IN THE MATTER OF

THE B. F. GOODRICH COMPANY AND TEXACO, INC.

(formerly The Texas Company)

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

*Docket 6485. Complaint, Jan. 11, 1956—Decision, Jan. 14, 1966**

Order, following a remand direction by the Supreme Court, opinion dated June 7, 1965, 381 U.S. 739, 7 S.&D. 1263, the Commission prohibits, for the second time, The B. F. Goodrich Company and Texaco, Inc. (formerly The Texas Company), from carrying out their sales commission agreement—under the agreement Goodrich paid Texaco a commission for promoting the sale of Goodrich tires, batteries, and automotive accessories (TBA) to its retail gasoline dealers—and from entering into sales commission arrangements with any other company.

On June 7, 1965, the Supreme Court vacated the judgment of the Court of Appeals, District of Columbia Circuit, dated July 30, 1964, 336 F. 2d 754, 7 S.&D. 956, which set aside the Commission's cease and desist order of April 15, 1963, 62 F.T.C. 1172.

*This order was modified on March 12, 1969, in conformance with a mandate of the Supreme Court, by deleting numbered paragraphs 5 and 6 of the order directed against Texaco.

OPINION OF THE COMMISSION

JANUARY 14, 1966

BY ELMAN, *Commissioner:*

On April 15, 1963 [62 F.T.C. 1172], the Commission held unlawful as an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act[1] a sales commission agreement between The B. F. Goodrich Company ("Goodrich") and Texaco, Inc. ("Texaco"). Under that agreement Goodrich pays Texaco a commission for promoting the sale of Goodrich tires, batteries, and automotive accessories ("TBA") to its retail gasoline dealers. By its order, the Commission enjoined Goodrich and Texaco from carrying out their agreement and from performing or entering into sales commission arrangements with any other companies. On review, the Court of Appeals for the District of Columbia Circuit set aside the Commission's order and directed the Commission to dismiss the complaint. *Texaco, Inc.* v. *F.T.C.*, 336 F. 2d 754 (D.C. Cir. 1964). On June 7, 1965, the Supreme Court granted certiorari, vacated the judgment of the Court of Appeals, and directed that the case be remanded to the Commission "for further proceedings, without the participation of Chairman Dixon, in light of *Atlantic Refining Co.* v. *Federal Trade Comm'n,* [381 U.S. 357 (1965)]." *F.T.C.* v. *Texaco, Inc.*, 381 U.S. 739, 740.

In *Atlantic,* the Supreme Court upheld (1) the Commission's decision that a sales commission agreement between Atlantic Refining Company and Goodyear Tire & Rubber Company was an unfair method of competition, and (2) the Commission's order prohibiting Atlantic and Goodyear from carrying out their agreement and from performing or entering into any other sales commission agreements. The Commission, without the participation of Chairman Dixon and Commissioner MacIntyre, has reviewed afresh the entire record in this proceeding, in the light of the Supreme Court's decision in *Atlantic.* We have concluded, for the reasons set forth below, that the sales commission agreement involved here is, in its fundamental operation and effect, indistinguishable from the one held unlawful in *Atlantic,* and that an order like the one affirmed by the Supreme Court in *Atlantic* should be entered here.

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[1] Section 5 provides in relevant part:

"Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

I

An assessment of the relationship between this case and *Atlantic* requires a brief description of the events leading to this remand. This is one of three companion cases in which the Commission challenged, as an unfair method of competition, sales commission arrangements between major rubber companies and major oil companies. In *Goodyear Tire & Rubber Co.*, 58 F.T.C. 309, decided March 9, 1961, the Commission entered an order prohibiting Goodyear and Atlantic from employing sales commission plans. On the same day, in *Firestone Tire & Rubber Co.*, 58 F.T.C. 371, an identical order was entered against Firestone and Shell Oil Company. The Commission's order in *Goodyear* has been affirmed by the Supreme Court. *Atlantic Refining Co.* v. *F.T.C.*, 381 U.S. 357, affirming 331 F. 2d 394 (7th Cir. 1964). An appeal from the Commission's order in *Firestone* is pending in the Court of Appeals for the Fifth Circuit.

In both *Goodyear* and *Firestone* the Commission's reasoning was identical: It upheld the hearing examiner's finding that the oil companies used overt coercive tactics to force their dealers to buy the sponsored rubber companies' TBA products. But the Commission specifically declined to rest its decisions upon a finding of coercion or to limit its orders to injunctions against coercive tactics. Instead, it examined the unique degree to which the economic existence of gasoline dealers is dependent upon the good will of their major oil company suppliers, and concluded that the oil company "has sufficient economic power with respect to its . . . distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics . . . ." (58 F.T.C. at 364–65, 407.) The Commission regarded "overt acts of coercion as mere symptoms of a more fundamental restraint of trade inherent in the sales commission itself" (58 F.T.C. at 348, 398). Analyzing the actual operation of the sales commission plan in the context of the economic relationship between the oil company and its dealers, the Commission concluded that the competitive effects of the sales commission plan were like those of an illegal tying arrangement—it "presents a classic example of the use of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)" (58 F.T.C. at 367; see 58 F.T.C. at 406). Since the amount of commerce affected was "not insubstantial," the agreements were held unlawful.

