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Statement of
Everette MacIntyre, Commissioner
Federal Trade Commission
Before the
National Commission on Food Marketing
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STATEMENT OF COMMISSIONER MACINTYRE
BEFORE
THE NATIONAL COMMISSION ON FOOD MARKETING

The Congressional resolution setting up the bi-partisan Commission on Food Marketing gave you a very responsible and, indeed, formidable task.^{1/} Scanning the enumerated duties, I am impressed by the fact that you and we at the Federal Trade Commission have many interests in common. I hope that our work may be of help to you. In this connection, it is noted that you are to study changes in the various segments of the food industry and the prospects for the future if present trends continue. Also, you have been instructed to give thought to possible changes in the statutes or public policy relating to the organization of farming, processing and distribution of food products in order to achieve a desired distribution of power as well as desired levels of efficiency. These tasks have important antitrust implications and I would like to focus on these issues from that perspective.

A relevant concern in the light of the objectives set forth is the belief by many that agricultural policy is faced with crucial problems arising out of the spread between

^{1/} Public Law 88-354, 88th Cong., S. Res. 71, July 3, 1964,
78 Stat. 269

prices paid to the farmer for his products and the prices subsequently paid by consumers for food. In this connection, the President, in his Message on Agriculture on January 31, 1964, advised that steadily rising costs are eating up the major portion of the increased gross farm income, thus forcing upon the farmer a cruel cost-price squeeze. Antitrust considerations are obviously pertinent in this context.

Many reasons have been given for the farmer's declining share of consumer income spent on food products. The answers are obviously not the same for all products. One answer which has been given is the fact that food products are undergoing ever-increasing processing and consequently consumers are buying a finished product which costs more and which is worth more.

Examples of these are the foods packaged, processed, and in some instances prepared, even to the point of being cooked and ready to serve. In such instances it is obvious and inevitable that the food producers share of the total dollars spent for such food items declines. However, such changes in packaging, processing and preparing food items have not applied across the board. Eggs are packaged little, if any, differently from what they were a generation ago. Fresh meats in the form of steaks, roasts, etc. are

purchased by the housewife in little different type of package from what they were a generation ago. Therefore, processing and preparation is not necessarily the reason for the decline of the food producer's share of the dollars spent for food in all instances.

Some have raised questions regarding the growth of market power of certain factors operating in the sale and purchase of food items. For example, the President in his message of January 31, 1964, referred to the fact that there had been recent changes in the marketing structure for the distribution of food. He expressed the view that our information about this greatly increased concentration of power and its effect on farmers and consumers, is inadequate.

These observations lead me to suspect that you are interested in data or views which would bear on the question of whether this concentration of market power and practices in the use of it have any relation to the decline in the food producer's share of the dollars paid for food.

It is a truism that one of the prerequisites of a healthy economy is a rough equality on the buying and selling sides of the market.^{2/} This principle must prevail if the basic assumption of antitrust law is to have any validity at all,

^{2/} Mark Massel, Competition and Monopoly, The Brookings Institution (1962), pp. 24 and 25.

namely, that competition in the form of impersonal supply and demand factors in the market is to regulate production and prices rather than personal views and acts of any particular organization or group. Do the conditions and practices in the distribution and marketing of food items square with that test? In my view, they do not in many situations.

The bargaining power of the sellers of agricultural products in several lines has been blunted by increased concentration on the part of buyers. In certain instances the market power of sellers has, in effect, been dispersed by large buyers who, as a result of their size, have been able to bypass traditional public markets, and negotiate with sellers on an individual basis. Illustrative of this trend is the marketing experience of growers of certain livestock such as beef, lamb or hogs.

Once the competitive forces on both the selling side and the buying side of the market depended upon competition in a market where those forces clashed to determine the prices and the price levels in which transactions were to take place. This was recognized and written into the public policy for maintaining and making competitive and fair the marketing prices when Congress enacted the Packers and

Stockyards Act in 1921. Regulations were promulgated and issued as provided for in that law to help insure competition and fairness in the sale and purchase of livestock at the regulated stockyards. However, changes have taken place in the marketing of livestock which have precluded the application of the Packers and Stockyards Act and the regulations thereunder to a vast number of transactions accounting for a large percentage of livestock marketed.

