

(60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained in the supplemental initial decision on remand of proceeding.

IN THE MATTER OF
RURAL GAS SERVICE, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT AND SECTIONS 2 AND 3 OF THE CLAYTON ACT

Docket 7065. Complaint, Feb. 19, 1958—Decision, Oct. 24, 1961

Order dismissing—the allegations not being adequately supported by the record—complaint charging a distributor of liquified petroleum (LP) gas in the New England states and New York with obliging its distributors to purchase their gas requirements and equipment only from it, preventing its dealers from engaging in the same business for one year after termination of their contracts, and discriminating in price.

Mr. John Perechinsky for the Commission.

Bulkley, Richardson, Godfrey and Burbank, Springfield, Mass., by
Mr. Robert B. Atkinson for respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The corporate respondent, Rural Gas Service, Inc., a Massachusetts corporation, is engaged in the sale and distribution of liquefied petroleum gas (propane), with its main office and plant located in Westfield, Massachusetts. The area in which the company sells comprises the New England States (Massachusetts, Vermont, New Hampshire, Connecticut, Maine, Rhode Island) and the State of New York. The individual respondent, George Hammond, is President of the corporation and directs and controls its policies and practices. For convenience the singular term respondent will be used hereinafter and will refer to the corporation.

2. The Commission's complaint is in three counts. Count I charges the maintenance of an exclusive-dealing arrangement between respondent and its distributors, in violation of Section 3 of the Clayton Act. Count II charges violation of the Federal Trade Commission Act through the maintenance and enforcement by respondent of a policy which prevents its distributors from engaging in a similar business in a specified territory for a designated period of time after the severance of their relationship with respondent. Count III charges price discrimination by respondent in violation of Section 2(a) of the Clayton Act.

3. Upon the close of the case in chief in support of the complaint, respondent moved to dismiss for failure of proof. Admittedly there was no evidence in support of Count III, and this count was dismissed by order of the hearing examiner issued March 3, 1960. In the same order the motion to dismiss was denied as to the other two counts. Thereafter, respondent presented its evidence as to Counts I and II. Proposed findings and conclusions have been submitted by the parties, oral argument not having been requested, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected.

4. As indicated by its name, liquefied petroleum gas is in liquid form. It may be stored under pressure in metal tanks and cylinders. When released, it is in the form of a gas and is used in both homes and industrial plants for heating, refrigeration, cooking, fuel and other purposes. Respondent's sales of the product fall into two general categories: bulk sales, and sales in relatively small interchangeable cylinders. These cylinders are some 4½ feet in height and hold approximately 100 pounds of gas. In bulk sales, the gas is delivered by respondent in tank trucks to stationary tanks on the premises of the consumer. The tanks range in capacity from a few hundred gallons to many thousands of gallons. In both bulk sales and cylinder sales, all of the equipment, including tanks, cylinders, piping, tubing, etc., is supplied—loaned—to the consumer by respondent.

5. Some 60 percent of respondent's sales fall into the bulk category. These sales are made by respondent through its own employees direct to the consumer, no distributor or other intermediate party being involved. The remaining 40 percent fall largely into the cylinder category. These sales are made through some ninety distributors located at various places in respondent's sales area. While the distributors also solicit bulk sales to some extent, usually with the assistance of respondent's employees, such sales make up only a minor part of their business; by far the greater portion of their business is made up of sales in interchangeable cylinders.

6. Consumers wishing to be supplied by respondent with gas through its interchangeable cylinder service execute a written "Consumer Application" to respondent. While the application is made through the distributor, the application, if accepted by respondent, is in fact a contract between the consumer and respondent, not between the consumer and the distributor.

7. Relations between respondent and its distributors are governed by a contract known as a "Distributor Agreement", and it is certain provisions in this contract which form the principal subject matter of the present proceeding. There is sharp difference of opinion between counsel as to whether the agreement is in legal effect a contract

of sale and purchase as contended by Commission counsel, or a contract of agency as claimed by respondent's counsel. For the purposes of the present decision it is assumed by the hearing examiner that the agreement is one of sale and purchase. (In this connection it might be noted that some three years ago the form of the agreement was revised and it is now designated as an "Agency Agreement".)

