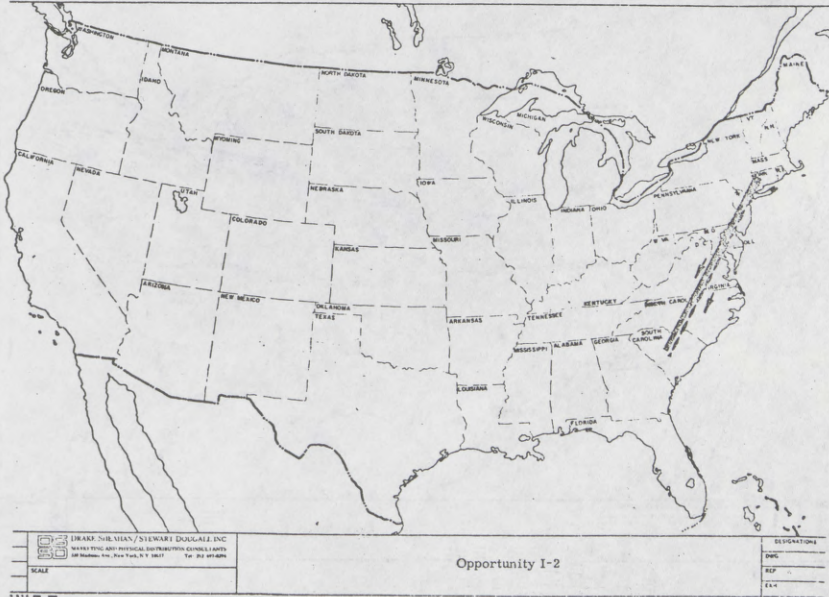
Opportunity I-1

Company I ships four trucks per week from Los Angeles to Chicago that are underutilized. The company has a subsidiary in the Los Angeles area for which it could provide transportation services. (It presently does provide some gratuitous transportation.) Presently, trucks average 80 percent of capacity and, if intercorporate hauling were legal, they could haul for compensation for its subsidiary. Total annual miles travelled are 44,000 per year. If intercorporate hauling were legalized and the additional 20 percent capacity could be utilized, the same product could be handled in the same equipment and with 20 percent less miles, which would be 35,000 miles. This would be a savings of 9,000 miles per year or 2,250 gallons of fuel. Some subsidiary tonnage is now moving via common carrier, however, it moves in LTL quantities. There would be some potential long-range diversion of traffic but no measurable transfer of miles from common carriers.



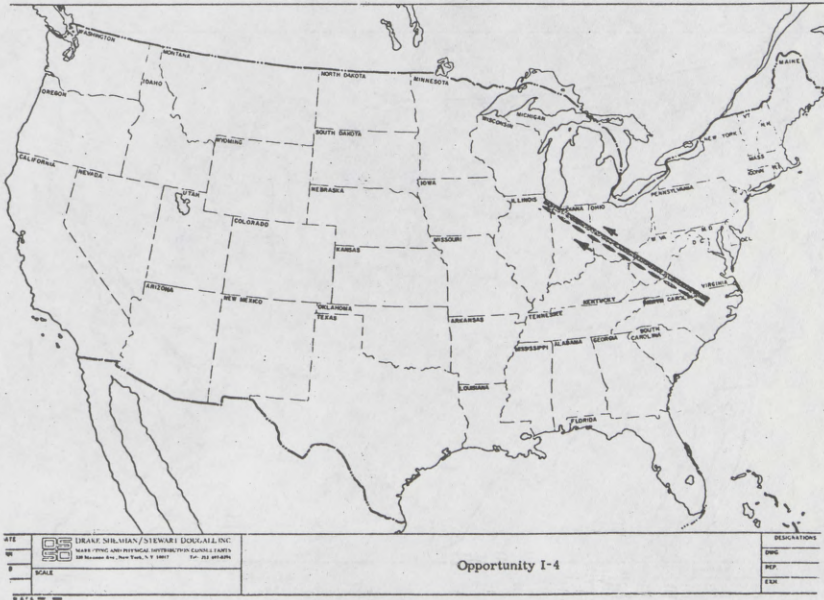
Opportunity I-2

Company I ships one truck per week from Connecticut to South Carolina, which operates at 80 percent of capacity. The company has subsidiaries in the Connecticut area for which it could perform transportation if intercorporate hauling were legalized. Presently, 41,000 miles per year are travelled. The same amount of product could be handled with 20 percent fewer miles, which would be 33,000 per year. This represents a savings of 8,000 miles per year or 2,000 gallons of fuel. Some subsidiary tonnage is now moving via common carrier; however, it moves in LTL quantities. There would be some potential long-range diversion of traffic but no measurable transfer of miles from common carriers.



Opportunity I-4

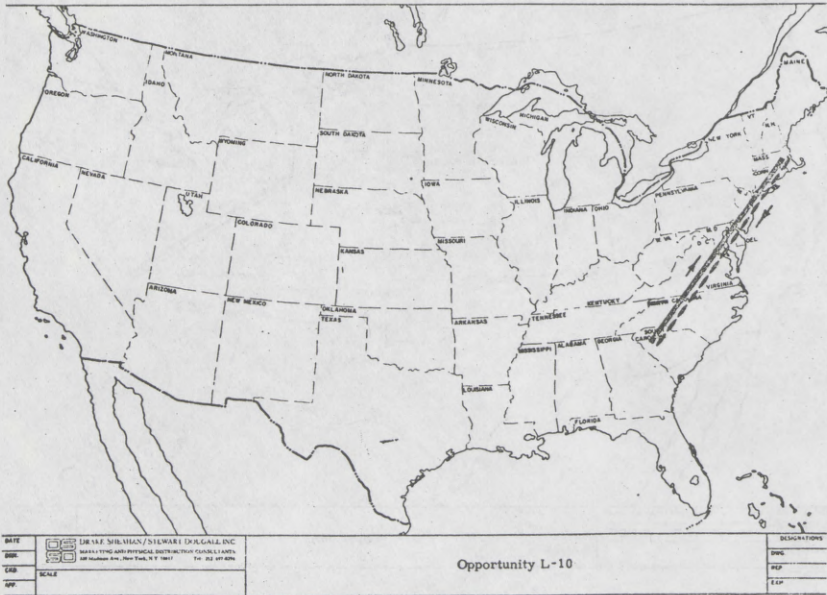
Company I ships one truck per week from North Carolina to Chicago. This trip totals 43,000 miles per year, and currently operates at only 80 percent of capacity. The company recently purchased a company which is operated as a separately incorporated company. If intercorporate transportation were legalized, it could transport, for compensation, products for this subsidiary company. The additional capacity could be handled with 20 percent fewer miles. This would involve approximately 35,000 miles per year, which is a savings of 8,000 miles, or 2,000 gallons of fuel. Some subsidiary tonnage is now moving via common carrier; however, it moves in LTL quantities. There would be some potential long-range diversion of traffic but no measurable transfer of miles from common carriers.



Opportunity L-10

Company L has a subsidiary in Massachusetts that ships an equivalent of one truck per week via rail to the South Carolina area. Company L has at least one truck terminating in Massachusetts that could transport the subsidiary's products if intercorporate transportation were authorized. Presently, Company L's trucks must run from Massachusetts to the New York City area to pick up a return home. Total mileage involved presently is 139,000, 11,000 of which are empty.

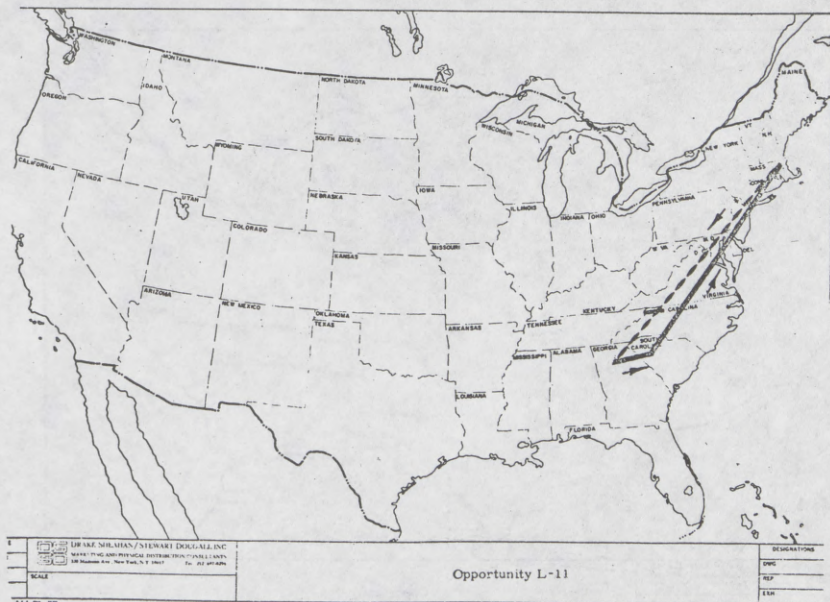
If intercorporate hauling were authorized, Company L's trucks could deliver its products in the Massachusetts area, and then pick up the subsidiary's products for delivery in the South Carolina area. The New York tonnage could then be given to a common carrier. This would entail total mileage of 132,000 per year, 2,000 of which would be empty. This is a savings of 7,000 miles or 1,750 gallons of fuel.



Opportunity L-11

Company L's subsidiary in Massachusetts ships an equivalent of one truck per week to the Atlanta, Georgia area via rail. Company L terminates at least one truck in the Massachusetts area, which presently deadheads to the New York City area to obtain a load back to the South Carolina facility. Also, at present, Company L delivers products from South Carolina to the Atlanta area and picks up materials for the return trip.

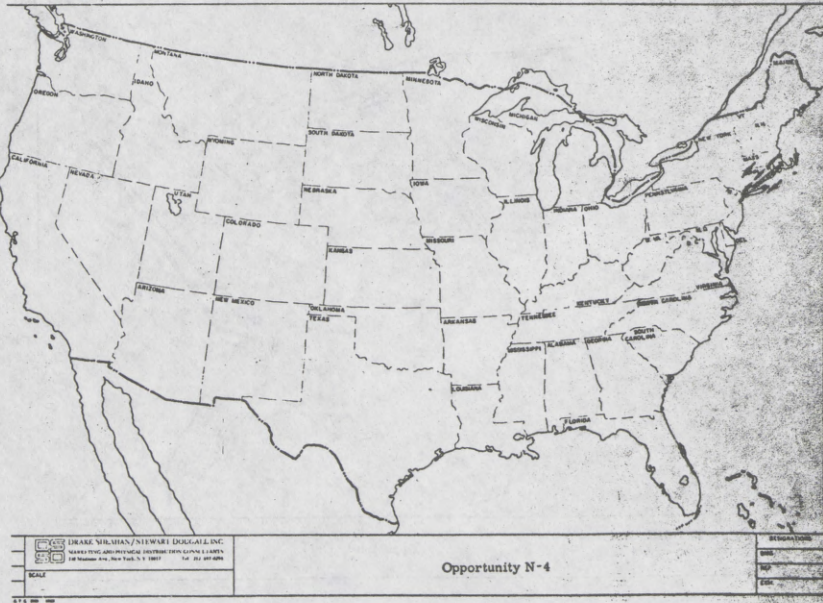
If intercorporate transportation were authorized, Company L could deliver its products in Massachusetts, go to the subsidiary plant and pick up its products for delivery in Atlanta, and then pick up its own materials for delivery to South Carolina. The New York freight could be given to common carriers which currently experience an imbalance southbound. The present operation constitutes about 162,000 miles per year, about 10,000 of which are empty. The proposed operation would constitute 147,000 miles per year, only 2,000 of which would be empty. This is a savings of 15,000 miles per year or 3,750 gallons of fuel.