However, in this proceeding involving the Goodrich-Texaco

sales commission plan, the Commission did not reach the same result. On the same day that it issued its orders in *Goodyear* and *Firestone,* the Commission held that although "Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics," the record did not contain "sufficient market data to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA." The case was remanded to the hearing examiner for the taking of additional evidence on that issue. *B. F. Goodrich Co.,* 58 F.T.C. 1176, 1178–79, 1183.

This disposition was, at the very least, enigmatic: In *Goodyear,* the Commission found that the competitive effect of the sales commission plan, like a tying arrangement, was the foreclosure of the substantial TBA marketing outlets represented by Atlantic's dealers. This finding was based upon competing wholesalers' testimony that they were unable to sell to Atlantic dealers who feared that Atlantic would look with disfavor upon their purchase of any but Atlantic-sponsored TBA products. Having made this finding, the Commission made no analysis of "market data" other than to observe that the amount of commerce affected was "not insubstantial" since Atlantic had sold about $50 million in sponsored TBA products during the period 1950–1956. (58 F.T.C. at 359–66) In *Goodrich* the Commission did not reject the hearing examiner's acceptance of the testimony of competing wholesalers regarding foreclosure of Texaco outlets, which was similar to, and as substantial as, that in *Goodyear.* The amount of commerce affected in *Goodrich* was considerably more substantial than that in *Goodyear:* in the five-year period 1952–1956 Texaco sold more than $245 million in sponsored TBA, almost five times as much as was involved in *Goodyear* during a six-year period. What additional "market data" was required is unclear.[2]

On remand, after taking further evidence, the hearing examiner found that the sales commission plans had been shown to be an unfair method of competition, and entered an order identical to those previously entered in *Goodyear* and *Firestone.* An appeal was again taken to the Commission. By that time, the composition of the Commission had changed and only one of the Commission-

[2] In *Firestone* the Commission did consider market share data relating to the entire market for TBA, including data relating to other outlets for TBA other than service stations, and other methods of distributing TBA other than sales commission plans. But none of this information was present in *Goodyear,* and so presumably this was not the kind of "market data" deemed critical by the Commission to a finding of illegality.

ers (Commissioner Anderson) who had participated in the Commission's earlier decision remained on the Commission. On this second appeal to the Commission, much of the evidence introduced on the remand was challenged as incompetent or immaterial. The Commission concluded that the challenged evidence was unnecessary to its decision, and, with Commissioner Anderson dissenting, upheld the examiner's order.[3] In its view, the legal principles under which the sales commission plans were held unlawful in *Goodyear* and *Firestone* were equally applicable to the *Goodrich* record, even without the challenged evidence (*B. F. Goodrich Co.*, Docket 6485, order issued April 15, 1963) [62 F.T.C. 1172].

On appeal, the Court of Appeals for the District of Columbia Circuit reversed and ordered that the complaint be dismissed.[4] After holding that Chairman Dixon was barred from participating in the decision of the case, the Court of Appeals went on to reject the Commission's decision on the merits. It rejected the examiner's finding that Texaco employed coercive tactics and then held that "the Commission erred in concluding that Texaco has sufficient economic power over its dealers, without the use of coercive tactics, to cause them to buy substantial quantities of Goodrich TBA." (336 F. 2d at 762.) Instead, it found that Texaco dealers "are quite free to accept or reject" the oil company's "recommendation" to puchase sponsored TBA products (*id.* at 763).

The fundamental premise underlying this conclusion was the Court of Appeals' finding that there was "no basis in this record for the Commission's conclusion that Texaco has controlling economic power over its dealers" and that Texaco's "contracts with [its] dealers do not give rise" to an inference that it did. (*Id.* at 762.) In the court's view, the "promotional services" performed by Texaco were indistinguishable from, and no less lawful than, conventional salesmanship to wholly independent purchasers.

This approach conflicted with that of the Court of Appeals for the Seventh Circuit, which affirmed the Commission's order in *Goodyear*.[5] For the Seventh Circuit the starting point for any realistic assessment of the nature and competitive effect of an oil company's "recommendations" under the sales commission plan was the economic power which the oil company possessed over its

[3] We agree that the evidence challenged on the second appeal to the Commission is unnecessary to our decision and have stricken the Findings and Conclusions of the hearing examiner based upon it.

[4] *Texaco, Inc.* v. *F.T.C.*, 336 F. 2d 754 (D.C. Cir. 1964).

