

Complaint

84 F.T.C.

IN THE MATTER OF

PHILLIPS PETROLEUM COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 8930. Complaint, May 15, 1973—Final Order, Dec. 27, 1974*

Consent order requiring a Bartlesville, Okla., distributor of petroleum, tires, batteries and automobile accessories, among other things to cease engaging in anticompetitive practices with respect to its lessee dealers. Further, with few exceptions allowed, respondent must offer its dealers leases with a term of not less than five years.

Appearances

For the Commission: *Martin A. Rosen* and *Richard L. Williams*.

For the respondent: *Lewis J. Ottaviani*, Bartlesville, Okla., *Robert A. Aitman* and *Carson M. Glass*, *Clifford, Warnke, Glass, McIlwain & Finney*, Wash., D.C.

COMPLAINT

The Federal Trade Commission having reason to believe that the Phillips Petroleum Company, a corporation, hereinafter sometimes referred to as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. Section 45), and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. For purposes of this complaint, the following definitions shall apply:

1. "Lessee dealer" means a tenant operating a gasoline service station under lease from Phillips Petroleum Company.
2. "Cancel or cancellation" means to terminate, invalidate or refuse to renew any lease of a lessee dealer for any reason whatsoever.
3. "TBA" means tires, batteries and accessories for automobiles.
4. "Petroleum products" means those products produced from petroleum and sold by lessee dealers.

PAR. 2. Respondent, Phillips Petroleum Company, ("Phillips"), is a corporation organized and doing business under the laws of the State of Delaware, with its principal place of business located in Bartlesville, Okla.

PAR. 3. Phillips Petroleum Company is a major oil company primarily engaged in the offering for sale, sale and distribution of petroleum and

TBA products. In 1970, respondent's total assets were \$3,057,000,000. In 1970, gross income of the respondent and its consolidated subsidiaries amounted to \$2,304,500,000. Respondent's net working capital at the end of 1970 was \$378,009,000. Phillips' products are sold through 26,000 outlets, in all 50 states. As of December, 1970, Phillips operated approximately 3,600 lessee dealer outlets throughout the United States.

PAR. 4. Respondent markets its petroleum and TBA products through its owned and operated service stations; through independent lessee-dealer service stations; and through independent distributors. At all times relevant herein, respondent purchased, sold and shipped products in interstate commerce throughout the United States, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Except to the extent that competition has been hindered, lessened, suppressed, or eliminated by the practices alleged in this complaint, respondent has been and is in competition with other corporations, partnerships, individuals or firms engaged in the sale and distribution, in commerce, of petroleum and TBA products.

PAR. 6. In the sale and distribution of its petroleum and TBA products, in commerce, Phillips is a party to contracts which restrain commerce and has engaged and is engaging in, among others, the following unfair methods of competition or unfair acts and practices:

1. Its standard form leases with lessee dealers provide for unreasonably short term leasehold interests, and allow Phillips to arbitrarily cancel on 10 days written notice.

2. Phillips requires by contract or course of dealing that its lessee dealers:

- (a) maintain minimum levels of Phillips' TBA and petroleum products to secure gasoline and/or TBA loans from Phillips,

- (b) purchase a stated minimum gallonage of gasoline from Phillips in amounts which constitute either a dealer's total requirements or a major percentage of the dealers' total gasoline sales, and

- (c) purchase Phillips' TBA products.

3. Phillips' credit card agreements require that lessee dealers may accept charges only for petroleum and TBA products sold or supplied by Phillips.

4. Phillips causes its lessee dealers in the event of cancellation to:

- (a) accept cancellations without recourse to an explanation of the reasons for the cancellation, and

- (b) accept cancellation without cause.