Opportunity N-4

Company N ships two to three truckloads per week by its own trucks from its plant in Massachusetts to the New York City area, all trucks returning empty. The total miles by its own trucks involved in this operation are 50,000 per year, one half of which are empty. The company has a sister subsidiary that ships a like amount from New York, to the Boston, Massachusetts area using for-hire carriers, which must deadhead back to New York. The miles involved are 60,000 per year, 30,000 of which are empty, making a total of 120,000 under the present operation. Because this carrier has empty back-hauls, it reluctantly handles this business to insure its participation in traffic of the company which offers greater utilization and profitability.

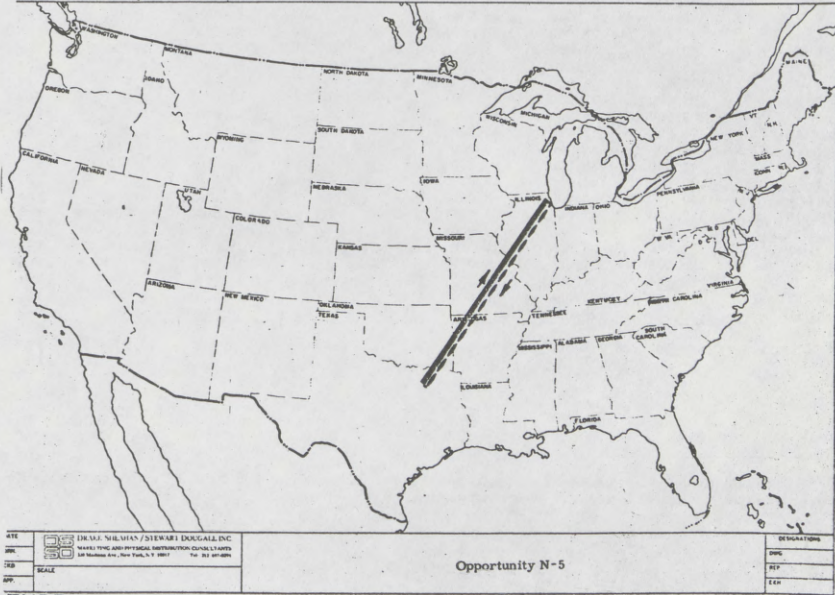
If intercorporate transportation were authorized, Company N could deliver its product from Massachusetts to the New York area, and then pick up the subsidiary's products for transport back to New England. This would result in 67,000 miles per year, 7,000 of which would be empty. This represents a savings of 53,000 miles per year or 13,250 gallons of fuel. This opportunity is treated as eliminated miles rather than diverted because the common carrier involved has indicated a desire to give up this business in order to use its equipment in areas where it enjoys more balanced moves.



Opportunity N-5

Company N ships one to two truckloads per week via private carriage from its Dallas, Texas plant to Chicago, Illinois, all trucks returning empty. The total miles involved in this operation are 120,000 per year, one half of which are empty. The company has a sister subsidiary located in Chicago that has nationwide distribution. It ships to Dallas via common carrier which handles this business reluctantly because it has an imbalance of traffic from the Southwest and must return empty. It does so only to insure its participation in traffic that offers greater utilization and more profitability. The total annual common carrier miles are 120,000, 50 percent of which are empty. Total current annual miles are 240,000, 120,000 of which are empty.

If intercorporate hauling were authorized, Company N could carry the sister company's products on its southbound trip, thereby eliminating the empty miles. The common carrier has an imbalance from Texas; therefore, empty backhaul miles for the common carrier would also be eliminated. Total miles involved would be 125,000 per year. This would be a savings of 115,000 miles per year or 28,750 gallons of fuel. This opportunity is treated as eliminated miles rather than diverted because the common carrier involved has indicated a desire to give up this business to use their equipment in traffic lanes that provide a more balanced operation.



Schedule F-1

Intercompany Hauling

Opportunities			Effect						Realizable
	Miles travelled		Private carriage eliminated miles	Transfer from for-hire carriers		Empty miles			
	Current	Proposed		Rail	Truck	Current	Proposed		
A-2	850,000	650,000	75,000	-	125,000	250,000	70,000	Yes	
A-3	800,000	470,000	330,000 ^a	-	-	400,000	65,000	Yes	
A-4	350,000	240,000	-	110,000	-	120,000	10,000	Yes	
A-5	800,000	440,000	360,000	-	-	400,000	40,000	Yes	
A-6	515,000	477,000	38,000	-	-	50,000	15,000	Yes	
B-5	330,000	170,000	160,000	-	-	165,000	5,000	Yes	
C-1	260,000	210,000	50,000	-	-	130,000	40,000	Yes	
C-2	100,000	62,000	38,000	-	-	50,000	22,000	Yes	
C-3	390,000	295,000	(5,000)	-	100,000	145,000	50,000	Yes	
C-4	105,000	75,000	(5,000)	-	35,000	35,000	5,000	Yes	
C-5	120,000	85,000	(5,000)	-	40,000	40,000	5,000	Yes	
C-9	280,000	230,000	(60,000)	-	110,000	85,000	35,000	Yes	
F-6	175,000	135,000	(10,000)	50,000	-	50,000	10,000	Yes	
H-2	105,000	97,000	(2,000)	-	10,000	10,000	2,000	Yes	
H-3	103,000	83,000	(5,000)	-	25,000	30,000	10,000	Yes	
H-5	70,000	52,000	(2,000)	-	20,000	20,000	4,000	Yes	
I-1	44,000	35,000	9,000	-	-	0	0	Yes	
I-2	41,000	33,000	8,000	-	-	0	0	Yes	
I-3	50,000	40,000	10,000	-	-	0	0	Yes	
I-4	43,000	35,000	8,000	-	-	0	0	Yes	
L-10	139,000	132,000	(2,000)	9,000	-	11,000	2,000	Yes	
L-11	162,000	147,000	(4,000)	19,000	-	10,000	2,000	Yes	
L-12	122,000	96,000	17,000	-	9,000	28,000	2,000	Yes	
L-12	290,000	227,000	4,000	59,000	-	18,000	8,000	Yes	
N-1	78,000	57,000	(3,000)	-	24,000	27,000	6,000	Yes	
N-4	120,000	67,000	53,000 ^a	-	-	60,000	7,000	Yes	
N-5	240,000	125,000	115,000 ^a	-	-	120,000	5,000	Yes	
Total	6,682,000	4,765,000	1,172,000	247,000	498,000	2,254,000	420,000		

^a These eliminated miles are those of specialized common carriers that would willingly give up this traffic in order to use equipment in areas of greater utilization.

Mr. OTTINGER. We will hear next from Maxine Savitz, Deputy Assistant Secretary, Conservation and Solar Applications, Department of Energy.

STATEMENT OF MAXINE SAVITZ, PH. D., DEPUTY ASSISTANT SECRETARY, CONSERVATION AND SOLAR APPLICATIONS, DEPARTMENT OF ENERGY

Ms. SAVITZ. Thank you, Mr. Chairman. I am pleased to be here. I am here this morning to present the views of the Department of Energy on H.R. 1681, the Diesel Fuel and Gasoline Conservation Act of 1979. I would like to point out that some of the views which I will express in my testimony today are similar to those which were expressed by the Federal Energy Administration before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources on June 27, 1977, on S. 1699, the Diesel Fuel and Gasoline Conservation Act of 1977.

The Food Industry Advisory Committee contributed greatly to our ability to consider the backhaul problem. In the spring of 1975 the committee provided an analysis of the food industry's experience with empty backhaul resulting from the Federal Trade Commission's interpretation of section 2(a) of the Clayton Anti-Trust Act, as amended by the Robinson-Patman Act. That analysis included the committee's conclusions regarding potential annual fuel and cost savings that could be attained by removing the restrictions imposed by current applications of section 2(a).

We were impressed by the committee's findings, although we had reservations concerning the total extent of the fuel savings promised. These reservations are prompted by uncertainties concerning its impact on the load factors of all classes of carriers and because of the lack of data from other sources that would allow us to make a completely objective evaluation of the problem.

While the Food Industry Advisory Committee's analysis estimated potential savings of 100 million gallons per year with the implementation of this legislation, an analysis performed by the Graduate School of Business at Indiana University indicated that such potential savings were not realistic. We are convinced that there are some energy savings that could result from this legislation, but we cannot be specific about the actual level because the analysis by the food industry also shows there was a substantial amount of backhauling already in these operations, so we really need to get a better handle on what is currently happening in order for us to estimate the total energy savings potential.

We believe that the elimination of the restriction against cost justified backhauling through H.R. 1681 could probably have significant impact on the economics of certain trucking operations. However, it would address only a relatively small aspect of the overall efficiency problem in the trucking industry. Most backhaul restrictions can be relaxed only through a more comprehensive approach which the administration is currently addressing in the legislation which Dr. Fearnside just described briefly. We share the commitment of the administration to reduce regulatory burdens and increase the role of the marketplace in the pricing and distribution of goods and services.

The Nation's energy situation has created the urgent need for revising the regulations under which the transportation modes currently operate. Our staff was involved in the early development of the recently proposed legislation to modify the transportation policies which affect the railroads, motor carriers, and freight forwarders in the attempt to improve the energy efficiency of those operations and we are continuing to examine the impact of the change with respect to the recent change in fuel prices.

We estimate that the provisions of the proposed bill submitted by the administration on the trucking deregulation could reduce fuel consumption about 200 to 300 million gallons per year.

In brief, let me say that we support H.R. 1681, but our support is tempered by our uncertainty regarding the level of the energy savings that would result and the impacts on competition within the industries affected. We believe the effects of the Diesel Fuel and Gasoline Conservation Act of 1979 will have to be closely monitored to assure that the promised energy savings and increased economic efficiencies are achieved. We believe that the Administration's regulatory reform legislation contains provisions that are much more comprehensive in reducing the total backhauling problem.

[Ms. Savitz' prepared statement follows:]

STATEMENT OF MAXINE SAVITZ, PH. D., DEPUTY ASSISTANT SECRETARY,
CONSERVATION AND SOLAR APPLICATIONS, DEPARTMENT OF ENERGY

Mr. Chairman and Members of the Subcommittee:

I am Maxine Savitz, Deputy Assistant Secretary for Conservation and Solar Applications in the U.S. Department of Energy (DOE). I am here this morning to present the views of the Department of Energy on H.R.1681, the Diesel Fuel and Gasoline Conservation Act of 1979. I would like to point out that some of the views which I will express in my testimony today are similar to those which were expressed by the Federal Energy Administration (FEA) before the Subcommittee on Energy Conservation and Regulation of the Senate Committee on Energy and Natural Resources on June 27, 1977, on S.1699, the Diesel Fuel and Gasoline Conservation Act of 1977.

Section 2(a) of the Clayton Anti-Trust Act, as amended by the Robinson-Patman Act, which makes it unlawful for a seller to discriminate between different purchasers in the prices at which he offers his merchandise, has been the subject of a great deal of attention by private trucking interests since long before the energy situation reached today's critical proportions. The unhappy consequence of the present interpretation of Section 2(a) is that private truckers too often make a return trip empty because it is either not feasible or not possible for them to make a pick-

up from a seller of goods, wares or merchandise in the proximity of the truckers' delivery points.

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

DOE supports the objectives of the Diesel Fuel and Gasoline Conservation Act of 1979 in the belief that it would serve to clarify the Robinson-Patman Act provisions with respect to backhaul allowances, and would provide private truckers additional opportunity to reduce the amount of empty backhaul their vehicles run, thereby improving the fuel efficiency of their operations.

FEA's Food Industry Advisory Committee (FIAC) contributed greatly to our ability to consider the backhaul problem. In the spring of 1975, the Committee provided an analysis of the food industry's experience with empty backhaul resulting from the Federal Trade Commission's interpretation of Section 2(a). That analysis included the Committee's conclusions regarding potential annual fuel and cost savings that could be attained by removing the restrictions imposed by current applications of Section 2(a). We were impressed by the Committee's findings although we had reservations

concerning the total extent of fuel savings promised. These reservations are prompted by uncertainty concerning its impact on the load factors of all classes of carriers and because of the lack of data from other sources that would allow us to make a completely objective evaluation of the problem. While the FIAC analysis estimated potential savings of 100 million gallons per year with the implementation of this legislation, an analysis performed by the Graduate School of Business at Indiana University indicated that such potential savings were not realistic. DOE is convinced that some energy savings could result from this legislation, but we cannot be specific about the actual level because analysis by the food industry^{1/} indicates that a substantial amount of backhauling is common industry practice.