[5] *Goodyear Tire & Rubber Co.* v. *F.T.C.*, 331 F. 2d 394 (7th Cir. 1964).

dealers and which derived from the contractual relationship between them. In its view, the "heart of this case is the economic power Atlantic possesses over its service station dealers" (331 F. 2d at 400). Such power was not at all dependent upon coercive tactics.[6] Rather, the "keystone" to that power could be found in the "lease and equipment loan contract with their short term and cancellation provisions." (*Ibid.*) Viewed in the context of these provisions, the "service station dealer is more of an economic serf than a businessman free to purchase the TBA of his choice." (*Ibid.*) Reaching an opposite conclusion from that of the District of Columbia Circuit in *Texaco,* the Seventh Circuit held (*id.* at 401):

> Atlantic's power to cause its dealers to carry either Goodyear or Firestone TBA does not depend upon overt coercive methods. The totality of facts surrounding the relationship between the oil company and the dealers points to one conclusion: the oil company is able to exert sufficient economic power over its dealers so that for all practical purposes they are required to carry sponsored TBA.
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> Atlantic says that its influence over its dealers to purchase sponsored TBA short of force, threat, or intimidation is lawful; that it may recommend high quality TBA to its dealers; and that such action serves a legitimate business purpose in the promotion of the sale of gasoline. This would be a persuasive argument except for the dealers' economic dependency upon the oil company. In that setting, recommendation is tantamount to command. Covert practices are as efficient as overt action. Sophisticated methods of pressuring the dealers into carrying sponsored TBA are as effectual as express covenants and open threats.

Supreme Court review was sought in both *Texaco* and *Atlantic-Goodyear*. The Commission, arguing that different dispositions of the two cases based upon narrow factual distinctions would be inappropriate, framed the issue presented by both cases in identical, broad terms, asking the Court to hold that:

> [I]t is an unfair method of competition, in violation of Section 5 of the Federal Trade Commission Act, for a major rubber company and a major

[6] The Seventh Circuit upheld the Commission's finding of coercion; the District of Columbia Circuit rejected it. The evidence of coercion in *Texaco* was no less substantial than that in *Atlantic-Goodyear*. The different results on appeal appear attributable to two factors: (1) the Seventh Circuit deferred to the hearing examiner's assessment of the witnesses' credibility, and (2) while only a few dealer witnesses testified to coercive tactics and a considerably larger number of dealers called by respondents testified to the contrary, the Seventh Circuit thought the hearing examiner correctly evaluated the entire testimony in light of the economic dependency of dealers upon the oil company. Review in the Supreme Court of the finding of coercion was not sought in *Atlantic*. To the extent respondents seek to distinguish this case from *Atlantic* on the presence or absence of coercion, we conclude that no such factual distinction exists; we do not disturb the examiner's finding of coercion which was based essentially on his assessment of the credibility of the witnesses. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 495–96. However, as we point out below, the fundamental issue here—the legality of sales commission agreements between major oil and major rubber companies—does not turn on a finding of coercion, and we do not rest our decision upon it.

oil company to enter into an agreement under which the oil company, in return for a commission, sponsors the sale of the rubber company's products to the oil company's retail dealers.[7]

In both cases the Commission urged the same broad rationale reflected by the Commission and Seventh Circuit decisions in *Goodyear:* (1) Because of the gasoline dealer's singular dependence upon, and subservience to, his major oil company supplier, the oil company had the power to require its dealers to purchase substantial quantities of TBA without overt coercion; (2) the promotional services which the oil company was obligated to, and did, perform under the sales commission agreement constituted the exercise of that power for the benefit of the sponsored TBA supplier; and (3) as a result, the effect of the sales commission plan is like that of a tying agreement, foreclosing competing non-sponsored suppliers from the substantial market of the sponsoring oil company's dealers.[8]

The Supreme Court reviewed the *Atlantic-Goodyear* case for the purpose of resolving the "apparent conflict" with *Texaco* (381 U.S. at 363). The Court affirmed the Seventh Circuit's decision, and a week later vacated the judgment of the District of Columbia Circuit in *Texaco* and ordered that the case be remanded to the Commission for reconsideration in light of the decision in *Atlantic* (*F.T.C.* v *Texaco, Inc.*, 381 U.S. 739).

II

We turn then to the threshold question in this remand proceeding: What light is cast by the Supreme Court's decision in *Atlantic* upon the appropriate disposition of this case?

Reading its opinion against the background set forth above, we can draw only one conclusion: In upholding the Seventh Circuit and Commission decisions, the Supreme Court approved their broad rationale, rejected the approach taken by the District of Columbia Circuit in this case, and enunciated a rule which transcends the confines of the particular facts involved in *Atlantic.* In the Court's view, while coercive practices aggravate the restraint imposed by the sales commission plan, it is the oil company's power over its dealers, derived from the contractual relationship between them, and the utilization of that power through the performance of the promotional services required by the sales com-

[7] *F.T.C.* v. *Texaco, Inc., supra,* Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia, p. 2; *Atlantic Refining Co.* v. *F.T.C., supra,* Brief for the Federal Trade Commission, p. 2.