8. As already stated, Count I of the complaint charges the maintenance of an exclusive-dealing arrangement between respondent and its distributors, in violation of Section 3 of the Clayton Act. There is no doubt that an exclusive-dealing arrangement does exist. Respondent's agreement with its distributors expressly provides that the distributor will purchase all of his requirements of liquefied petroleum gas from respondent; that no such gas except that purchased from respondent in cylinders bearing respondent's trade name shall be purchased or sold by the distributor; and, further, that no gas service equipment except that furnished by respondent shall be purchased, sold, or used by the distributor.

9. Next presented is the vital question of the competitive effect of the exclusive-dealing arrangement. Considered alone, that is, apart from figures for the industry generally, respondent's sales are substantial. Its total sales of liquefied petroleum gas in the area in question amounted to \$1,390,472.64 in 1956 and \$1,465,660.53 in 1957. These figures, however, lose their significance when considered in connection with total sales by the industry in the same area. Total sales, in gallons, in the area by the industry and by respondent for the years 1953-1957 were as follows:

Year	Total industry sales	Respondent's sales
1953	168,676,000	4,076,294
1954	182,326,000	4,585,964
1955	188,625,000	5,115,100
1956	206,914,000	6,227,709
1957	220,552,000	5,932,714

10. It will thus be seen that respondent's sales accounted for only some 3 percent of the total sales by the industry in the area. And, as already indicated, some $\frac{3}{5}$ ths of respondent's sales are bulk sales which are made by it direct through its own employees, its distributors being in no way involved. Other evidence establishes that the liquefied petroleum gas industry in the area is highly competitive; that there are numerous sellers, one hundred or more, active in the area; and that a number of these are larger than respondent.

11. It is elementary that Section 3 of the Clayton Act forbids exclusive-dealing arrangements only where the effect "may be to substantially lessen competition or tend to create a monopoly". Clearly,

no such effect has been shown here. In fact, the record establishes the contrary. In order to find a violation of the statute it would be necessary to hold that respondent's contract with its distributors is unlawful per se, a view for which there is no warrant in the statute nor, insofar as the hearing examiner is advised, in any of the adjudicated cases.

12. Count II of the complaint attacks as violative of the Federal Trade Commission Act a provision in respondent's contract with its distributors to the effect that the distributor shall not, for a period of one year after the termination of his contract, engage in the business of selling liquefied petroleum gas in the territory covered by the contract. It appears that in some five or six instances respondent has instituted litigation against former distributors to enforce this provision and that it was successful in each instance.

13. The validity of covenants of this kind turns upon the question of their reasonableness. Here both the time element (one year) and the geographical limitation (the territory in which the distributor has been selling respondent's product) appear to be reasonable. It must be remembered that respondent has a substantial investment in the equipment loaned to consumers and also that the consumers' contracts are with respondent, not with the distributors. It further appears that while there are exceptions (one of which is exemplified by testimony the present case), usually distributors upon entering into their agreements with respondent are furnished by it with an already-existing supply of customers, that is, consumers who have entered into purchasing agreements with respondent.

14. In these circumstances there is merit in respondent's contention that it is entitled to reasonable protection against a distributor who, immediately upon the termination of his relations with respondent, would undertake the sale of a competing product and solicit business from consumers under contract to respondent.

15. Also attacked in Count II of the complaint is a provision in respondent's contract with its distributors which requires that upon termination of the contract the distributor shall surrender to respondent any executed consumer agreements which the distributor may have on hand. No illegality is seen in this provision. As heretofore pointed out, the consumer agreements are between the consumer and respondent, and respondent's contract with its distributors expressly provides that the consumer agreements are the property of respondent, not that of the distributor.

16. Finally, as Count II is based upon the Federal Trade Commission Act, the presence of substantial public interest is an essential element in the proceeding insofar as that count is concerned. In the light of the competitive conditions existing in the trade area in ques-

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tion, it seems clear that the requisite public interest is not present. Actually, what the complaint seems to seek to do is to afford relief to respondent's distributors from what the complaint apparently regards as a burdensome and improvident contract. If the contract may properly be so regarded (as to which the hearing examiner expresses no opinion), the matter is essentially a private controversy, not a matter involving the substantial public interest necessary to bring it within the purview of the Federal Trade Commission Act.

CONCLUSION

The complaint has not been sustained.

ORDER

It is ordered, That the complaint be, and it hereby is, dismissed.