These changes have included a dispersal of livestock marketing from the stockyards to scattered points. Some of these are sometimes referred to as country points. This has contributed to the development of situations where the heavy concentration of economic power in the hands of a single buyer may and has been brought to bear with its full impact upon the bargaining power of a few, and sometimes even one small seller. The ensuing negotiation usually results in enabling the buyer to secure livestock at prices below those then prevailing at the large competitive markets where a large number of buyers and sellers are facing each other. When news of the negotiated transaction at the country point gets around to the effect that a new low price has been made, it has its effect on other negotiations

at other scattered points. The sum total of the results of all of these scattered negotiations and transactions between large buyers with concentrated economic power and small sellers results in a lowering of prices, even in the competitive markets where a large number of sellers and buyers operate. This lowering of such prices in many instances is not reflected in the prices paid by consumers. Consequently, it would appear that these circumstances produce a widening spread in the amount between what the producer receives and the consumer pays for the food product in question.

What I have said about the marketing of livestock has equal application to the marketing of a number of other food items. These include canned fruits and vegetables and some fresh fruits and vegetables. In that connection I would like to refer to H.R. No. 1471 of the 87th Congress. That is a report on the investigation which had been made by the Select Committee on Small Business regarding the marketing of tomatoes out of the Rio Grande Valley. I would like to quote from that report as follows:

Complaints were received in which it was alleged that unfair trade practices were being used in connection with the marketing of tomatoes below cost of production and with disastrous consequences to producers and small business firms. Moreover, it was alleged that competition

on the buying side had been substantially lessened as a result of progressive concentration of buying and distribution facilities into fewer and fewer hands. Specifically the complaints related to the marketing of fresh tomatoes marketed from the Rio Grande Valley in 1961.

Hearings were held on the problem thus presented. From the evidence it was determined that:

On several occasions since and during the marketing season of 1957, reports by the U.S. Department of Agriculture on daily prices for tomatoes marketed from the lower Rio Grande Valley show that prices paid Texas growers fell to levels substantially below 4 cents per pound. For example, in the 1959 season during the period of heavy shipments in the latter part of May, prices ranged to a low point of 1.5 cents per pound. During the 1961 season as early as May 8, the range of the daily prices was from 2 to 3 cents per pound. As the heavy shipments continued during the month, these prices dropped to a range of 1.75 to 2.25 cents per pound.

Among the testimony received during the course of its hearings was that of a member of the Farm Bureau which had requested members of Congress to arrange for the hearings. That witness stated:

We wanted to know why the farmer was receiving practically nothing for his tomatoes while the housewife was paying 39 cents a pound.

We have asked this question before and the answer has always been, "It is the law of supply and demand."

It is our opinion that the supply of tomatoes has little effect on what the grower receives or the housewife pays. It is a matter of unscrupulous tactics used by chainstore buyers in forcing

grower prices down, creating artificial gluts by holding off buying, thus panicking the growers and completely demoralizing the price situation. At the consumer level, the housewife cannot shop around for tomatoes. The independent grocery is gone and she must pay the price dictated by the chain.

The independent farmer has made several attempts at marketing cooperatively his produce, but the buying forces are so centralized and powerful that even if every grower in the Rio Grande Valley was organized he couldn't combat the combined strength of the chains. When the chains divert their purchases to Florida or to Mexico for a few days the valley situation becomes desperate. It is not only a matter of shipper against shipper but of one producing area against another.

The House Report to which I referred contained the following statement:

Representatives of the principal retail food chain organizations countered the testimony showing:

1. That only two of the leading retail food chain are engaged in direct buying of fresh tomatoes in the Rio Grande Valley from growers through company-owned field buying offices.
2. That these two retail food chain organizations purchased (directly through their field buying offices in the Rio Grande Valley of Texas during the 1961 season) only about 10 percent of the fresh tomatoes sold and shipped from the Rio Grande Valley in the 1961 season.
3. They confirmed other information received by the subcommittee to the effect that prices paid growers had dropped in May and June 1961 to range from 1 3/4 to 2 1/4 cents per pound for tomatoes in the Rio Grande Valley.
4. They testified that there were instances during that same period of time in which retail

stores operated by their firms had sold fresh tomatoes at prices as low as 14 cents per pound in a number of the principal cities.

The special subcommittee made an effort to obtain information from approximately 20 of the leading retail food chain organizations operating retail outlets in the midwestern and southwestern consuming markets which would show what part of their total purchases originated in the Rio Grande Valley during the 1961 shipping season were accounted for by these leading retail food chain organizations. The replies made by the chain organizations were unsatisfactory. They stated that they did not know where the tomatoes sold through their retail stores originated. Also, they were requested to supply the subcommittee with the names and addresses of the repackers and shippers from which they bought, so that the subcommittee would be enabled to ascertain from those repackers and shippers where the tomatoes originated. The chain organizations failed to supply the special subcommittee with that information.