[8] *Atlantic Refining Co.* v. *F.T.C., supra,* Brief for Federal Trade Commission, pp. 32-34; *F.T.C.* v. *Texaco, Inc., supra,* Petition for a Writ of Certiorari, pp. 16-19.

mission agreement, which renders the sales commission plan unlawful.

The starting point for the Supreme Court's analysis, like the Seventh Circuit's, is reflected in its emphasis upon the oil company's considerable economic power over its dealers. The Court said (381 U.S. at 368):

> [Atlantic and its dealers] simply do not bargain as equals. Among the sources of leverage in Atlantic's hands are its lease and equipment loan contracts with their cancellation and short-term provisions. Only last term we described the power implications of such arrangement in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), and we need not repeat that discussion here. It must also be remembered that Atlantic controlled the supply of gasoline and oil to its wholesalers and dealers. This was an additional source of economic leverage, *United States* v. *Loew's, Inc.*, 371 U.S. 38, 45 (1962)....

In this context, "threats and coercive practices" merely "bolstered" the "lever" which resulted from this economic power (*id.* at 369). The Court viewed the oil company's aggressive and vigorous salesmanship in carrying out the sales commission plan, wholly apart from any coercive tactics, as an exertion of "the persuasion that is a natural incident of its economic power" (*id.* at 368), rather than as the "recommendations" of a salesman to an independent purchaser "free to accept or reject" them.

Accordingly, the Court accepted the Commission's and the Seventh Circuit's characterization that the sales commission contract, which obligated the oil company to use its power over its dealers to sell the sponsored rubber companies' TBA, had the same "central competitive characteristic" as a tying agreement—"the utilization of economic power in one market to curtail competition in another." (*Id.* at 369.) Indeed, in the Court's view, that was its primary if not sole purpose. Under the sales commission plan (as the records in both *Atlantic* and *Texaco* show), the oil company, without making any investment in distributional facilities or TBA inventory, and without relieving the TBA supplier of the burden of sales, distribution, and service, is nevertheless paid large commissions for its promotional efforts. Accordingly, the Court found that "it is difficult to escape the conclusion that there would have been little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers . . ." (*id.* at 376).

In sum, the Supreme Court, in upholding the Commission's

order prohibiting outright the use of the sales commission plan by Atlantic and Goodyear, was also affirming the rationale of the Commission's decision, which the Court described as follows (*id.* at 361):

> [T]he Commission considered the coercive practices to be symptomatic of a more fundamental restraint of trade and found *the sales-commission plan illegal in itself as* "a classic example of the use of economic power in one market . . . to destroy competition in another market . . . ." (Emphasis supplied.)

At the same time the Supreme Court dispelled the ambiguities generated by the Commission's first decision in this proceeding. An assessment of the competitive effects of the sales commission plan does not require an analysis of "market data." Since the testimony only confirmed what was essentially implicit in the relationship between the oil company and its dealers—that the oil company's sponsorship under the sales commission plan has the competitive effect of foreclosing non-sponsored TBA suppliers from access to the market represented by the oil company's dealers—further market analysis is unnecessary. It is sufficient to show that a "not insubstantial portion of commerce is affected."[9]

To be sure, the Supreme Court took note of the striking demonstration in *Atlantic* of both the extreme abuses attending Atlantic's use of the sales commission plan, and the dramatic effectiveness of the plan in foreclosing non-sponsored TBA suppliers from the Atlantic service station market. *Atlantic* was the first case before the Court involving a challenge to the sales commission plan; it presented for review a Commission decision whose rationale would render unlawful the sales commission plans themselves, whenever used by major oil and rubber companies. The Court, therefore, made a careful examination of the entire record to assess the "economic and business stuff out of which these arrangements emerge," so as to determine whether they are "naked

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[9] The Court said in this regard (*id.* at 371):

"Goodyear and Atlantic contend that the Commission should have made a far more extensive economic analysis of the competitive effect of the sales-commission plan, examining the entire market in tires, batteries and accessories. But just as the effect of this plan is similar to that of a tie-in, so it is unnecessary to embark upon a full-scale economic analysis of competitive effect. We think it enough that the Commission found that a not insubstantial portion of commerce is affected."