OPINION OF THE COMMISSION

By ELMAN, Commissioner:

This is an appeal from the hearing examiner's dismissal of the complaint.

Respondent, Rural Gas Service, Inc., sells liquefied petroleum (LP) gas in the New England states and the state of New York. It ranks about eighth in LP gas sales, accounting for approximately 3% of total sales in this area. In the states of Massachusetts and New Hampshire, however, it accounts for 8% of total sales.

Approximately 40% of respondent's sales are made through distributors while 60% are made directly to consumers. Most of the gas sold through distributors is delivered in 100 lb. cylinders; gas to consumers is generally delivered in bulk to larger storage tanks on the consumer's premises.

Respondent has entered into agreements with each of its distributors which require the distributor to purchase all of its requirements of LP gas from respondent, prohibit it from purchasing or selling any LP gas except that purchased from respondent in its cylinders, and further prohibit it from purchasing, selling or using any gas service equipment except that furnished by respondent. Each agreement also provides that upon termination the distributor may not engage for one year in the sale of LP gas in the territory covered by the agreement.

In addition to the distributor agreements, Rural Gas has entered into agreements with each consumer, whether its purchases were made directly from respondent or through one of respondent's distributors, which provide that the consumer must use only LP gas and gas equipment furnished by respondent. The initial period of these

agreements is one year in the case of bulk sales and three years for sales through dealers in 100 lb. cylinders.

The complaint contains three counts. Count One alleges that the agreements with respondent's distributors, obliging them to purchase their requirements of LP gas from respondent and to use only cylinders and other equipment supplied by respondent, violate Section 3 of the Clayton Act by foreclosing competition in this segment of the market. Count Two charges that the foregoing provisions, together with the provision of the dealer contracts preventing the dealers from engaging in the same business for a period of one year after termination of their contracts, plus the requirements contracts between respondent and its consumer customers, violate Section 5 of the Federal Trade Commission Act. Count Three charges respondent with price discrimination in violation of the Robinson-Patman Act. No evidence was introduced on this count, and it was dismissed by the examiner at the close of the case-in-chief.

The examiner's initial decision was issued January 24, 1961. With respect to Count I, he held that since respondent's total sales accounted for only 3% of total industry sales in its market area, and since $\frac{3}{5}$ of these sales were made directly to consumers and not through its distributors, the requisite effect on competition had not been shown. On Count II, the examiner held that the post-termination restrictions upon respondent's distributors were a reasonable protection of its investment in equipment loaned to consumers and of its relationship with these consumers. He further held that these restrictions were lacking in substantial public interest and constituted "essentially a private controversy" beyond the purview of the Federal Trade Commission Act.

Without concurring in all of the views expressed in the initial decision, we have concluded that the allegations of the complaint are not adequately supported by the record, and that, in the circumstances of this case,¹ the complaint should be dismissed.

Count I: The likelihood of competitive injury which is requisite to proof of violation of Section 3 of the Clayton Act may, of course, be satisfied, as the Supreme Court held in the so-called *Standard Stations* case, by a showing of foreclosure of competition in a substantial segment of the relevant line of commerce. *Standard Oil Co. v. United States*, 337 U.S. 293 (1949). Respondent accounted for approximately 3% of total LP gas sales in all of the states in which it sold, and approximately 8% of total sales in each of the states

¹ Whether, because of deficiencies in proof, a case should be remanded for the taking of further evidence or the complaint should be dismissed necessarily depends on the Commission's determination, in the light of all relevant factors, as to which disposition would best serve the public interest in effective enforcement of the law.

of Massachusetts and New Hampshire. These figures do not reflect, however, the amount of competition which was foreclosed by the exclusive dealing contracts—the essential question under Section 3.

Respondent made only about 40% of its total sales through distributors, and only this part of its business was foreclosed to competition by the exclusive dealing provisions of its dealer contracts. Forty per cent of respondent's business would, of course, amount to less than $\frac{1}{2}$ of its 8% market share even in the states where it did the largest share of the total business. This situation resembles *Standard Stations* where the defendant sold about 23% of the gasoline in the relevant market, but where its sales through individual distributors who were affected by its requirements contracts accounted for only about 6.7% of the market. The Supreme Court considered this foreclosure sufficient to meet the requirements of Section 3, but gave no indication as to how small a market share might suffice in another case.