PAR. 7. The above acts and practices have the capacity and tendency of hindering, lessening, suppressing or eliminating competition with the following effects, among others:

1. Phillips' lessee dealers are intimidated or coerced into agreeing to contracts of adhesion whereby they are deprived of:
 - (a) control of their business operations,
 - (b) their choice of suppliers, and
 - (c) obtaining financing from sources other than Phillips;
2. Phillips' lessee dealers operate under the fear of arbitrary cancellation of their leasehold interests which could result in severe financial loss;
3. Phillips' competitors are substantially foreclosed from distributing TBA products to Phillips' lessee dealers;
4. The consuming public is hindered and restricted in its access to the TBA products of Phillips' competitors and other advantages which would result from the natural and unobstructed flow of commerce.

PAR. 8. The aforesaid acts and practices of respondent constitute unfair methods of competition in commerce and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated a complaint charging that the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; and

Respondent and complaint counsel, by joint application filed July 3, 1974, having moved to have the matter removed from adjudication for the purpose of submitting an executed consent agreement; and

The Commission, by order issued July 16, 1974, having withdrawn this matter from adjudication pursuant to Section 2.34(d) of its rules; and

The executed agreement containing the following consent order; an admission by respondents of all the jurisdictional facts set forth in the complaint which the Commission issued; a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint or otherwise; and waivers and provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission

1666

Decision and Order

hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Phillips Petroleum Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located in Bartlesville, Okla.
2. The Federal Trade Commission has jurisdiction of this proceeding and of the respondent and this proceeding is in the public interest.

ORDER

I

For purposes of this order, the following definitions shall apply:

1. The term "lessee dealer" refers to a tenant operating a Phillips Petroleum Company trademarked automotive service station leased to such tenant by Phillips Petroleum Company and such tenant being primarily engaged in the business of reselling automotive gasolines, lubricants, tires, batteries and automotive accessories from the leased premises to the motoring public. The term "lessee dealer" does not include nor refer to jobbers or wholesale distributors of gasolines, lubricants, tires, batteries or automotive accessories; persons who lease a service station from jobbers or wholesale distributors or other third parties; persons who own or lease from third parties the facilities they are operating and receive a flat rental or a monthly accumulated gallonage rental from Phillips Petroleum Company; aviation fixed base operators; and marina outlets.
2. The term "refined petroleum products" refers to automotive gasolines and automotive lubricants customarily sold by lessee dealers, which are produced in the refining process of crude oil and natural gas liquids.
3. The term "TBA" refers to automotive tires and tubes, automotive batteries and automotive accessories, including, but not limited to, spark plugs, oil filters, fan belts, auto lamps, fuses, windshield wipers and blades, antifreeze preparations, waxes, polishes, and other items used on or in the minor servicing or minor repairing of highway automotive vehicles.
4. The term "effective date of this Order" refers to the date of issuance of the Commission's Decision and Order with respect to this matter.

II

It is ordered, That respondent, Phillips Petroleum Company, a corporation, its successors and assigns and respondent's officers, agents,

representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the sale or distribution of refined petroleum products and TBA products in commerce, as "commerce" is defined in the Federal Trade Commission Act, shall not:

1. Enter into, renew or initiate an offer to enter into or renew a lease with a lessee dealer for a term of less than five (5) years as a condition to becoming or remaining a lessee dealer; *Provided, however,*

(i) That in any lease with a lessee dealer respondent shall give such dealer the option to cancel such lease upon sixty (60) days written notice to respondent;

(ii) That where respondent holds any premises as lessee and not as owner for a period of less than five (5) years, respondent may condition the five-year lease offered its lessee dealer upon respondent's renewal of the term of the underlying lease on the premises for a period coextensive with the five-year period of the lease offered the lessee dealer. Such condition shall be conspicuously noted on such lease. In the event respondent does not renew the underlying lease, the term of its lease to its lessee dealer may be the same as the term of such underlying lease;

(iii) that with respect to a lessee dealer who has not operated a service station as a dealer in the sale of gasoline for a period of six (6) months prior to the execution of said lease, respondent shall have the right to terminate the five-year lease offered to such dealer at any time without cause and without arbitration within six (6) months after the date such dealer enters into such lease upon advance written notice of not less than thirty (30) days.