Atlantic had indeed based its contention that a more extensive economic analysis was necessary, in part, upon the Commission's first decision to remand *Goodrich-Texaco* to take evidence of "market data" for an assessment of the competitive effects of the sales commission plan. *Atlantic Refining Co.* v. *F.T.C.*, *supra*, Brief of Petitioner The Atlantic Refining Company, pp. 31–32, 57, n. 43.

restraints of trade with no purpose except stifling of competition" and whether "they may be too dangerous to sanction" (*White Motor Co.* v. *United States,* 372 U.S. 253, 263). But, like the Commission, the Court looked upon the dramatic aspects of *Atlantic* as "symptomatic" of a broader problem. Having examined, as reflected by the record in *Atlantic,* the dangers presented by sales commission plans, their essentially anticompetitive character, and the vivid demonstration of the abuses which may attend their use, the Court concluded more generally that the sales commission plan itself "amount[s] to a device that permits suppliers of tires, batteries and accessories, through the use of oil company power, to effectively sew up large markets" and, as such, could not be defended even though it might be an efficient and economic method of distribution (381 U.S. at 371). Consequently, the Court's ultimate concern was not limited to the sales commission plan involved in *Atlantic,* but was rather with "the destructive effect on commerce that would result from the widespread use of these [sales commission] contracts by major oil companies and [TBA] suppliers" (*ibid.*).

The Court's concern in *Atlantic* with the dangers presented by the "widespread use" of the sales commission plans by major oil and TBA suppliers is especially significant. *Atlantic* was not, as the Court was well aware, an isolated case. In *Texaco,* in which a petition for certiorari was pending at the time of the Court's decision in *Atlantic,* the record showed that Texaco entered into sales commission plans with three of the leading rubber companies—Goodrich, Firestone and, under an agreement instituted about the time this proceeding began, U.S. Rubber Company. Goodrich also had sales commission plans with Continental Oil Company and other oil companies as well. The *Firestone* and *Goodyear-Atlantic* cases show that both Goodyear and Firestone have sales commission plans with Shell and Atlantic; that in addition, Goodyear has sales commission plans with Sinclair Refining Company, Richfield Oil Company, and a number of other oil companies; and that Firestone, in addition to its sales commission plan with Texaco, has sales commission arrangements with Union Oil Company, Continental Oil Company, and others.

The service station dealer outlets affected by these sales commission plans constitute a vast market for the sale of TBA; and at the same time only the largest rubber companies are the beneficiaries of the marketing advantages derived from the sales commission plans, a fact which would appear to confirm the Commis-

sion's finding in *Atlantic* that smaller TBA suppliers are unable to utilize the sales commission arrangement (58 F.T.C. at 367). Given the Court's view of the fundamentally anticompetitive character of the sales commission plan when used by oil companies possessing power over their dealers, the proliferation of these plans between major oil companies and major rubber companies constitutes in itself an acute danger for competition. It was in this context that the Court, looking beyond *Atlantic,* and the specific facts involved there, concluded that generally the use of the sales commission plan by major oil companies and major rubber companies, whatever its economic advantages, is a practice "too dangerous to sanction."

This conclusion is buttressed as much by what the Court did, as by what it said. The Court's affirmance of the Commission's order prohibiting outright the use of sales commission plans by Atlantic and Goodyear not only between themselves but with other companies had broad competitive consequences in both the TBA and petroleum markets. If the Court's decision were to be read as limiting the Commission in its evaluation of other sales commission plans to the specific factual circumstances involved in *Atlantic,* one major oil and one major rubber company would be prohibited not only from further engaging in coercive tactics, but from using a sales commission plan which its major competitors might still be free to use.

For example, at the present time, it would appear that three of the largest rubber companies, Goodrich, Firestone, and U.S. Rubber, use sales commission plans providing Texaco sponsorship to promote their TBA products to Texaco's dealers. Yet, Goodyear could not ask Texaco (even assuming that Texaco has demonstrated no propensity to use coercive tactics in performing its other sales commission plans) to perform for it the same promotional service which Texaco performs for Goodyear's three major competitors. At the same time, Texaco, one of the largest oil companies, without making any investment in distributional facilities or TBA inventory, receives substantial commissions for the sale of TBA products to its service stations. Atlantic, a major oil company but substantially smaller than Texaco, is barred from the same economic opportunity, no matter how scrupulously it might refrain from coercive tactics in the future. Yet, the same kinds of leases, equipment loan contracts, and sales agreements stressed by the Court in *Atlantic* also render Texaco dealers economically subservient to, and dependent upon, Texaco; and its sales commis-

sion plans require Texaco to perform the same kind of vigorous promotional campaign described in *Atlantic*. To bar only Atlantic and Goodyear from the use of the sales commission plan would thus not only create a harmful competitive imbalance among the leading firms of the two industries, it would be arbitrary and inequitable.

The Supreme Court was informed of the harmful and anomalous consequence of a rule confined to the particular facts of *Atlantic*.[10] We find nothing which would permit us to read the Court's opinion, or its remand order in this proceeding, as sanctioning such results.