DOE believes that the elimination of the restriction against cost-justified backhauling through H.R.1681 could probably have significant impact on the economics of certain trucking operations. However, it would address only a relatively small aspect of the overall efficiency problem in the industry. Most backhaul restrictions can be relaxed only through a more comprehensive approach which the Administration is currently addressing through its regulatory reform program.

^{1/} Backhaul--A Status Report - Special Research Report #14, Super Market Institute, 1975.

The Department of Energy shares the commitment of the Administration to reduce regulatory burdens and increase the role of the marketplace in the pricing and distribution of goods and services. In view of the changing demands on the national transportation infrastructure, we view the relaxation of regulatory controls on the different modes of transportation as a key objective of the Nation's energy program. Such modifications should not only reduce the inefficiency and fuel waste of the present system but should encourage greater use of the more energy-efficient modes within the system.

The Nation's energy situation has created the urgent need for revising the regulations under which the transportation modes currently operate. Our staff was involved in the early development of the recently proposed legislation to modify the transportation policies which affect the railroads, motor carriers, and freight forwarders, in the attempt to improve the energy efficiency of those operations. DOE is continuing to examine the possible impact of these changes in light of recent fuel price changes. As a result, we plan to conduct an in-depth analysis of the legislation in order to develop estimates of their net energy impact.

The Trucking Competition and Safety Act of 1979, recently introduced as S.1400, contains important proposals concerning

many aspects of the current regulatory environment which impede efficiency. The President has indicated that this proposal is one of the Administration's high priority bills. It would relax gateway, route and commodity restrictions; route circuitry requirements; restrictions on private carriers; exemptions for agricultural commodities; restrictions on contract carriage and dual authority; and zone of reasonableness for rates. It would also provide for the establishment of joint rates and through routes. We estimate that these provisions of the proposed bill could reduce fuel consumption by 220 to 320 million gallons per year.^{2/}

In conclusion, Mr. Chairman, DOE supports H.R.1681. However, our support is tempered by our uncertainty regarding the level of the energy savings that would result and the impacts on competition within the industries affected. We believe that the effects of the Diesel Fuel and Gasoline Conservation Act of 1979 will have to be closely monitored to assure that the promised energy savings and increased economic efficiencies are achieved. And we believe the Administration's regulatory reform legislation contains provisions that are much more important to reducing the empty backhaul problem.

^{2/} A 1977 study by Charles River Associates, Inc. (Potential Fuel Conservation Measures by Motor Carriers in the Inter-city Freight Market), estimated that the savings resulting from similar measures, but excluding provisions for exemptions for agricultural commodities, zone of reasonableness rates, and the establishment of joint rates and through routes, would range from approximately 110 to 160 million gallons per year. DOE believes, pending further analysis, the additional provisions of S.1400 combined with a greater interest within the trucking industry to take advantage of fuel saving opportunities, as a result of recent rises in fuel prices, could increase the savings by the same amount.

Mr. OTTINGER. Thank you.

We will hear last from Mr. Alfred Dougherty, Director of the Bureau of Competition, Federal Trade Commission.

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

Mr. DOUGHERTY. Thank you, Mr. Chairman, for this opportunity to contribute to this subcommittee's work in examining H.R. 1681 and the question of backhaul allowances and delivered pricing systems.

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. It would not be fair to say, however, that I am unfamiliar with the Commission's historical involvement with this issue. This is, in fact, the fourth time in the past 3 years we have had occasion to testify before various committees and subcommittees of the Congress on the legislation now before this body.

Our concern in this area is a result of 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 good faith meeting of a competitor's lower prices. In a nutshell, our objection to the legislation before the subcommittee is that it legalizes different prices to competing buyers at the same seller's loading dock and therefore could result in price discrimination otherwise violative of Robinson-Patman. This legislation is only the latest of several recent efforts to amend or repeal the act and it is surely the most artfully packaged of them all. In the midst of a nationwide energy shortage the bill has been titled "The Diesel Oil and Gasoline Conservation Act of 1979."

Before marching again into the complex issue of delivered pricing systems and alternatives to them, perhaps a simple overview of the battleground would facilitate the subcommittee's understanding.

In many industries, particularly food, 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. A uniform delivered price does not 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 to 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.

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. The cutting edge of the argument of backhaul proponents is that if sellers refuse to grant reasonable backhaul allowances or where they insist upon delivered prices, the empty trucks of buyers that are available to pick up goods after making unrelated deliveries must return home empty with resulting fuel losses.

Proponents of the legislation who claim that the Federal Trade Commission's interpretations of the Robinson-Patman Act in the backhaul area are a restriction on backhauling are simply wrong. The Commission's policy has consistently been to favor backhaul allowance deductions from uniform delivered prices, as long as the resulting loading dock or f.o.b. price, or quantity discounts from that price, are the same to all buyers, avoiding injury to competition, and thus preventing unlawful price discrimination. This fact was recognized 3 years ago by a report of a subcommittee of the House Small Business Committee.

In fact, the Commission recently has endorsed the Carter-Kennedy trucking deregulation proposal which would increase the opportunities for backhauling very substantially by permitting regulated carriers to employ empty trucks to pick up different types of goods. The price discrimination law, barring anticompetitive discriminatory pricing at the loading dock, stands to insure that the results of deregulation will be enjoyed equally by all.

The issue in backhauling 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 may result in significantly different prices at the loading dock because differing amounts are deducted from a uniform price. Such f.o.b. prices favor buyers from far away, likely to be chain stores with interstate truck fleets, and discriminate against firms close in.

Why this occurs is important in understanding this controversy. Let's go back and look again at uniform delivered price systems. In such delivered price systems every buyer within a given area 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. This difference is borne by the seller in the form of what is called freight absorption.

To the nearby customer, the identical delivered price is higher than it would be if it reflected the real cost of transportation. This overcharge is called phantom freight. Such phantom freight is used by the seller to subsidize losses due to freight absorption in sales to distant buyers.

Mr. Fearnside provided examples of backhaul situations, and others are provided on pages 5 and 6 of my prepared testimony. For the sake of brevity, I will not repeat those examples now, Mr. Chairman.

The Commission has long favored backhaul allowances, but not so as to result in anticompetitive price discrimination at the seller's dock. 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 sufficiently the same to all as to avoid injury to competition. 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 potentially creating a discriminatory price is to deduct actual from average 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 avoids competitive injury. To us, this is common-sense. At the seller's dock, all other things being equal, the price should be the same to all buyers of goods.

It has consistently been our position that the wrong culprits are being collared when the FTC and the Robinson-Patman Act are named as the impediment to backhaul and associated energy savings. The real problem is the refusal of many manufacturer-sellers, particularly in the food industry, to offer buyers alternatives to uniform delivered prices. 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 industrywide 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.

Where price competition is replaced by administered, or "lock-step," 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 meaning-

less backhaul option may imply the reasonableness of such systems.

My proposal to remedy the delivered pricing-backhaul problem is similar to one made by Chairman Dingell in an August 7, 1973, letter to then-FTC Chairman Lewis A. Engman. Chairman 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 pickup or meaningful f.o.b. option price whenever he offers a delivered price. The pickup 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. I will be happy to answer any questions.

[Testimony resumes on p.106.]

[Mr. Dougherty's prepared statement and supplement follow:]

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

Thank you, Mr. Chairman for this opportunity to contribute to this Subcommittee's work in examining H.R. 1681 and the question of backhaul allowances and delivered pricing systems.

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. It would not be fair to say, however, that I am unfamiliar with the Commission's historical involvement with this issue. This is, in fact, the fourth time in the past three years we have had occasion to testify before various committees and subcommittees of the Congress on the legislation now before this body.

Our concern in this area is a result of 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 good faith meeting of a competitor's lower prices. In a nutshell, our objection to the legislation before the Subcommittee is that it legalizes different prices to competing buyers at the same seller's loading dock, and therefore could result in price discrimination otherwise violative of Robinson-Patman. This legislation is only the latest of several recent efforts to amend or repeal the Act, and it is surely the most artfully packaged of them all -- in the midst of a nationwide energy shortage, the bill has been titled "The Diesel

Oil and Gasoline Conservation Act of 1979."

But before marching again into the complex issue of delivered pricing systems and alternatives to them, perhaps a simple overview of the battleground would facilitate the Subcommittee's understanding.

In many industries -- particularly food -- 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 to 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. 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. The cutting edge of the argument of backhaul proponents:

*/ A uniform zone delivered price system is by no means the only form of uniform delivered pricing, but it is the system in focus in H.R. 1681.

is that if sellers refuse to grant reasonable backhaul allowances or where they insist upon delivered prices, the empty trucks of buyers that are available to pick up goods after making unrelated deliveries must return home empty with resulting fuel losses. Thus, the bill's description as energy conservation legislation.

Proponents of the legislation who claim that the Federal Trade Commission's interpretations of the Robinson-Patman Act in the backhaul area are a restriction on backhauling are simply wrong. The Commission's policy has consistently been to favor backhaul allowance deductions from uniform delivered prices, as long as the resulting loading dock or f.o.b. price or quantity discounts from that price, are the same to all buyers, avoiding injury to competition, and thus preventing unlawful price discrimination. This fact was recognized three years ago by a Report of a Subcommittee of the House Small Business Committee. */ In fact, the Commission recently has endorsed the Carter-Kennedy trucking deregulation proposal, which would increase the opportunities for backhauling very substantially by permitting regulated carriers to employ empty trucks to pick-up different types of goods. The price discrimination law, barring anticompetitive discriminatory pricing at the loading dock, stands to insure that the results of deregulation will be enjoyed equally by all.

*/ [N]either the Robinson-Patman Act nor the Federal Trade Commission prevents sellers from permitting customers to load their empty trucks at the sellers' loading platform for backhaul reasons provided that the price charged all customers is on the basis of equality and is non-discriminatory. H. Rep. No. 94-1738, 94th Cong., 2d Sess. 114 (1976).

The issue in backhauling 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 may result in significantly different prices at the loading dock because differing amounts are deducted from a uniform price. Such f.o.b. prices favor buyers from far away, likely to be chain stores with interstate truck fleets, and discriminate against firms close-in.

Why this occurs is important in understanding this controversy. Let's go back and look again at uniform delivered price systems. In such delivered price systems every buyer within a given area 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. This difference is borne by the seller in the form of what is called "freight absorption." To the nearby customer the identical delivered price is higher than it would be if it reflected the real cost of transportation. This overcharge is called "phantom freight." Such phantom freight is used by the seller to subsidize losses due to freight absorption in sales to distant buyers.

An illustration may be helpful in conceptualizing the overall situation. Assume the uniform delivered price of a given quantity of products is established by a seller at \$100 to all buyers in a zone. The actual cost of the product, including profit, were it not delivered might be, say \$80. But in reality, delivery of that product to the customers at the far fringe of the zone may amount to, say, \$30. To the customers located across town, close to the seller, the cost of delivery may be only \$10. What the seller has done is average the two costs of delivery and establish a uniform delivered price. That price is \$10 less than it would be in reality to the distant buyer and \$10 more than it would be to the close-in buyer. This latter \$10 is the phantom freight, a form of subsidization of distant buyers by closer ones.

Now let's turn to a situation involving a backhaul allowance. Remember, if you will, that customers seeking to backhaul don't want the uniform delivered price; they want to deduct a backhaul allowance representing the fact that they will bear freight costs themselves. Proponents of H.R. 1681 want to deduct an amount up to the "actual savings in delivery costs to the seller." This sets up a formula by which actual costs of transportation are deducted from uniform delivered prices based on average costs of transportation.