2. Coerce, intimidate or prohibit lessee dealers from purchasing TBA products and refined petroleum products, except gasoline, from non-respondent sources, or require, by contract, agreement, understanding, course of dealing, or by any means whatsoever, that lessee dealers:

(i) deal exclusively in such products manufactured, sold, distributed, or sponsored by respondent;

(ii) refrain from handling such products obtained from non-respondent sources.

3. Prohibit lessee dealers from purchasing gasoline from non-respondent sources; *Provided, however,* respondent may require lessee dealers to maintain on the premises a representative amount

of respondent's trademarked and/or trade named gasolines, for resale to the public; and *Provided further*, That respondent may take such measures as are both lawful and necessary to protect respondent's trademark rights and to avoid violations of federal and state statutes, and regulations adopted pursuant thereto, governing the distribution, handling or sale of gasoline.

4. Refuse to accept from all authorized lessee dealers authorized charges on Phillips credit cards by its valid card holders for purchases made at the leased premises of refined petroleum products and TBA regardless of whether or not such products were manufactured, distributed or sponsored by respondent.

5. By contract or course of dealing:

(i) require any of its lessee dealers to accept product financing from respondent; or in any way prevent its lessee dealers from obtaining product financing from sources other than respondent;

(ii) condition or deny financing of the purchase of any product line by lessee dealers on the basis that a lessee dealer who requests financing is (a) selling another product line which is not manufactured, distributed or sponsored by respondent, or (b) is not purchasing or stocking enough of a product line which is manufactured, distributed or sponsored by respondent.

III

It is further ordered, That from and after the date of this order:

(a) All existing leasehold agreements not in conformity with Part II, Paragraph 1, of this order, shall, within ninety (90) days from the effective date of this order, be renewed so as to conform with the provisions of this order.

(b) All leasehold agreements entered into between respondent and any lessee in conformity with Part II, Paragraph 1, of this order shall be automatically renewed for a term of equal duration unless either party, prior to the expiration of the agreement, gives ninety (90) days advance written notice to the other party of his intention to terminate the agreement; *Provided, however*, respondent may give a ninety (90) day advance written notice of its intention to offer a new lease agreement of different terms and conditions not inconsistent with this order and in such event the existing lease shall remain in effect until a new lease agreement is reached or until either party concludes that an impasse exists and in the latter event either party shall give the other party sixty (60) days advance written notice of termination of the existing lease.

IV

It is further ordered, That immediately after the effective date of this order, a cancellation by respondent prior to the expiration of the term of any lease between respondent and a lessee dealer must be pursuant to sixty (60) days advance written notice of intent to cancel said lease; *Provided, however,* respondent may cancel a lessee dealer without advance written notice in the event of the following:

- (a) Death or legal incompetency of the lessee dealer;
- (b) The institution of insolvency, bankruptcy or receivership proceedings by the lessee dealer or the taking advantage by lessee dealer of any law for the benefit of debtors;
- (c) Vacancy or abandonment of the leased premises for a continuous period of five (5) days;
- (d) If the premises or a sufficient portion thereof to prevent the use thereof as a service station are condemned to be taken for any public purposes or if Phillips elects to execute a voluntary conveyance or assignment in lieu of such taking by condemnation;
- (e) Destruction of the leased premises;
- (f) Dealer is convicted of a felony.