III

In our view the Supreme Court's decision in *Atlantic* compels the conclusion that the Texaco-Goodrich plan is an unfair method of competition and that Texaco and Goodrich should be prohibited, as were Atlantic and Goodyear, from performing or entering into any other sales commission plans. The Court's concern for the dangers which derived from a widespread use of the sales commission plan is especially relevant here. As has been pointed out, Texaco is considerably larger than Atlantic. Its service station dealers constitute an even more significant TBA market. Stations operated by Texaco's lessee dealers [11] and contract dealers [12] constituted 16.5% of the service stations in the United States in the year 1955. In that year, Texaco had approximately six times as many contract and lessee dealers as Atlantic.[13]

Moreover, as we have noted, in *Atlantic* the total sales to At-

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[10] The Government in its petition for certiorari in *Texaco* told the Court:
"Even if the cases [Atlantic and Texaco] could be distinguished on their facts, the conflict, if unresolved, would create an anomalous situation in which one major oil company and a large tire company were permitted to employ essentially the same marketing practice that their competitors were prohibited from using."
F.T.C. v. *Texaco, Inc.*, 381 U.S. 739, Petition for a Writ of Certiorari, p. 12.
Similarly, Atlantic told the Supreme Court that:
"The order in each of the two cases represents a rule of general application, not the disposition of an isolated controversy. The rule should be uniform throughout the industry. Moreover, Atlantic and Texaco are competitors; and Atlantic, the smaller company, should not be under a marketing handicap as against Texaco, which is three times larger."
Atlantic Refining Company v. *F.T.C.*, *supra*, Brief of Petitioner The Atlantic Refining Company, p. 34.

[11] A lessee station (referred to as a C station) is one that is either owned or leased by Texaco and in turn leased by it to the dealer.

[12] A contract station (referred to as D stations) is either owned by the operator or leased by him from someone other than Texaco. In addition to selling gasoline directly through C and D stations, Texaco sells indirectly through consignees (B accounts) and independent distributors (E accounts), who operate bulk storage plants, purchase Texaco products and sell them to service station dealers and consumers.

[13] In 1955 Texaco had approximately 30,000 contract and lessee dealer stations; Atlantic had approximately 5,000 service stations. 381 U.S. at 363.

lantic dealers of Goodyear and Firestone products for the six-year period June 1950-June 1956 amounted to about $50 million. Goodrich and Firestone sold almost $60 million in TBA products to Texaco dealers in the year 1956 alone. In the five-year period 1952–1956, the sales of the sponsored Goodrich and Firestone TBA to Texaco amounted to approximately $245 million.

The economic dependence of Texaco dealers is no different from that of Atlantic dealers. Thus, Texaco lessee dealers, who constitute the most important segment of service station TBA outlets, have the same kind of short term leases, renewable on a year-to-year basis and terminable at year's end upon ten days' notice of either party. These leases contain the same kind of general "housekeeping" requirements concerning the station's use, maintenance and appearance which, if breached, can result in immediate cancellation by Texaco without notice to the lessee. The lessees have often made a considerable investment in their stations, at times, on funds borrowed from Texaco. "Contract dealers," who own their stations or lease them from third parties, nevertheless lease their pumps and other equipment from Texaco. Both lessee and contract dealers purchase their gasoline pursuant to an "Agreement of Sale," prescribing annual minimum and maximum purchases at current Texaco prices. These "Agreements of Sale" also are generally on a year-to-year basis, terminable at year's end upon thirty days' notice, and automatically cancelled if a lessee dealer's lease is terminated.

In these circumstances, the competitive advantage given a TBA supplier whose products are sponsored by Texaco need hardly depend upon the use of overtly coercive tactics. Here, as in *Atlantic*, Texaco's "promotional" efforts in carrying out its sales commission agreement with Goodrich and Firestone constitute a forceful exercise of its economic power over its dealers. Its consequence is to impress upon Texaco dealers, through constant repetition and in a variety of ways, that Texaco, whose favor the dealer must court, has a strong interest in their purchase of the sponsored TBA products.

Even before the dealer has been accepted, Texaco begins its campaign on behalf of the sponsored TBA products. Texaco personnel, when interviewing prospective dealers for new or established service stations, advised them of the importance of TBA, recommending the TBA products of Goodrich and Firestone. Once the dealer is selected, and before he opens his station, Texaco frequently informs Goodrich and Firestone of the prospective open-

ing of his station, affording Goodrich and Firestone a head start over competitors in the initiation of their own sales campaign on behalf of their products. Thereafter, Texaco, often with the direct assistance and participation of the rubber companies, maintains a continuous campaign designed to induce the dealer to purchase the sponsored TBA products. Dealer meetings and training courses designed to educate the dealer in the use of TBA products utilize the products of the sponsored companies. Texaco participates in the sponsored companies' seasonal and special sales, promotional and advertising campaigns. Texaco publications sent to its dealers carry displays of the sponsored TBA products. And, perhaps most effective of all, the Texaco salesman continually carries the message in his day-to-day contacts with the dealers. In this regard, it is important to remember that these Texaco salesmen, who are most directly involved in pushing the sponsored TBA products, also play a critical role in the annual dealer evaluations and in the determination of whether the dealer's lease and contractual relations with Texaco are to be renewed. At the same time, Texaco, in making promotions, evaluates these salesmen's performances in part by their success in selling sponsored TBA products.