Again to illustrate, suppose the uniform delivered price on a product is still \$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 \$10. To the distant buyer the actual cost is \$30. To be able to charge both buyers the same delivered price (\$100), the seller must average

his freight costs, which works out to \$20 for each of the two buyers. A buyer clutching the newly-enacted H.R. 1681 seeks to invoke his backhaul allowance. The distant buyer is told by the seller that his backhaul allowance is \$30 and that the loading dock price is thus \$70. The close-in buyer also asks for a backhaul allowance and is told the seller's actual cost of delivery is \$10, and that therefore his loading dock price is \$90.

If the two buyers compete, the close-in buyer is clearly disadvantaged by what is now a \$20 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 pick-up price of \$90, the favored buyer paying a pick-up price of \$70 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 often barred by the Robinson-Patman Act, but that is permitted under H.R. 1681.

The Commission has long favored backhaul allowances, but not so as to result in anticompetitive price discrimination at the seller's dock. 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 sufficiently the same to all as to avoid injury to competition. 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 non-discriminatory loading dock price. What you

can't do without potentially creating a discriminatory price is to deduct actual from average (H.R. 1681) 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 avoids competitive injury. To us, this is common sense. At the seller's dock, all things being equal, the price should be the same to all buyers of goods. Because each allowance can be significantly different for each buyer, the second argument of proponents of H.R. 1681, that it is non-discriminatory, is incorrect.

It has consistently been our position that the wrong culprits are being collared when the FTC and the Robinson-Patman Act are named as the impediment to backhaul and associated energy savings. The real problem is the refusal of many manufacturer-sellers, particularly in the food industry, to offer buyers alternatives to uniform delivered prices. 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 anti-competitive 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 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."

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 Chairman Dingell in an August 7, 1973 letter to then-FTC Chairman Lewis A. Engman. Chairman 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.

Proponents of H.R. 1681 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 cost factors such as truck purchase, maintenance and depreciation, labor, dock construction, and maintenance and other transportation equipment expenses 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 H.R. 1681 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 have never 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 H.R. 1681's proponents is that it will result in substantial energy savings. The report of the Senate Energy Committee declining to recommend passage of H.R. 1681's predecessor in the Senate observed that the Federal Energy Administration, a lukewarm supporter of the bill, expressed serious reservations about extravagant claims for energy savings by that bill's proponents. */ The report stated: "The data necessary for a completely objective evaluation of the problem was and still is not available because of the complexity and magnitude of the trucking industry." 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 customers located close to the seller's dock.

*/S.Rep. 95-674, 95th Cong., 2d Sess., 9 (1978).

Apart from the weaknesses in the bill's provisions, there is another aspect of H.R. 1681 that troubles us. 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 H.R. 1681 on such industries would seem to be absolutely necessary prior to any favorable Congressional action.

In conclusion, H.R. 1681 may have the effect of immunizing anticompetitive price discrimination otherwise in violation of the Robinson-Patman Act, enforced by the Commission. 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.

SUPPLEMENTAL STATEMENT OF ALFRED F. DOUGHERTY, JR.

Basically, two types of motor carrier and railroad regulation have energy usage implications: ICC certificate restrictions and rate regulation by the ICC and the carriers.

ICC certificate restrictions include backhaul, route, and commodity restrictions. The first of these, ICC backhaul restrictions, prohibit a trucker from carrying freight from point A to point B after he has carried freight from point B to point A. As a result, according to a 1977 ICC study, over 20 percent of all truck miles on our interstate highways are traveled empty. 1/ */. The percentage of empty miles traveled by exempt carriers -- those carriers not regulated by the ICC -- is even greater, at 21.2 percent. 2/ This occurs essentially because exempt carriers may carry only exempt commodities, and the list of exempt commodities is short. Finally, the percentage of empty miles traveled by private carriers -- carriers owned by a shipper which carry that shipper's own commodities -- is greater still, at 27.3 percent. 3/ This is because of, among other things, the prohibition on inter-corporate hauling, which prevents corporations from performing transportation for their own corporate subsidiaries. 4/ Moreover, it is ICC regulation that prevents private and exempt carriers from soliciting backhaul loads.

However, not all the empty mileage traveled by truckers is due solely to ICC regulations. For example, specialized carriers, such as oil tank trucks and automobile carriers, may be simply unable to get a return load of the commodity or commodities they are

*/ Footnotes follow text.

equipped to carry. And a trucker may have to drive a number of empty miles from his destination point to pick up a return load.

A second type of ICC certificate restriction that wastes fuel is the route restriction. ICC route restrictions may require a trucker to take an indirect route or travel through a designated "gateway city" to reach his destination, or they may prohibit a carrier from stopping at small towns between major cities. President Carter has noted that as a result of gateway restrictions, one company is permitted by the ICC to go from Denver to Albuquerque, a distance of 442 miles via Interstate 25, but only if it goes by way of Salt Lake City -- which makes the trip 730 miles. 5/ Similarly, another carrier is permitted to go between Denver and Omaha, usually a 540-mile trip, but only if it follows a route that is almost 900 miles long. 6/ The ICC has found that gateway restrictions on irregular route truckers alone have resulted in the waste of over 21 million gallons of fuel and 100 million vehicle miles per year. 7/ In addition, ICC prohibitions on making intermediate stops between origin and destination points create fuel inefficiencies by preventing carriers from maximizing their load factors, and cause other carriers to take circuitous routes to serve these points. 8/ Such restrictions are therefore in large part responsible for the 14.4 percent of truck miles that the ICC has found are not used to full capacity (in addition to the 20.4 percent of truck miles that are operated entirely empty). 9/

A third ICC certificate restriction that has contributed both to empty backhauls and to lower load factors is the commodity restriction, which narrowly limits the commodities a trucker can

carry. As President Carter has stated, these restrictions often follow no logical pattern and serve no apparent purpose. 10/ For example, the President noted, some ICC certificates allow a carrier to haul crated machinery but not uncrated machinery; to haul paint in two-gallon cans but not in five-gallon cans; and to haul bananas but not pineapples (although the carrier could haul pineapples if they were mixed with bananas). 11/ By narrowly restricting the commodities a trucker can carry, these illogical and purposeless distinctions make it more likely that a truck will travel empty or partially empty and make it necessary for a trucker to travel a greater distance in order to load his truck with only the commodities he is authorized to haul. Consequently, empty backhauls increase, load factors decrease, and energy is wasted.

Extremely important, but difficult to quantify, is the effect of regulation on load factors. The average load factor is the key to fuel efficiency -- the higher the average load factor, the more freight is moved by each gallon of fuel. When the airline industry was deregulated, the average load factor of the airlines increased by almost 20 percent -- from 51.6 percent in 1973 to 61 percent in 1978. 12/ That is, 20 percent more passengers were transported in 1978 than in 1973 by the same amount of fuel. Because of regulatory restrictions that inhibit fuel efficiency in the trucking industry but that never existed in the airline industry -- such as the backhaul, route, and commodity restrictions -- I would expect the average load factor in the trucking industry to increase as a result of deregulation even more than it did in the airline industry. The resulting fuel savings, obviously, would be huge.

Perhaps the most powerful spur to a high load factor is to allow our free enterprise system -- free competition -- to function. Presently, such competition is restricted, both by ICC regulation of rates and by a special antitrust exemption given to truckers that allows them to fix their prices. (Such price-fixing activity would be a felony in most other industries, which lack the exemption enjoyed by carriers.) Such legalized price-fixing -- euphemistically known in the industry as "collective ratemaking" -- has enabled truckers to set a price high enough to allow the most efficient carriers to reap huge profits and the less efficient carriers to survive. Under this system, inefficient carriers survive -- and may even prosper -- without maximizing their load factors. This inefficiency is exacerbated by ICC rate regulation, which permits the ICC to suspend a rate and hold it unlawful if another carrier "protests" a rate lower than the fixed rate. Thus, the ICC in effect enforces price-fixing among the carriers. Although I am aware of no studies of the amount of fuel wasted as a result of ICC rate regulation and of price-fixing by the carriers, it is axiomatic that competition would result in greater fuel efficiency (as well as other kinds of efficiency) than has a combination of a private cartel and government regulation.

Finally, I would like to turn briefly to the question of the effects of ICC regulation, and of the anticipated effects of removal of such regulation, on energy use by other modes, particularly rail. Clearly, energy savings would be maximized if all modes were deregulated -- if trucks, railroads, and barges could all concentrate on serving the public and meeting the demands of the marketplace rather than on

complying with what President Carter has called a "mindless scheme of government interference and control." 13/ Railroads and barges both have significantly lower costs than trucks for certain types of carriage. Thus, if all modes were free of government economic regulation, in city-pair markets where barge and/or rail service exists one would expect commodities for which such service is feasible to move by barge or rail.

Even if the railroads continued under the present scheme of regulation while trucking was substantially deregulated, the railroads could still take certain initiatives that would result in greater overall fuel efficiency. For example, although railroads--like trucks--are granted a special exemption allowing them to price-fix, they could simply begin to price their services independently--rather than fix their prices, as they presently do at meetings of industry associations, called "rate bureaus." Railroads would thus be able to charge less for their lower-cost routes: they would attract more traffic and realize economies of density. The high-cost, inefficient routes would no longer be retained; thus, both energy consumption would be reduced and the excess capacity that has long plagued the rail industry would be alleviated. 14/ Conrail, for one, has recognized this, and has announced that it could operate more efficiently if it priced its services independently, outside the confines of the rate bureau. 15/ Because of ICC rate regulation, the refusal of one carrier such as Conrail to price-fix would not by itself be sufficient to crack the power of the rate bureaus and bring about the fuel efficiencies that would result from competition. Nevertheless, the railroads do have that ability, and they have that ability whether or not trucking is deregulated.

The impact on the rail industry of reducing fuel-wasting regulation of the trucking industry therefore should not be used as a reason for continuing such regulation. Or, as FEA emphasized, "Attempting to achieve an energy efficient mode split through policies designed to make an energy intensive mode even more energy intensive is a self-defeating public policy." 16/

In closing, I would like to emphasize that the "Trucking Competition Reform and Safety Improvement Act," proposed by President Carter and Senator Kennedy, would eliminate all back-haul, route, and commodity restrictions; would eliminate the special exemption that allows truckers to price-fix; and would substantially reduce ICC rate regulation. The proposed Act, in addition to its other beneficial effects, would therefore result in extremely significant fuel savings -- on the order of hundreds of millions of gallons of fuel per year. I strongly support the proposed "Trucking Competition Reform and Safety Improvement Act," and I urge the members of this Subcommittee to do the same.

1. Interstate Commerce Commission, Empty/Loaded Truck Miles on Interstate Highways During 1976, at 3 (Apr. 1977) (hereinafter cited as Empty/Loaded Truck Miles).
2. Id.
3. Id.
4. Charles River Associates, Inc., Potential Fuel Conservation Measures by Motor Carriers in the Intercity Freight Market, prepared for the Federal Energy Administration, at 4-9 (Mar. 1977) (hereinafter cited as FEA).
5. Statement of President Carter, The White House, June 21, 1979 (hereinafter cited as President Carter).
6. Department of Transportation, Motor Carrier Options Paper, at 3 (Dec. 7, 1978).
7. Interstate Commerce Commission, Ex Parte No. 55 (Sub-No. 8A), Final Report of Gateway Elimination Savings, at 1 (Feb. 1977) (hereinafter cited as Gateway Elimination Savings).
8. FEA at 1-9, 3-13.
9. Empty/Loaded Truck Miles, at 4.
10. President Carter.
11. Id.
12. Testimony of Council of Economic Advisers Chairman Charles L. Schultze, before the Senate Commerce Committee, at 14 (June 26, 1979).
13. President Carter.
14. For example, there are five parallel mainline routes between Chicago and Minneapolis, eight between Chicago and Kansas City, and five between Dallas and Houston. A Prospectus for Change in the Freight Railroad Industry, A Preliminary Report by the Secretary of Transportation, at 53 (Oct. 1978) (hereinafter cited as Prospectus). Thirty-three percent of the rail network produces only two percent of the traffic. Final Standards, Classification, and Designation of Lines of Class I Railroads in the United States, Vol. I, Section 503 Report, issued by U.S. Department of Transportation, at 30 (Jan. 1977). DOT has estimated that for every mile of excess trackage eliminated, there would be an annual saving of \$4,600. Prospectus, at 84. DOT has also estimated that for each reduction of one percent in average circuitry, there would be an annual saving of \$37 million. J. Sloss, et al., Analysis and Evaluation of Past Experience in Rationalizing Railroad Networks, issued by U.S. Department of Transportation, at 36 (1975).
15. ICC Section 5b Application No. 3, Eastern Railroads -- Agreement, Comments of the Consolidated Rail Corporation, at 7 (Nov. 20, 1978).
16. FEA at 1-12.