Upon receipt of the requisite notice of intent to cancel, either party may elect to invoke arbitration pursuant to the Commercial Arbitration Rules and the Procedures of the American Arbitration Association (AAA), for the purpose of determining whether good cause exists or existed for the cancellation. If respondent cancels a lessee dealer without advance written notice for the reasons set forth in Part IV, Subparagraphs (a) through (f) above, such lessee dealer may not invoke arbitration. The party invoking arbitration shall give the other party written notice of its intent to invoke arbitration within fifteen (15) days from the receipt of the notice of intent to cancel, setting forth the basis for such invocation and filing two (2) copies of said notice with the Regional Office of AAA closest to said lessee dealer's residence. If such written notice of intention to arbitrate is not made within such fifteen (15) day period, arbitration shall be deemed to have been waived. If arbitration is invoked by either party, such arbitration shall be exclusive and in lieu of any other common law rights. The locale for arbitration shall be fixed by the AAA and shall be selected from the standby facilities maintained by the AAA for arbitration. It is understood and anticipated that such locale shall be the closest available to the lessee dealer's residence.

The arbitrator shall be selected by the parties from the panel of arbitrators of the AAA; said arbitrator shall be empowered to deter-

mine the merits of the good cause issue; assess the costs of arbitration; and the decision of said arbitrator shall be final and binding upon the parties and judgment thereon may be entered in any court of competent jurisdiction. Arbitration shall be no cause for delay; and in the event of a default by either party in appearing before the arbitrator, pursuant to advance written notice, the arbitrator is authorized to render a decision upon the testimony of the party appearing.

The lessee dealer may elect to remain in possession of the leased premises pending the decision of the arbitrator, and for an additional thirty (30) days in the event the decision of the arbitrator is against the lessee dealer; *Provided, however,* That upon motion by respondent showing that the lessee dealer has discontinued operations during normal business hours, the arbitrator shall be empowered to order that respondent may take immediate peaceable possession of the premises.

The arbitrator shall have no power or jurisdiction to add to, subtract from, alter, or modify any of the terms of the lease. Except with respect to costs, as provided below, the arbitrator shall only have power and jurisdiction to determine if good cause for cancellation exists or existed under the provisions of the lease. Further, except for costs, as provided below, the sole remedy that the arbitrator has jurisdiction and authority to award is allowing the dealer to continue as a dealer under the terms of the lease, and the arbitrator does not have jurisdiction or authority to award monetary damages or any other affirmative relief.

If the arbitrator fails to find that good cause exists or existed for cancellation, respondent shall allow the lessee dealer to continue as a lessee dealer under the terms of the existing lease arrangement or enter into a new leasehold agreement conforming with the provisions of this order.

At any time during the arbitration proceedings, the arbitrator, upon motion by either party shall be empowered to order the other party to post bond with a reputable bonding or surety company or otherwise provide security to the arbitrator in an amount sufficient to cover any costs of arbitration to be borne by the parties as hereinafter provided and to cover any losses in rent, reimbursement for supplies or other damages which may be sustained by either party, or other damage to the leasehold during the period following the invoking of arbitration.

At the conclusion of the arbitration proceeding, the arbitrator shall be empowered to assess all costs of arbitration as he deems to be just and equitable under the circumstances of the particular case except that in all instances respondent shall pay its attorneys' fees. If the arbitrator fails to find that good cause exists or existed for cancellation, respondent shall bear all costs of the arbitration.

The lessee dealer's right to elect arbitration, including lessee dealer's time limitations, lessee dealer's remedies, AAA's headquarters address and the Regional Office of AAA closest to the lessee dealer's residence as then known, shall be conspicuously noted in all leases subject to the provisions of this order; *Provided, however*, That with respect to those leased premises subject to the Court's jurisdiction in the case of *United States v. Phillips Petroleum Company and Tidewater Oil Company*, No. 66-1154 (C.D. Cal., 1966) and permitted to be retained by respondent after the entry of a Final Judgment in that case, the requirements of this last paragraph of Part IV as to conspicuous notice in leases shall not be effective until ninety (90) days after the entry of such Final Judgment; *Provided, further*, That with respect to those leased premises subject to the Court's jurisdiction in the aforesaid case which are to be sold or divested by respondent pursuant to such Final Judgment, the requirements of this last paragraph of Part IV as to conspicuous notice in leases shall not apply; and, *Provided, finally*, That the requirements of this last paragraph of Part IV as to conspicuous notice in leases shall in all other instances be made effective ninety (90) days after the effective date of this order.