Frequently, both the Texaco and rubber company salesmen call upon the dealer together ("double teaming"). The Supreme Court in *Atlantic* noted the inherently coercive effect of that device, pointing out that since "the annual dealer evaluation by Atlantic salesmen carried substantial weight when the district managers decided upon annual lease extensions . . . dealers were . . . understandably susceptible to the encouragement of Goodyear salesmen when Atlantic men were nearby looking over their shoulders." (381 U.S. at 375.) And, as in *Atlantic,* each dealer's performance as a purchaser of sponsored TBA is also fully disclosed by the reports furnished by the sponsored rubber companies to Texaco of the amount of sponsored TBA purchased by each dealer. As the record indicates, Texaco, in accessing the economic success of service stations, was vitally concerned with the amount of sponsored TBA sold by its dealers.

Here, as in *Atlantic,* there was substantial testimony by non-sponsored TBA suppliers confirming the conclusion that, as a result of Texaco's vigorous sales campaign to its dealers, many Texaco dealers were left with the impression that Texaco would look with disfavor upon their purchase of non-sponsored TBA products and that they were required to purchase the sponsored TBA.

As a result, these non-sponsored suppliers were unable to gain access to these Texaco service station outlets. In sum, the Supreme Court's characterization of the operation of the sales commission plan in *Atlantic* is equally applicable here. Texaco, with Goodrich's "encouragement and assistance, has marshalled its full economic power in a continuing campaign to force its dealers and wholesalers to buy [Goodrich] products" (*id.* at 371).

Respondents argue that there are a number of factual distinctions between this case and *Atlantic*. But as we read *Atlantic* none of these distinctions is material. As already demonstrated, under *Atlantic* it is the oil company's power over its dealers, and the exercise of that power through the performance of the promotional services required by the sales commission agreement, and not coercive tactics, which condemns the sales commission plan. And while, unlike *Atlantic*, the sales commission plans involved here did not allocate territories between the sponsored TBA suppliers, the gravest danger to competition presented by the sales commission plans here as in *Atlantic* is in their capacity for hindering competition between sponsored and non-sponsored TBA suppliers. A device which may enhance the position of two or three leading TBA suppliers vis-a-vis smaller competitors cannot be defended on the ground that it still leaves these few firms free to "compete" with one another for access to the Texaco service station market.

Respondents also argue that, unlike *Atlantic*, there is here no showing that Texaco's promotional campaign was effective. Thus, they contend that the statistics show that only about 30% of Texaco's dealers purchased sponsored TBA products. This figure, however, is derived by considering the number of Texaco dealers purchasing sponsored TBA in proportion to the total number of lessee and contract dealers. In fact, however, as respondent Goodrich, itself, points out,[14] many contract dealers do not handle, and are not appropriate outlets for, TBA products. Since more than half of the total number of Texaco dealers are made up of contract dealers, the actual success of Texaco's sales commission plans would appear to be considerable indeed. But, under *Atlantic*, proof of the actual effectiveness of the sales commission plan is unnecessary. The Court's ultimate concern was with the cumulative danger presented by the "wide-spread use" of the plans, rather than the relative effectiveness of particular plans. More-

[14] Brief of Respondent The B.F. Goodrich Company, In Answer to Appeal Brief of Counsel Supporting the Complaint, dated March 28, 1960, p. 28.

over, the Court viewed the sales commission plan when used by a major oil company as having the same competitive characteristics as a tying agreement. As in the case of a tying agreement, the fact that the sales commission plan has not fully achieved its purpose, or that nonsponsored suppliers can overcome the unfair competitive advantage which the sales commission gives the sponsored supplier, is no defense. *Cf. International Salt Co.* v. *United States,* 332 U.S. 392, 397; *Northern Pacific R. Co.* v. *United States,* 356 U.S. 1, 12; *Osborn* v. *Sinclair Refining Co.,* 286 F. 2d 832, 838 (4th Cir. 1960), *cert. denied* 366 U.S. 963.

In essence, respondents urge upon us the rationale of the District of Columbia Circuit's opinion—that despite the economic dependence of the Texaco dealer upon Texaco, Texaco's vigorous promotional activities under the sales commission plan are nothing more than the "recommendations" of a salesman to a purchaser "free to accept or reject" them. In affirming the Seventh Circuit's decision in *Atlantic,* the Supreme Court rejected that position.