In the present case, we are not able to infer competitive injury solely from the market shares foreclosed. Where foreclosure is so small, further evidence of competitive effect is required. Such evidence is here completely absent. The record fails to reveal even the most basic information concerning the structure of the industry, e.g., the relative size of the competitors of Rural Gas and the method by which their gas is sold. The latter would seem of particular importance since if it should be found that these competitors sold their gas directly to consumers, competition could hardly be injured by their foreclosure from possible sales to respondent's distributors.

The brief of counsel supporting the complaint seeks to enlarge the market shares foreclosed by pointing out that all of respondent's sales, whether made directly or through distributors, were covered by consumer contracts which required the purchasers to buy all of their requirements of LP gas from respondent. It is claimed that all of respondent's sales were thus foreclosed from competition. But this was not alleged in the Section 3 Clayton Act Count, which concerns only the contracts with respondent's distributors.² Further, the requirements contracts with consumers were for relatively short periods (from one to three years) and since consumers could change suppliers at the end of these periods, their effect upon competition is, on this record at least, too speculative to serve as a basis for finding the requisite competitive injury.

² Although Count II did allege the requirements provisions of the agreements with consumers who purchased through respondent's dealers, it did not allege the similar provisions of respondent's contracts with its bulk customers. Thus, even under Count II, the alleged requirements contracts with consumers could not serve to increase the share of competition foreclosed.

Even if the foreclosure resulting from respondent's consumer agreements were to be considered under Count I, the foreclosure could probably be considered substantial only in the states of Massachusetts and New Hampshire where respondent accounted for about 8% of total LP gas sales. But the record contains no evidence from which the appropriateness of these states as relevant market areas may be determined. Although the Supreme Court in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), did not purport to lay down any absolute or comprehensive principles applicable to every case, its opinion makes clear that "the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." 365 U.S., at 327. No facts from which an "area of effective competition" smaller than respondent's total market area could be delineated are to be found in the present record.

In sum, although the restrictive agreements imposed by respondent on its distributors are of the very sort proscribed by Section 3, there is lacking here the evidence necessary to determine that the agreements have that degree of substantiality in their anticompetitive effects required to condemn them under the statute. See *Murray Space Shoe Corp.*, D. 7476 (Oct. 17, 1961), p. 803 herein.

Count II: The same considerations which preclude a finding of violation of Section 3 of the Clayton Act in the exclusive dealing provisions of respondent's dealer agreements similarly bar a finding of a violation of Section 5 of the Federal Trade Commission Act.

Count II also alleges the unlawfulness of respondent's dealer agreements in so far as they prohibit a dealer from engaging in a similar business for a period of one year after termination of its agreement. The validity of these covenants does not, as the examiner's opinion implies, depend on their abstract reasonableness, viewed in isolation from other provisions of the agreements or respondent's entire course of dealings with its distributors. Nor can we agree that these covenants involve only a private controversy between respondent and its dealers. In addition to the reasonableness of their duration and geographic scope and the interest intended to be protected by them, the legality of these provisions depends on whether they have the substantial potential capacity to aid in enforcing compliance by the dealers with other unlawfully restrictive practices. It was in this context that such covenants were held unlawful in *Dictograph Products, Inc. v. Federal Trade Commission*, 217 F. 2d 821 (C.A. 2, 1954), cert. denied, 349 U.S. 940. However, in the instant case, since no other provisions of respondent's dealer agreements have been proved

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unlawful, and since these covenants do not appear unreasonable when viewed alone, we cannot find that they violate Section 5 of the Federal Trade Commission Act.

With the foregoing modifications, the Commission adopts the examiner's initial decision and order dismissing the complaint. This disposition of the case will not, of course, preclude the initiation of any new proceedings in the future based upon new or additional facts not shown by the present record, if such proceeding be required in the public interest.

Commissioner MacIntyre did not participate in the decision of this case.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel in support of the complaint from the hearing examiner's initial decision and order dismissing the complaint, and upon the briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having denied the appeal of counsel in support of the complaint and having adopted the examiner's initial decision as modified by the opinion of the Commission:

It is ordered, That the initial decision of the hearing examiner, as modified by the Commission in its opinion, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the complaint be, and it hereby is, dismissed.

By the Commission, Commissioner MacIntyre not participating.

IN THE MATTER OF

GOLD SEAL CHINCHILLAS, INC., ET AL.