Mr. OTTINGER. Mr. Dougherty, it strikes me that the delivered price system is consistently in violation of the antitrust laws. Why do you permit delivered prices in the first place?

Mr. DOUGHERTY. They are not consistently in violation of the antitrust laws, Mr. Chairman. They can be a facilitating device that can result ultimately in an antitrust violation, but in and of themselves they are not antitrust violations. You have to look at other facts that surround the delivered price system. As has been recognized in the antitrust literature for at least the last 25 years, delivered prices are a factor by which prices in certain instances can become more rigid and can be used as what we call a facilitating device to attain an anticompetitive effect.

Mr. OTTINGER. Well, wherever you have a delivered price, you have a discriminatory price to the party who is having to pay freight.

Mr. DOUGHERTY. You have the same price. With the uniform delivered price, you have the same price to everybody in the zone.

Mr. OTTINGER. You have the same price to everybody in the zone and therefore automatically the people who are a shorter distance from the average price are being subsidized.

Mr. DOUGHERTY. Well, that system has been upheld, Mr. Chairman, by the courts.

Mr. OTTINGER. Maybe it has been upheld by the courts for being only technically legal. That is the source of the problem.

Mr. DOUGHERTY. It can work an economic unfairness to certain buyers.

Mr. OTTINGER. And create the disincentives that we are trying to address here.

Mr. DOUGHERTY. That is why, if anything, this is a legislative problem, Mr. Chairman. I might add that that is why I believe Chairman Dingell's suggestion is the simple way out of this box and will result in a very fair solution to the problem.

Mr. OTTINGER. To require any manufacturer that has a delivered price to give a uniform price, subtracting the average transportation cost or a uniform sum regardless?

Mr. DOUGHERTY. Yes. If you are going to work out an average price system, then it has to be average and average. If you are going to work off an actual price system, then it has to be actual and actual. What the proponents of this legislation are doing is mix apples and oranges, they want it both ways.

Mr. OTTINGER. All right. I understand that.

Does the Department have any position at all on legislating against delivered prices?

Mr. DOUGHERTY. The Federal Trade Commission?

Mr. OTTINGER. Yes.

Mr. DOUGHERTY. The Federal Trade Commission has no position to date on legislation, no, Mr. Chairman.

Mr. OTTINGER. What about the Department of Transportation?

Mr. FEARNSIDES. Mr. Chairman, a lot of Transportation economists will go along with your feeling that uniform zone delivered pricing is probably not an optimal way of structuring a system. This has to do especially with the economics of siting, where people put their plants, where people put their warehouses, and the like. However, as you go through it, you can see in some cases where a

uniform zone delivered price could conceivably even help competition and maybe even keep prices down in a particular area.

Once again it gets so complicated that a good bit of it really is up to the seller. It seems like giving him the wide range of opportunities whether to do the average costing or the uniform zone delivered pricing is the best way. I am not sure that the Federal Government could come up with a way that would solve this problem with universal equity.

Mr. OTTINGER. Where do you come down on the bottom line? Do you support H.R. 1681 or do you go along with the Federal Trade Commission in supporting the Dingell solution of required f.o.b. price?

Mr. FEARNSIDES. Based on what we have seen so far, Mr. Chairman, we do not see that the difference between the two approaches can be measured and consequently I guess the question is whether you want to have legislation to amend or to otherwise challenge the Robinson-Patman Act short of having good energy reasons for it.

Now as I mentioned, I really would like to work with the committee to get some other examples. The examples that we developed were a way of trying to figure out what the economics were of both approaches and we came down pretty much that the savings to the consumer and the fuel savings would be the same in the various cases that we tried.

However, I learned a long time ago that a couple of test cases do not a total argument make, and we would be very interested in working further with the committee to see whether in fact there are enough specific examples to make this a good public policy issue of energy versus the Robinson-Patman Act.

Mr. OTTINGER. I take it the Department of Energy position is if we can save on backhauling, it is worthwhile doing.

Ms. SAVITZ. Yes, though we temper those remarks with the realization that we need to get a better handle about how much energy we can actually save and we really need to know what is going on now to see what the difference is going to be.

Mr. OTTINGER. I don't know; there are enough examples that certainly have come to my attention and in talking to my colleagues of situations in which truckers are unable to backhaul because of regulation that prevents them from doing so.

Mr. FEARNSIDES. But this bill, Mr. Chairman, would not really deal with regulated carriers very much at all. The backhauls precluded would be private carrier backhauls or the private carriage coming from the other side—from the wholesaler. As a matter of fact, the only potential impact it has on the regulated industry is perhaps if the discounts were permitted, people without private fleets might be encouraged to use a little bit more for-hire carriage.

Regardless, there is no question but that having backhaul allowances—I think that is the important point that has to be made—accrues not only to energy savings but also to savings for the consumer. However, we have decided that the issue is, what is the best way?

Mr. OTTINGER. Is passage of this legislation in any way in conflict with your deregulation proposals?

Mr. FEARNSIDES. No; I would not say so, Mr. Chairman. It would be, in a way, a little complementary aspect of our bill, but certainly the goals and the intent are absolutely consistent with the goals and intent of the administration's trucking bill.

Mr. OTTINGER. Mr. Dougherty?

Mr. DOUGHERTY. Mr. Chairman, I don't think there is any disagreement that encouraging backhaul is a worthy exercise and that we should——

Mr. OTTINGER. You just want to make sure that the manufacturers can't discriminate the pricing in the process?

Mr. DOUGHERTY. Yes. First of all, I would point out, as Dr. Fearnside has, that this is not a comprehensive piece of legislation; in fact, to put it bluntly, this is special interest legislation.

Second, any type of backhaul legislation should be legislation that tries to make sure that there is as much equity in the system as possible, and there are better ways to address the problem than 1681 and the example I gave, Chairman Dingell's approach, is one of those ways.

Last, I would say that the evidence is not overwhelming that energy savings will result. The only study that we have is one that continues to be discredited and the dollar savings figure continues to drop. So unless we have some proof that this bill will result in some benefit, I would suggest that the Congress not go forward.

Mr. OTTINGER. Let me attack it a different way. If the administration bill is passed, is this problem taken care of?

Mr. FEARNSIDES. No; it isn't, Mr. Chairman. The administration bill deals only with specific cases where the economic regulations as promulgated by the ICC prevent private or exempt carriers from carrying regulated goods.

For example, where we do deal with private carriage, as I mentioned, is to allow them to apply for common carrier authority and to allow them to haul carriage for their subsidiaries where, for example, the subsidiaries are at least 51 percent owned by the parent company or can show control with a lesser percentage. These are both areas where we think there is a substantial amount of fuel to be saved. Incidentally, we do feel that private carriage has a higher empty backhaul rate than the regulated carriers for a variety of reasons. The most important reasons are addressed in our legislation.

I would say that we really didn't think that this was something that we needed to do very much about one way or the other. There is already a good bit of backhauling in operation in these situations, but I don't know how much. Would we need legislation, Mr. Dougherty, to allow the uniform system to allow the uniform discount system?

Mr. OTTINGER. I don't suppose there is anything that presently prohibits a seller from offering the two prices.

Mr. DOUGHERTY. No.

Mr. OTTINGER. Mr. Loeffler.

Mr. LOEFFLER. Thank you, Mr. Chairman.

Dr. Savitz, I would like to direct a question to you. The Department of Energy has elaborate data systems which should show us consumption by the transportation sector. I refer to the I.E.A. Monthly Energy Review, May 1979, page 26, and there we find that

the statistics with respect to coal are none, that is clearly obvious to us, and that natural gas is only 1.34 quads. Petroleum usage, which is all but a tiny amount of all energy used in transportation, is available, but not broken down. In fact the numbers cover passenger, freight, military uses, et cetera.

Does the Department of Energy have any statistical information, other than the FEA study which you spoke of during your prepared presentation, that would indicate the effect of backhaul restrictions or deadheading practices by the trucking industry?

Ms. SAVITZ. No, that is basically the data that we have in addition to the work we did with the Charles River Associates which looked at a range of savings, but no more current information on this backhauling,

Mr. LOEFFLER. Given the tremendous amount of statistical acquisition, in your Department, is there a way it can be broken out? It would seem to me the Department of Transportation, the ICC, and the FTC would be awfully wanting of such evidence.

Mr. FEARNSIDES. Mr. Loeffler, we have been working with the Department of Energy in two rather substantial studies in this area over the last year. The first is a study of the transportation efficiencies of various modes of transportation and their energy usage.

As I mentioned, these numbers are pretty tough to come by, especially if you are trying to assess the impact of deregulation. Positing a future system structure, and determining what will happen then as opposed to what is happening now, can be kind of a tricky business, as I think Chairman O'Neal mentioned.

The other major study that we are doing is only indirectly related to what you mentioned, and that is the study of the actual transport of energy in the country and what the likely changes in energy usage will be. For example, since you mentioned coal I thought I would bring this up, because it is pretty clear that there is a substantial potential increase in the amount of coal that is going to be transported in the United States and we really have to make some intelligent, intermodal investigation decisions about how it is going to be carried, whether it be done in unit trains or pipelines. The Department of Energy and the Department of Transportation have gotten together on unit trains and pipelines, both of which are very energy efficient.

Mr. LOEFFLER. It would appear to me that if you do not have the figures, it would be beneficial to the President and to the administration that the figures be brought to bear with respect to trucking deregulation, busing deregulation, and rail deregulation as to their impact on the use of energy.

Mr. FEARNSIDES. That is right.

Mr. LOEFFLER. And we don't have those figures at the moment.

Mr. FEARNSIDES. We have a 220- to 320-million-gallon estimate of annual saving as a result of enactment of our trucking bill. The rail issue is one that gets a little bit more complicated because of the fact that there may be substantial structural reforms, if you will, in the existing rail network. The busing issue is one that we are currently working on. We have not submitted busing legislation and we are trying to get some harder data on that.

In general I think the point that pushes us is that, as I mentioned to the chairman, unfettered transportation economics has a tendency to drive you toward the most efficient system. This is especially going to be true as the cost of gasoline gets to its replacement value, or what some people call the true social cost of gasoline.

If we allow the marketplace to take care of these things, it is our feeling that by and large the savings will accrue from people not only making better choices with respect to backhauls and having carriers of all types be able to provide a wider variety of backhaul services but perhaps opportunities for rail to substitute for trucking. We have found out, for example, that the recent ICC decision that railroads be given the same kind of exemption for transporting fresh fruits and vegetables that trucks already have, has given them a real opportunity to compete and shift some traffic from truck to rail. But we do feel that existing regulation, with all of its restrictions, has an enormous impact on fuel consumption. If I take, for example, just these little examples that I started out with today, I can't tell you how complicated that gets as soon as you start talking about 15,000 or 16,000 regulated trucking companies, over 100,000 indirectly regulated operators, a \$36 billion regulated trucking industry—the whole trucking industry is well over \$100 billion, serving every community in the United States.