IV

We think that orders against both Texaco and Goodrich, identical with the orders against Atlantic and Goodyear which were affirmed by the Supreme Court, are appropriate here. Texaco should clearly be enjoined from entering into or performing any sales commission plan. As to Goodrich, like Goodyear, it was "no silent or inactive partner in the implementation of the sales-commission plan" (381 U.S. at 373). As the record demonstrates, the sales commission plan here is essentially a joint effort in which the massive power of a major rubber company and a major oil company is united, to the disadvantage of non-sponsored competitors, behind the sale of the rubber company's TBA products. Goodrich now has sales commission plans with five other oil companies: Continental, Shell-American, Jenney, Ohio Oil and Emblem. Its sales commission plans with these companies are substantially the same as those it has with Texaco. There is nothing in this record to indicate that these oil companies do not also have the kind of economic power possessed by Texaco over its dealers. We would not be justified in concluding that any of these other plans, unlike Goodrich's plan with Texaco, was not an attempt to buy the economic power of the oil company over its dealers in order to obtain an unfair competitive advantage over competing rubber companies. The order therefore prohibits Goodrich from

entering into or carrying out any sales commission plan. If Goodrich should come forward with facts establishing that it has a sales commission plan with any oil company which does not possess economic power over its dealers, the proceeding can always be reopened for such modification of the order as may be warranted. See *Atlantic Refining Co.* v. *F.T.C., supra,* at 377.

Chairman Dixon and Commissioner MacIntyre did not participate in this decision.

FINAL ORDER

By its order dated June 16, 1965, the Court of Appeals for the District of Columbia Circuit remanded this case to the Commission for further proceedings in conformity with the opinion of the Supreme Court herein dated June 7, 1965 [7 S.&D. 1263]. Pursuant thereto, the Commission heard oral argument and received written briefs, and fully considered, on the basis of the entire record, all questions of fact and law presented by the appeals from the hearing examiner's revised initial decision of September 24, 1962 [62 F.T.C. 1172, 1177]. For the reasons stated in the accompanying opinion of the Commission,

It is ordered, That:

A

The revised initial decision of the hearing examiner be, and it hereby is, modified as follows:

(1) Findings 10(b), 32, 33, 34, and conculsion 7 are stricken. [62 F.T.C. at 1182, 1191, 1192, 1194]

(2) The first sentence of finding 8 [62 F.T.C. at 1181] is deleted, and the following is substituted therefor: "Tires, batteries, and accessories have become a necessary and integral part of the business operation of the ordinary Texaco dealer, and in particular for Texaco's lessee dealers."

(3) The last sentence of finding 20 [62 F.T.C at 1187] is deleted, and the following is substituted therefor: "It would be unusual to expect that a Texaco salesman would vigorously insist to a dealer that he had a right to buy wherever he might wish when Texaco's evaluation of the salesman's performance was in part based upon his success in selling sponsored TBA products to the dealer."

(4) The second sentence in finding 26 [62 F.T.C. at 1189] is deleted, and the following is substituted therefor: "There are written contracts with Texaco, Conoco, and Ohio-Marathon, but

there are no formal contracts with the other three oil companies, which are smaller local concerns. Shell-American and Jenney operate generally with only service station customers selling at the retail level, but without wholesale outlets such as consignees, jobbers, and distributors."

(5) The second sentence in finding 30 [62 F.T.C. at 1190] is deleted, and the following is substituted therefor: "From 1952 to the end of 1955, the number of Conoco leased stations increased from 1,138 to 1,765.[1]"

(6) The last sentence of finding 31 [62 F.T.C. at 1190–1191], and the chart immediately below, are deleted, and the following substituted therefor: "Outlets of the additional oil companies having sales commission contracts with Goodrich during the years 1953–55 were as follows:

	12–31–53	*12–31–54*	*12–31–55*
Conoco	1061	1272	1508
Shell-American	53	66	60
Jenney Mfg.	138	188	201
Ohio Oil	594	666	804
Emblem	30	9	25
	1876	2201	2598[3]"

(7) The first sentence of conclusion 5 [62. F.T.C. at 1194] is deleted, and the following is substituted therefor: "Practically all of the representatives of the competitors of Goodrich called as witnesses testified generally that they had difficulty in selling TBA to Texaco stations and testified specifically as to the reasons given by certain Texaco dealers for not buying or selling their TBA items."

B

The hearing examiner's revised initial decision of September 24, 1962 [62. F.T.C. 1172, 1177], as hereinabove modified and supplemented by the accompanying opinion, and the order contained in said revised initial decision be, and they hereby are, adopted as the decision and order of the Commission.

C

The respondents shall, within sixty (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 of their compliance with this order.

Chairman Dixon and Commissioner MacIntyre not participating.

IN THE MATTER OF

OGUS, RABINOVICH & OGUS, INC.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1032. Complaint, Jan. 14, 1966—Decision, Jan. 14, 1966

Consent order requiring a New York City retailer of fur products to cease falsely invoicing its fur products by omitting and abbreviating required information and deceptively advertising said products, including mink hats, by using fictitious pricing claims.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Ogus, Rabinovich & Ogus, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Ogus, Rabinovich & Ogus, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent is a retailer of fur products with its office and principal place of business located at 304 East 45th Street, New York, New York.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent has been and is now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.