V

It is further ordered, That from and after the effective date of this order, respondent shall not, directly or indirectly, require, encourage or suggest that its branded jobbers or wholesale distributors enter into contractual arrangements with their dealers which, if entered into by respondent and its lessee dealers, would contravene the provisions of Part II, Paragraphs 2, 3, 4 and 5 of this order.

VI

It is further ordered, That respondent shall, within ninety (90) days after the effective date of this order, serve upon all of its lessee dealers a letter by certified mail, signed by a responsible official binding the respondent, and on official Phillips Petroleum Company stationery, which shall include the following statement in its first paragraph:

The Federal Trade Commission has entered an Order which, among other things, prohibits Phillips Petroleum Company from coercing, restraining or restricting the rights of lessee dealers to function as independent businessmen, as more fully set forth in the relevant provisions of the Order which are enclosed.

The relevant provisions of this order which shall be enclosed in such letters to such lessee dealers are Parts I-IV thereof. This letter shall be submitted to the Commission for approval before it is mailed to lessee dealers.

VII

It is further ordered, That respondent shall within ninety (90) days after the effective date of this order serve upon all of its branded jobbers and wholesale distributors a letter by certified mail, signed by a responsible official and on official Phillips Petroleum Company stationery, which shall include the following statement in its first paragraph:

The Federal Trade Commission has entered an Order which, among other things, prohibits Phillips Petroleum Company from requiring, encouraging, or suggesting that its branded jobbers or wholesale distributors enter into contractual arrangements with their dealers which, if entered into by Phillips and its lessee dealers would violate Part II, Paragraphs 2, 3, 4 and 5 of the Order. The relevant provisions of the Order are enclosed.

The relevant provisions of this order which shall be enclosed in such letters to branded jobbers and wholesale distributors are Parts I, II, III, and V thereof. This letter shall be submitted to the Commission for approval before it is mailed to jobbers and wholesale distributors.

VIII

It is further ordered, That should respondent during the ninety (90) day period immediately following the effective date of this order send any lessee dealer advance written notice of intent to cancel a lease between respondent and such lessee dealer prior to the expiration of the term of the lease, respondent must simultaneously notify such lessee dealer of the provisions of Part IV of this order.

IX

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its marketing division operating units.

X

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

XI

It is further ordered, That respondent shall, within ninety (90) days after service upon it of this order, and every ninety (90) days thereafter

Complaint

84 F.T.C.

for a period of one (1) year and thereafter annually at the end of the calendar year for a period of nine (9) years file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order. This order shall remain in effect for twenty (20) years from its effective date.

XII

It is further ordered, That no provision contained in this order shall prohibit respondent from completely divesting itself of any interests in any leased station which is required by a Final Judgment in *United States v. Phillips Petroleum Company and Tidewater Oil Company*, No. 66-1154 (C.D. Cal., 1966), and that immediately after the effective date of this order only Paragraphs 2, 3, 4 and 5 of Part II of this order and Part IV of this order shall apply to the respondent's lessee dealers whose leased premises are subject to the Court's jurisdiction in the aforementioned case; *Provided, however,* That in the event respondent is permitted, following entry of a Final Judgment in the aforesaid case, to retain any of the premises presently leased to lessee dealers, thereupon after ninety (90) days all the other provisions of this order shall apply in all respects to such retained, leased premises; *Provided, further,* That no provision of this order shall be binding upon or apply to any of the leased premises of respondent sold or divested pursuant to a Final Judgment in the aforesaid case.

IN THE MATTER OF

TOMORROW'S HERITAGE, INC., TRADING AS HERITAGE, ET
AL.

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