The scale problems of trying to really get a decent assessment of this are very tough. What we are trying to do is maybe put a sensible set of bounds on it, but if you are talking about, as the administration is, nothing less than a whole new way of looking at the way the Government interacts with transportation, you are really dealing with a massive system. I guess it really comes down to demonstrating how we see that regulations are causing gross inefficiencies, and demonstrating how we think that competition will enable those inefficiencies to be resolved in the ways that inefficiencies are resolved in other sectors of our economy. We will try to come up, and have consistently tried to come up, with figures on fuel impacts.

The 200- to 300-million-gallon figure that Dr. Savitz suggested strikes me as being something that could be low, but it is the best we have been able to get so far and we are continuing to work on it. It is a substantial problem and you run the obverse risk, I think, of using numbers that may be too large and losing a lot of credibility.

Ms. SAVITZ. Neither we nor the ICC require reporting of fuel consumption data by private or exempt carriers. The ICC requires reporting by regulated carriers and what we could do, though, is to work with our Energy Information Administration and also with the ICC to possibly do a sampling of the private and exempt carriers.

Mr. LOEFFLER. It would seem to me that the overall data would be able to be broken down very quickly to provide the necessary specifics that we are talking about here this morning.

Mr. FEARNSIDES. Just one more point. It is relatively easy, although it entails an enormous number of reporting elements, if you will, to get data on the current system. The issue involves looking at the way traffic actually runs and hypothesizing what deregula-

tion means, which is a future truck system in which there is no way of getting anything but estimates. You obviously cannot get data on that system yet.

Mr. LOEFFLER. I would like to address just one more question in the interest of time and I appreciate the chairman's indulgence in my questions.

I direct this to the entire panel, but specifically to Dr. Savitz from the Department of Energy. What effect has the Department of Energy's recent changes in the allocation regulations, especially regarding rule No. 9, had on the availability of diesel fuel for both hauling and backhauling or deadheading with respect to the trucking industry and also with respect to the agricultural industry? In addition, what are your projections in the short term, say 6 months, and full term, up to 1 year?

Ms. SAVITZ. I can give some of those projections like the 6 months; 8 months I will have to provide for the record. The information is being developed. It will be sent as soon as it becomes available.

For the present situation, we are not getting any complaints from the truckers about the availability of fuel. We are getting a lot of concern about the price of fuel, but there seems to be fuel available for the needs of the present. We are getting weekly reports from the State energy offices, and these assist us in finding out about the availability and prices in all of those areas. We are depending upon them for the data right now. I will submit for the record any 6- to 8-month projection.

Mr. LOEFFLER. I would appreciate your sending it to my office also.

Mr. FEARNSIDES. With respect to increased cost of fuel, even if there is a slight shortfall it is hoped that prices will be able to drive down the demand for the diesel fuel. So if in fact the fuel availability number is 95 percent, higher prices and problems in getting fuel can drive it down to near 95 percent, that might be an equilibrium point.

Mr. OTTINGER. Does your deregulation proposal resolve the problem of present requirements that were referred to earlier where the truck going from A to D, even though he is full, has to go to points B and C?

Mr. FEARNSIDES. Yes, Mr. Chairman. I have suggested that route restrictions be a thing of the past. Within a very few years, the bill, which is not directed at total deregulation, but at getting rid of all the substantial inefficiencies in the system—backhaul restrictions, intermediate stop restrictions, route restrictions, and commodity restrictions—will eliminate that problem. We want eventually to get away from all of those restrictions.

Mr. OTTINGER. I take it the bill does not cover this.

Mr. FEARNSIDES. As I mentioned, Mr. Chairman, we were focusing on the regulatory system and the problems dealing with the ICC, and we only dealt with private carriage insofar as private carriage was made inefficient by the regulations of the ICC. The question raised by H.R. 1681 is something that our scan didn't cause us to pay particular attention to.

As I mentioned, we are very interested in any reform that will cause a reduction in transportation costs. You are looking at some

of the ways in which transportation costs can be both inflationary and energy inefficient, and rather than take a position on the bill now I really would like to see whether or not either Chairman Dingell's approach or the approach as outlined in 1681 would be the better approach. We just didn't include either in this particular bill. We need to do more work on it.

Mr. OTTINGER. So you will supply something to us?

Mr. FEARNSIDES. Yes, sir. As a matter of fact, I will call the staff and come up and have our folks go over a variety of the technical details with them.

Mr. OTTINGER. Do your regulations also get to the price differentials that presently prevail between recycled materials and originally manufactured materials?

Mr. FEARNSIDES. No, I don't think so, Mr. Chairman. We did not specifically address rates as I can recall with respect to any particular commodity. What we have done is allow rate flexibility beginning almost immediately, a 5 percent up and 20 percent down no-suspend zone, as they have come to be called, in the various deregulation proposals, bills and continuing on until after 2 years carriers can raise rates without suspension by 7 percent per year. There will not be any such thing as minimum rate regulation except in those cases where predatory or monopoly behavior might exist. We have not specifically put in any particular requirement or rate ceiling, for example, or rate incentive for recycled material.

Mr. OTTINGER. Will the Department of Energy come up with any proposals with respect to eliminating that discrimination?

Ms. SAVITZ. We have not. We have looked at how much energy is saved on using recycled material as against virgin materials and it is enormous.

Mr. OTTINGER. Then why have we not got some proposals either from the Department of Energy or the Department of Transportation eliminating that discrimination?

Ms. SAVITZ. I don't know if the costs of hauling it is the cause or the lack of industrial utilization of the recycled materials versus the industry's inability to provide the capital stock to do the processing of recyclable materials.

Mr. OTTINGER. But it has got to operate to discourage it whether it is the sole reason or not. The discriminatory prices which charge a higher price for recycled materials even if they are not the whole answer has to be part of the answer.

Ms. SAVITZ. We will look into it with DOT.

Mr. OTTINGER. From the point of view of addressing our energy problems, that kind of price discrimination without any basis and actual cost of haulage seems to me to be highly detrimental.

Mr. FEARNSIDES. I will definitely take a look at that, Mr. Chairman. The way Transportation gets into this, as Dr. Savitz has mentioned, strikes me as one where the only concern we have is whether a carrier might be charging some kind of predatory price if the price for recycled materials was less than the price for carrying regular materials on an otherwise equitable basis.

Mr. OTTINGER. It is the other way around.

Mr. FEARNSIDES. Then if that is the specific aspect, we are putting in rate freedom to allow the marketplace to take care of that.

We will not be in favor of setting specific rates high or low for any particular commodity.

Mr. BERWAGER. Mr. Chairman, I will provide some details for the record regarding one ICC case for rail rates for recycled products in which we joined with the Department of Justice in asking that the decision be remanded back to the ICC to reconsider giving a fairer deal, if you will, to the recycled products industry in terms of the railroad rates which they have to pay for transporting their products.

Mr. OTTINGER. I don't see any cost justification there at all. It has been an insidious one which ought to be pursued and if it can be pursued without legislation that is fine. Otherwise, I would like to see a recommendation coming to us for legislation to deal with the problem.

Mr. Barrett?

Mr. BARRETT. Ms. Savitz, you refer to this Charles River associate study and an estimate of some 200 to 300 million gallons saved per year and you said there was an Indiana University study that tended to downplay that.

Ms. SAVITZ. No; it was a Food Advisory Committee study that estimated 100 million gallons for the backhauling that the Indiana University study tended to think was high. The Charles River one was looking at various transportation options, including backhauling which we used as a basis for our estimate of 200 to 300 million gallons per year.

Mr. BARRETT. Do you know who did the Indiana University study?

Ms. SAVITZ. It was done by a Dr. Walters and a Joseph Hartley from the Department of Transportation at the graduate school of business in June 1977.

Mr. BARRETT. As I understand it, Professor Walters is a member of the board of directors of Yellow Freight Lines, is that correct?

Ms. SAVITZ. I really don't know.

Mr. BARRETT. Would it not influence your judgment as to the disinterestedness of this decision?

Ms. SAVITZ. What it shows and what we would agree, because the other one was done by the food industry, is that there is a need for an objective study, which we plan to do.

Mr. BARRETT. If I could ask Mr. Dougherty—how many Robinson-Patman enforcement cases has the FTC brought and has pending now?

Mr. DOUGHERTY. Are you talking about cases that are in litigation, or are you talking about investigations that are underway that could lead to enforcement action?

Mr. BARRETT. Give us both.

Mr. DOUGHERTY. This is off the top of my head and I will supply the exact answer for the record. We have 6 cases in litigation and probably somewhere between 15 and 20 investigations in process.

Mr. BARRETT. Is one of the cases that is in litigation the *Continental Baking* case?

Mr. DOUGHERTY. That is correct.

Mr. BARRETT. That has been open since when, since about 1970?

Mr. DOUGHERTY. It has been in litigation for approximately the last 4 or 5 years.

Mr. BARRETT. And the beer investigation was a Robinson-Patman investigation?

Mr. DOUGHERTY. The beer case had a predatory price discrimination element. That investigation has been closed.

Mr. BARRETT. When was that investigation opened?

Mr. DOUGHERTY. I don't know precisely. Approximately 1970, 1971, or 1972.

Mr. BARRETT. That is when it was reopened. It had been on in the late fifties.

Mr. HAMILL. The original beer investigation was opened on the basis of allegations of piece discrimination in southern Texas in 1966 or 1967. It was expanded shortly thereafter to look into similar allegations in Wisconsin. Then that investigation was turned into a larger industrywide one in fiscal year 1972. That is the history of that file.

Mr. BARRETT. Then the investigation was closed?

Mr. HAMILL. That is correct.

Mr. BARRETT. Without action?

Mr. HAMILL. The investigation resulted in referral to the Bureau of Economics for a study of competitive conditions in the beer industry.

Mr. DOUGHERTY. As a law enforcement matter the investigation was closed.

Mr. BARRETT. Without action?

Mr. DOUGHERTY. That is correct.

Mr. BARRETT. Could I ask you to submit for the record a 5-year list of complaints under Robinson-Patman, the number of cases that have been opened by year and the number of cases closed, and indicate in each instance the action that has been taken and also copies of all final orders in all cases?

Mr. DOUGHERTY. Certainly.

[The list referred to follows:]

ROBINSON-PATMAN ACTIONS

[1974-79]

Calendar year	Investigations ¹				Docketed matters		Consent orders
	Preliminary		Formal		Complaints issued	Final orders	
	Opened	Closed	Opened	Closed			
1974.....	11	8	13	29	1	7	2
1975.....	9	² 11	3	17	1	1	1
1976.....	12	³ 9	9	8	2	1	3
1977.....	4	⁴ 5	3	7	1		1
1978.....	5	8		5	2		4
1979.....	8	7	1	3			

¹ As of 1979, the Commission altered the terminology applicable to investigations: what had been called preliminary investigations are now termed "initial phase" and what had been called formal investigations are now "full" investigations.

² Two preliminaries closed in 1975 went to formal in 1976.

³ One preliminary closed in 1976 went to formal in 1976.

⁴ One preliminary closed in 1977 went to formal in 1977.

Mr. BARRETT. Thank you.

Mr. OTTINGER. Now I will thank you all for your contribution and adjourn the hearings for the day.

[The following statements were received for the record:]

STATEMENT
OF THE
FOOD MARKETING INSTITUTE
SUPPORTING
H.R.1681
DIESEL FUEL AND GASOLINE CONSERVATION
ACT OF 1979
BEFORE THE
HOUSE SUBCOMMITTEE ON ENERGY AND POWER

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 H.R.1681. 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 less than ten stores. The association conducts programs in research, education and public affairs on behalf of its members.

FMI's support for H.R.1681 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, this legislation will promote significant energy conservation by eliminating wasteful empty truck movement. Both of these effects of H.R.1681 will benefit consumers and the public at large.