The Committee Report (H.R. No. 1471, 87th Congress, p. 10) reached the conclusion that the drop in the prices of tomatoes in the Rio Grande Valley to a level below the cost of production was not because of inferior quality or due to the fact that they did not command high prices when resold at retail to the consumers, but, on the contrary, to the decrease in the number of buying firms and the concentration of economic power in those firms and concluded with the statement:

This concentration of economic power in the buying and selling of food products involves also a power to influence in a substantial way,

if not to control, prices paid to producers as well as the prices charged consumers for products such as the fresh tomatoes produced and sold from the Rio Grande Valley of Texas.

House Report No. 2234 of the 86th Congress is a report on "Small Business Problems in Food Distribution." It is a report by the Select Committee on Small Business of the House of Representatives and covers a number of different situations where problems existed somewhat similar to those which were found to exist in the marketing of tomatoes in the Rio Grande Valley. These situations include the marketing of canned fruits and vegetables in California and the marketing of livestock and meat products in Denver, Omaha and other livestock markets. The facts found and the conclusions reached regarding these situations in that report were somewhat similar to those to which I have called your attention in H. Rep. No. 1471 of the 87th Congress regarding the tomato industry.

The experience and knowledge I have acquired in earlier years as a member of the staff of the Federal Trade Commission and more recently as a member of the Commission itself, confirm the validity of the information which came to my attention as general counsel to the Select Committee on Small Business of the House of Representatives, some of

which is reflected in the two reports to which I have referred.

Included among the information which has come to my attention in connection with my work at the Federal Trade Commission has been evidence of a growing concentration of economic power in the hands of a declining number of powerful buyers of food items. Also, in this information has been evidence of acts and practices of how this vast economic power has been used. This has included evidence of the use of discriminatory acts and practices and indeed at times the transfer of food items at prices below cost.

On countless occasions I have heard the question, "Why doesn't the Federal Trade Commission do something about this?" There are many answers to that question. On some occasions the Federal Trade Commission has attempted to do something about some of the acts and practices. There are many situations regarding the concentration of economic power over which the Federal Trade Commission has no jurisdiction to act. In some of the situations where it has undertaken to act against the use of acts and practices which the Commission had reason to believe adversely affected competition, the results, in my opinion, have not been very fruitful.

The use of alleged discriminatory practices is the area where the Commission has undertaken a number of actions. So far as I can determine, these actions have not halted discriminatory practices. Under existing law the best results the Commission could obtain would have been feeble and uncertain and I regret to say that the results have not always been the best possible results.

In the area of sales at prices below cost, the Commission has moved very little and with extreme caution. The Commission is uncertain whether it has any jurisdiction to move against situations involving sales at prices below cost unless it is clear that these involve predatory intent in addition to a showing of a substantial lessening of competition.

In view of these circumstances, it is my recommendation that the laws and the public policy designed to preserve competition be strengthened. Whatever is needed in that regard to help insure market conditions which would provide "a rough equality on the buying and selling sides of the market" should be considered. The following definition of the principles underlying the Sherman Act by Louis B. Schwartz, professor of law at the University of Pennsylvania and a noted authority in the antitrust area, seems most relevant in this context. Professor Schwartz states with respect to our basic antitrust statute:

". . . The principle of the Sherman Act is as enduring and fundamental as the notion of due process of law. It speaks to a perpetual problem in the organization of all societies, namely, how is power to be distributed and controlled. As the Constitution of the United States concerns itself with the distribution and control of political power, the Sherman Act addresses itself to economic power. In principle, both documents seek a maximum dispersion [sic] of power consistent with the marshalling of our spiritual and material resources." 27 A. B. A. Antitrust Section, 87, 91 (1965).

The legislation creating the National Commission on Food Marketing is a more recent statement of the Congressional concern with the same fundamental problems. Clearly, these questions cannot be considered apart from either our experience with the antitrust laws or their future, and hopefully more effective, application.

Likewise, I would urge that consideration be given to proposals for strengthening and clarifying the laws and public policy against discriminatory practices and sales at prices below cost where the effect may be to substantially lessen competition or tend to create a monopoly. Of course, consideration should be given to the strengthening of the laws which would prohibit large and powerful buyers from knowingly inducing or receiving preferred treatment or from engaging in action designed to beat down prices to levels below the cost of production. The laws designed to achieve these objectives should be clear and commanding. The public policy

embodied and expressed therein should not be easily evaded. Also, the enforcement of these statutes should not be rendered either aimless or less vigorous because the enforcement agencies either lack full agreement with, or understanding of, the public policy expressed therein.