Consumers will receive the benefits from H.R.1681 because the improvements in product distribution efficiency, in the form of lower transportation costs, can be passed on to them. These efficiencies will result from the fact that trucks serving retailers and wholesalers will be economically encouraged to operate with full loads on both their outbound and return trips. This economic encouragement is provided in the language of H.R.1681 which clarifies the legality of a company's being able to negotiate for a cost-justified customer pick up on products that it receives at the seller's dock. The savings which the companies can earn is an amount up to that which the supplier will save in its transportation costs by having the purchaser provide transportation.

The food distribution industry is highly competitive. It is, therefore, virtually inevitable that any savings in distribution effected by H.R.1681 will, in whole or in part, be passed on to consumers.

The legislation is made necessary by an advisory opinion of the Federal Trade Commission to the effect that if

an allowance is granted which results in different purchasers paying different prices for merchandise, and if the price difference results in injury to competition, then the allowance may be unlawful under the Robinson-Patman Act.* Although the advisory opinion is cast in very conjectural terms and has not been supported by any FTC adjudicatory proceedings, many, but not all, sellers rely on it in refusing to discuss pick up allowances with buyers. Former FTC Executive Director Basil J. Mezines identified a major part of the problem in his testimony before the House Small Business Committee:

To say backhauling is illegal under the Robinson-Patman Act really is not true, and I think a great deal of this controversy has been engineered because grocery manufacturers don't want to be bothered with trucks pulling in disrupting their operations. It is not comfortable for them to have some truck pull in and the driver say, "I want to load up", because they are going to Salisbury, or wherever. I think the FTC

* Advisory Opinion No. 147, issued October 24, 1967, 72 F.T.C. 1050 (1967). Subsequent "clarifications" of the Advisory Opinion have done little to provide meaningful latitude for backhaul allowances. FTC is evidently unwilling to sanction cost-justified allowances and will approve only identical allowances for all buyers. Advisory Opinion No. 194, issued February 24, 1968, 73 F.T.C. 1309 (1968); Advisory Opinion No. 198, issued March 5, 1968, 73 F.T.C. 1312 (1968); Clarifying Opinion announced December 26, 1973, [1973-1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶20,498 (1968); Clarifying Opinion announced March 28, 1975, [1973-1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶20,850 (1975); and the FTC news release dated October 8, 1975 to the Director of the Council on Wage and Price Stability. As hereinafter discussed, uniform allowances would not be an effective alternative to a zone pricing system.

was used in a very, very unfortunate sense because they were thrust into a debate on the Robinson-Patman Act. [Emphasis supplied].*

H.R.1681 will allow retailing companies the opportunity to obtain transportation savings in those instances in which their suppliers operate within a uniform zone delivered price system. Under these uniform zone delivery systems, suppliers divide the country into geographic pricing zones and all buyers purchasing goods from a supplier pay a single, delivered price within each zone. These zones can be of any size and in some instances the entire country constitutes a single geographic zone. Under a delivered price system, the supplier has the products delivered to the buyer, and regardless of how many miles farther from the supplier one buyer is located as opposed to another within one zone, all buyers pay the same price for the delivered goods. Delivered prices in zone delivery systems may return to a supplier more in transportation payments paid by buyers than the sum of all the supplier's transportation costs. Without H.R.1681, a uniform zone delivery system may allow a supplier a net revenue gain on the transportation portion of the delivered price without the buyer being able to effectuate a reduction in transportation charges based upon actual savings achieved when the buyer performs the transportation function which would otherwise be the seller's responsibility.

* Recent Proposals to Amend the Robinson-Patman Act, Hearings Before the Subcomm. on Antitrust, Consumers and Employment of the House Comm. on Small Business, 95th Cong., 1st Sess. 129 (1977).

Where only an identical delivered price is offered to all buyers the zone system deprives buyers of a chance to bargain for lower prices in the form of reduced transportation costs. The net effect of sellers' refusal to deviate from any uniform pricing system has recently been described by the FTC in the following terms:

When firms act in a unified fashion, when they seek to pass on costs imposed uniformly upon all of them, or when they seek to obtain prices established pursuant to an arbitrary pricing formula, it defies common sense to suppose that the sum of these collective actions has no effect on price. [Emphasis supplied].*

To explain the cost and energy savings benefits which result from this legislation, it is useful to describe briefly how the food distribution system operates.** Many of the products sold in retail food stores, such as fresh bakery and dairy products are "direct delivered". They are delivered directly to individual grocery stores or supermarkets by the manufacturer or supplier of the goods, usually in the supplier's own trucks. The direct store delivering system is not affected by H.R.1681.

Other goods, essentially non-perishable items, such as canned goods, paper goods, cereals, and soaps and detergents,

* Boise Cascade Corp., FTC Dkt. No. 8958, Slip op. 16 (Jan. 11, 1978).

** The public will receive similar transportation savings from H.R.1681 in any other industry where large amounts of transportation occur on a daily basis, where the buyers' trucks are now economically foreclosed from making backhauls to their warehouses.

are not "store-delivered" by the supplier, but instead are transported from the supplier's distribution center to the retailers' and wholesalers' warehouses by common carriers or the supplier's own trucks. Costs of distributing these types of goods can be reduced by H.R.1681. These goods are usually bought in volume, stored at these warehouses, and then delivered by the buyer to its stores. All food retailers, whether they be the smallest "corner grocery" or the largest supermarket, receive these products delivered to the store from warehouses. Passage of H.R.1681 will result in the opportunity for decreased distribution costs, by allowing warehoused goods to travel from the supplier to the buyer's warehouses in a more efficient manner.

In servicing these individual retail stores, the warehouses load and dispatch trucks daily to retail outlets. In the food distribution industry these vehicles operate within a limited range of between 150-300 miles per day.* At the end of this "outbound trip", the trucks are empty. Unless these vehicles are afforded the opportunity to pick up a load from a supplier for the buyer's warehouse, they must return empty. Obviously, this empty backhaul is totally non-productive and serves only to waste fuel and to increase the cost of distribution. The importance of pick up opportunities to independent wholesalers and retailers is forcefully described in the attached

* Since these retail deliveries occur daily and within these limited geographic areas, the benefits of H.R.1681 will be in shorthaul trucking; long range or cross country hauling will not be affected.

article from Progressive Grocer in which a wholesaler from Hickory, North Carolina, describes the physical difficulty of distributing groceries in the absence of backhaul. See Attachment A.

The magnitude of this waste in the food industry is illustrated by the fact that approximately 1/3 of the grocery trucks on American roads are traveling empty. In 1975 the Transportation Task Force - Food Industry Advisory Committee, of the Federal Energy Administration, issued a report estimating that a reduction in empty backhaul by removing existing legal uncertainties would, within the grocery industry alone, have the potential to eliminate 500 million empty miles; would save 100 million gallons of fuel; and would reduce distribution costs approximately \$300 million each year. Moreover, not only is the food distribution industry forced to operate less efficiently because of empty backhauls, but its suppliers are also traveling to food warehouses full and returning to their bases empty. In other words, large fleets of trucks for both suppliers and buyers are passing each other every day carrying nothing except air.

The most effective method for turning empty mileage into productive transportation would be for the trucks of retailers and wholesalers to stop on the way back to their central warehouses at the plants or distribution centers of

the suppliers and pick-up the goods their company has bought from that supplier. These products could then be transported back to the warehouse in a full load. However, to encourage more customer pick up, buyers need to be able to negotiate a backhaul allowance from the supplier which would make that backhaul economically feasible.

H.R.1681 removes the cloud created by FTC's advisory opinions and authorizes (but does not require) sellers to grant cost-justified backhaul allowances. Under H.R.1681 this backhaul allowance could be no greater than the actual cost savings to that supplier and it must be made available on a non-discriminatory basis to all the supplier's customers.

Thus, if a buyer transported his goods to his warehouse and saved the supplier \$100 in transportation expense, that buyer could receive a cost-justified backhaul allowance up to \$100, but no greater. Any other buyer regardless of size who picks up and transports his products the same distance and, thus, saves the supplier the same transportation expense must receive the same pick up allowance. Large buyers may receive the allowance directly and others may receive their allowance from their wholesalers. All food retailers buy directly or through food wholesalers; thus, savings are available to all.

If a supplier decides to grant only a percentage of his transportation savings to a buyer who picks up the product, for example 80 percent, then that formula must be made applicable to all other buyers. H.R.1681 will encourage cost-justified allowances that will provide the needed economic incentive to increase customer pick up by permitting buyers to bargain (i.e., compete) for lower transportation charges within the delivered price zone context.

The Federal Trade Commission's suggestion that suppliers may offer only a uniform f.o.b. price to all buyers who pick up their goods regardless of the actual transportation savings to the supplier in not having to pay actual transportation expenses, is neither economically realistic nor legally supportable. If the uniform f.o.b. price becomes the accepted practice, the supplier would probably allow only the smallest freight rate for all customers regardless of their distance from the supplier. Thus, if the nearest buyer saves the supplier 5 cents per unit on delivery expenses, the supplier would offer all buyers only a 5 cent backhaul allowance for goods picked up at the supplier's warehouse. A customer that is located 150 miles away may save the supplier 50 cents per unit on delivery costs; and the 5 cent allowance would be insufficient to encourage that buyer to pick up and transport the goods to his central warehouse. Thus, a uniform f.o.b.

price will not encourage backhauling and will not result in savings for the ultimate consumer. Moreover, a uniform f.o.b. price ignores the provisions of section 2(a) of the Robinson-Patman Act which provides that nothing contained in the Act prevents differentials which make only due allowance for differences to the seller in the cost of delivery. As a matter of law, a buyer is entitled to receive different delivery allowances if those allowances reflect different costs in delivery to the seller.

Not only has FTC declined to initiate any enforcement action based on its advisory opinions, the agency's rationale is inconsistent with the Commission's recent decision in Boise Cascade Corp.* In that case, the Commission ordered respondents, where they sell on a delivered price basis, also to allow their customers the option of obtaining a point of origin price which is to be no greater than the delivered price less the actual transportation costs which would have been incurred by the seller if the sale were made on a delivered basis.

H.R.1681 however, 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, H.R.1681 may offer the optimum latitude for salutary price reductions between buyer and seller which

* FTC Dkt. No. 8958 (Jan. 11, 1978).

can occur within the framework of a zone delivered pricing system. A legal memorandum prepared by FMI's counsel discussing the relationship between H.R.1681 and the Robinson-Patman Act is attached to this statement. See Attachment B.

The provisions of H.R.1681 will not encroach upon or modify any provisions of the Interstate Commerce Act or any regulations promulgated by the ICC. H.R.1681 is not a motor carrier regulatory reform measure. The legislation does not alter in any way the permissible operational scope of any motor carrier; regulated or unregulated. Those backhaul opportunities which will be enhanced are currently permissible from an ICC standpoint. This legislation does not deal with issues of trucking regulation or with increasing the ability of some companies to haul products where they could not do so before. In addition, common carriers are now experiencing a growth rate averaging three billion miles annually. While H.R.1681 may encourage some expanded private carriage, when the extent of this increased proprietary backhauling is compared to the annual growth rate of common carriers, it is obvious that it represents only a very small percentage of total common carriage.

In addition, H.R.1681 will not revise, modify or amend the Robinson-Patman Act. It will only serve to clarify that suppliers may grant and buyers may receive cost-justified

backhaul allowances that result from exactly the type of differences in delivery costs provided for in section 2(a) of the Robinson-Patman Act.

In conclusion, passage of H.R.1681 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. H.R.1681 will also result in needed fuel savings. All food retailers will benefit regardless of size. It is because of these potential savings in distribution costs and energy that FMI actively supports H.R.1681.

"It is simply unrealistic for us, as an independent wholesaler . . . to try to operate out of our part of the country without opportunity to backhaul . . ."

Once a Bore, Backhaul Is Now Vital to Wholesaler's Survival

Before the cost of diesel fuel increased by 50% or more, a few years ago, the subject of "backhaul" produced great yawns among most retailers. It was all somewhat academic—part of that vague business called productivity—all very important of course, but what could you do about it?

For Allen La Torre, a Carolina wholesaler-operations man, it is a subject of life and death—profit or no profit. La Torre is director of operations for Merchants Distributors, Inc., of Hickory, N.C., a community of 22,000 people. Part of his responsibility is a fleet of trucks that runs north to Virginia and south to Albany, Ga., and Decatur, Ala. "Without backhaul," says La Torre, "we simply couldn't survive as an independent wholesaler. We don't own any of our own stores, so before we can serve a customer we have to determine whether we can do it profitably or not. There is no way that we could afford to run our trucks as far south as Albany, Ga., without a backhaul from suppliers along the way. If they had to come back empty, we'd have to give up the account."

"Right now, we backhaul 20 to 25% of everything we receive, and we'd like to do even more," says La Torre. "but some manufacturers offer us a backhaul allowance that is ridiculous—or none at all. For example, not long ago we were asked by a major supplier if we were interested in setting up a backhaul program from Atlanta. Naturally, we said we were. But when it came to discussing rates this company was offering only 31 cents a hundred-weight. We had to refuse. It costs us anywhere from \$1.05 to \$1.15 a hundred-weight from Atlanta, so why should we accept a deal like that?"

In actual practice, dozens of grocery manufacturers offer some kind of backhaul allowance program, and still more have expressed interest in starting one. However, because of the vagueness of interpretations of the law (Robinson Patman Act) by the Federal Trade Commission, many have been advised by

their legal counsels not to engage in backhaul until the FTC position is clarified or until a new law is enacted. Others, claiming to be obeying the letter of the law, offer the same rate of backhaul allowance to all, regardless of distance from manufacturer's depot to distributor's warehouse.

Some members of the industry even object to the term "allowance" applied to backhaul rebates. This in itself, they say, leads to misunderstanding. And, as a result, many manufacturers offer a cash allowance that has little to do with the actual freight rate they would have to pay to a common carrier, or what it actually costs the wholesaler or retailer to operate his trucks.

But for Allen La Torre, and for others like him, the debate won't wait. "It is simply unrealistic for us, as an independent wholesaler, with no stores of our own, to try to operate out of our part of the country without the opportunity to backhaul a good part of our received goods. Right now, we are picking up frozen orange juice in Ocala, Fla., and making stops in Birmingham, and even Chattanooga.

"If you look at a map," says La Torre, "you'll understand part of our problem. We are 55 miles from the nearest metropolitan market, Charlotte to the east. It is 75 miles to Asheville to the west. It takes three days for a rail car to get to us from Charlotte, and these are often late. Last year, for example, out of 212 rail car-days scheduled to us, only 44 were on time. The rest were late up to four and five hours. That meant that we had nine men waiting around to unload rail cars that didn't arrive on time. But if I want to hold up a rail car for unloading, there is a demurrage charge. With the railroads it's a one-way track."

"And then there is the subject of damage in rail cars," adds La Torre. "It gets worse all the time. Manufacturers are aware of this, and many would like to do something about it. But they've got to offer a realistic freight rate to us for



Allen La Torre, director of operations for Merchants Distributors, Inc., of Hickory, N.C., had to "go out and beat the bushes" for sufficient backhaul business to serve new customers.

backhauling or forget it. The best deal is f.o.b. at the dock, and let us worry about it—shortages, damages, and so on.

At the recent annual meeting of the National-American Wholesale Grocers Assn., several manufacturers expressed interest in further discussion of backhaul possibilities, while others encouraged support for S. 1699, the Administration-sponsored energy bill that would permit more backhaul in the grocery industry. Food Marketing Institute and all other food industry distributor groups are actively supporting the bill.

But in the grocery industry, the small, independent businessman (or super market operator) buys from an independent wholesaler for the post part, who needs every opportunity to remain competitive in a highly competitive industry. For this reason, most wholesalers would like to see the debate continued, and would like to see a bill enacted, even more. "Let's get it out in the open," says La Torre. "This is an absolute necessity for us. We're backhauling up to 99 product categories a week, right now, and we'd like to do even more. We know there's a lot more opportunity out there, and we'd like to get into it. It's the only way we can stay profitable."

ATTACHMENT B

MEMORANDUM

July 27, 1979

RE: DIESEL FUEL AND GASOLINE CONSERVATION ACT OF 1979

On January 31, 1979, Representative William Lehman of Florida introduced H.R.1681, entitled "Diesel Fuel and Gasoline Conservation Act of 1979". This bill was co-sponsored by Representative Paul Simon (D-Ill.). The purpose of H.R.1681 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 H.R.1681 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

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

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.

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

^{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.

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

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

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

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

Regulatory Barriers to Backhaul Allowances

This legislation has been necessitated by a series of regulatory interpretations issued by the Federal Trade Commission,^{5/} dealing with 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.

5/ Advisory Opinion No. 147, issued October 24, 1967, 72 F.T.C. 1050 (1967); Advisory Opinion No. 194, issued February 24, 1968, 73 F.T.C. 1309 (1968); Advisory Opinion No. 198, issued March 5, 1968, 73 F.T.C. 1312 (1968); Clarifying Opinion announced December 26, 1973, [1973-1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶20,498 (1973); Clarifying Opinion announced March 28, 1975, [1973-1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶20,850 (1975); 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.

6/ 15 U.S.C. §13(a).

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

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

Section 2(a) further provides,

That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery . . . (Id.) [Emphasis supplied].

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 tend to create a monopoly.

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

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

In addition, section 2(a) contains a defense of utmost importance in the backhaul context. This defense provides, in part, that nothing contained in the Act shall prevent differentials which make only due allowance for differences in the cost of delivery. Thus, since this legislation allows only cost-justified and 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 backhaul allowance situation. Several court decisions have, however, indicated that a price difference is not discriminatory if the lower price is available to all customers similarly situated. Thus, in Mueller Co. v. FTC,^{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 at 46.

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

In FTC v. Borden Co.,^{10/} the Supreme Court tacitly dealt with the availability and discrimination issues in a case involving an issue of "like grade or quality" of milk. In that case the court stated,

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

10/ 383 U.S. 637 (1966).

11/ See Viviano Macaroni Company, [1967-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶18,246 (1968), *aff'd*, 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 F.T.C. 1050 (1967). The element relating to a substantial lessening of competition is not necessarily present in many backhaul situations. The courts have clearly held that in section 2(a) cases, even where price discrimination occurs between competing purchasers, it must have the probable effect of injuring competition. See Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922); FTC v. Morton Salt Co., 334 U.S. 37 (1948). Where, for example, the near buyers and the far buyers' geographical areas of operation do not overlap, then there would be no likelihood of lessening of competition, since there is no competition. In situations where the near buyer and the far buyer have numerous outlets serviced by their respective warehouses and a few outlets overlap, again there would be no substantial lessening of competition, but at most a de minimis impact.

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

The legality of granting cost-justified backhaul allowances was first questioned by the Federal Trade Commission in 1967. In Advisory Opinion No. 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

^{13/} 72 F.T.C. 1050 (1967).

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 on average cost factors or a uniform delivered pricing system which would 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 supplied].

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

^{14/} 73 F.T.C. 1309 (1968).

^{15/} 73 F.T.C. 1312 (1968).

five percent discount to all customers buying in truck-load quantities.^{16/} The Commission, in rejecting the request, noted that the alleged cost saving depended upon averaging the savings in freight rates and that the freight rates to nearby customers was considerably less than five percent.

The Commission's Advisory Opinions 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

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

^{17/} The proposed legislation will provide an option to the manufacturer to allow a buyer the opportunity to pick up his goods at the manufacturer's shipping point and receive as an allowance an amount no greater than the actual savings to the manufacturer in his shipping costs. In other words, if the manufacturer would have to expend 15 cents per unit to ship the goods to the buyer then the buyer would be allowed a 15 cent 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 [1973-1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶20,498; Clarifying Opinion announced March 28, 1975 [1973-1976 Transfer Binder] Trade Reg. Rep. (CCH) ¶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.

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 nondiscriminatory 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 in 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,

"if different backhaul customers purchase identical goods in identical quantities and according to exactly the same method of sale and delivery (i.e., by pickup 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

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

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. at 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 decision.^{21/} In 1974 the Commission

^{20/} Challenges to payments of freight allowances have been brought by private parties under sections 2(d) and 2(e) of the Robinson-Patman Act. However, the courts in both American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951); and Chicago Spring Products Co. v. U.S. Steel Corp., 254 F. Supp. 83 (N.D. Ill. 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 sections 2(d) and 2(e). See New England Confectionery Co., 46 F.T.C. 1041, 1059-1061 (1949).

^{21/} International Paper Co., 84 F.T.C. 9 (1974); Vancouver Plywood Co., 84 F.T.C. 17 (1974); Ideal Basic Industries, Inc., FTC Docket No. 9039 (December 1976); Boise Cascade Corp., FTC Docket No. 8958 (Jan. 11, 1978).

accepted two consent orders which provided that the respondents for a period of ten years must give their customers the option of receiving a quotation and purchasing at f.o.b. prices. F.o.b. prices were defined so that they would not be set at artificial levels for the purposes of affecting purchases at the mill or distribution point. Thus, these consent orders allow customers the option of picking up at the seller's distribution point at a price that reflects actual transportation costs.

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 part of a Proposed Order,

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

^{23/} FTC Docket No. 8958.

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 truck-load, 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 supplied].

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

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

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.

^{24/} Id., Proposed Order, ¶3.

The relief provided in the two 1976 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 Distribution Efficiency 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 nondiscriminatory 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. That 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/}

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

^{26/} Id. at 91.

Yale Brozen, a professor at the University of Chicago, in a foreward 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.

^{28/} Id. at iii.

^{29/} Id. at iv.

^{30/} Id.

It would have the advantage, however, of eliminating some of the wastes inherent in 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.

In summary, the Commission's interpretations regarding cost-justified backhaul allowances in effect, deprive 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 1979" 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 nondiscriminatory 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

31/ Id. at v.

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.

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.

II.

Short Summary of Testimony

NARGUS supports and recommends approval of H.R.1681. The membership of the association took affirmative action on the measure at its 1977 convention.

NARGUS believes and asserts that backhaul allowances sanctioned by H.R.1681 will result in savings of fuel. The measure will assist 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 do direct buying corporate chains. The Robinson-Patman Act, which the association has consistently supported, will not be harmed or injured by passage of H.R.1681.

NARGUS has carefully considered the terms and effects of H.R.1681. It believes the proposed legislation will foster productivity gains in grocery distribution and merits favorable consideration by the Committee.

III.

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 manufacturer'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 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 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. H.R. 1681 provides that the backhaul allowance must not exceed "the actual savings in delivery cost to the seller."

Of course, under H.R. 1681, 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.

IY.

Bill Will Not Harm Robinson-Patman Act

As a supporter of the Robinson-Patman Act, NARGUS seriously considered the effects H. R. 1681 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 H.R.1681 would weaken the Robinson-Patman Act prohibitions against harmful price discriminations, NARGUS would oppose the legislation. Our own analysis, and our counsel's independent judgment, assure us H.R.1681 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.

H. R. 1681 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. H.R.1681 adheres to the basic concept of nondiscrimination, and requires that the backhaul allowance system be cost justified. There is no basis for contending that H.R.1681 would undermine or weaken the Robinson-Patman Act.

V.

Independent Retailers Benefit

A retailer does not have to operate his own warehouse, or buy directly from a manufacturer, to benefit under H.R. 1681. 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 manufacturer, from a cooperative, or from independent wholesale supplier, they will benefit from backhaul allowances authorized under H.R. 1681. Small, as well as large retailers, will gain under the measure.

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

VI.

Consumers Benefit

A major consideration in judging the merits of H.R.1681 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.

VII.

Conclusion

H.R. 1681 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, H.R.1681 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 advan-

tages 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, H.R. 1681 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 H.R. 1681 is to remove legal uncertainty over the right of a 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 backhaul function.

H.R. 1681 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.

[Whereupon, at 12:30 p.m., the hearing was adjourned.]



