Gasoline Marketing and the Robinson-Patman Act

To maximize profits and maintain a steady volume of metropolitan area sales in the face of price competition, major oil companies charge their dealers different prices for the gasoline they sell. With certain exceptions, § 2(a) of the Robinson-Patman Act[1] forbids price discrimination where its effect may be substantially to lessen competition or injure, destroy, or prevent competition with any person who grants or receives the benefit of such discrimination.

If found to have violated § 2(a), a major supplier will seek to avail himself of the Act's § 2(b) "meeting competition defense."[2] Despite the Supreme Court's two major opinions on the nature of the § 2(b) defense in the context of gasoline marketing,[3] the content of this provision is still in dispute. In *Bargain Car Wash v. Standard Oil Company (Indiana)*,[4] the Seventh Circuit recently remanded to the district court for a determination of the circumstances under which the § 2(b) meeting competition defense is available to a major gasoline supplier.

This Note argues that there is no competition to meet at the wholesale level because of the de facto exclusive dealing arrangements under which major oil companies market gasoline and hence that the meeting competition defense should be unavailable. Such an interpretation, far from protecting competitors at the expense of competition as the Act has frequently been accused of doing,[5] would tend to foster more widespread price competition in the retailing of gasoline.

1. The Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1970) [hereinafter cited as the Act], provides in pertinent part:

> § 2(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

2. 15 U.S.C. § 13(b) (1970):

> § 2(b) Upon proof being made . . . that there has been discrimination in price . . . the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section . . . . *Provided, however*, that nothing herein contained shall prevent a seller rebutting a prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . .

3. F.T.C. v. Sun Oil Co., 371 U.S. 505 (1963); Standard Oil Co. v. F.T.C., 340 U.S. 231 (1951).

4. 466 F.2d 1163 (7th Cir. 1972).

5. *See, e.g.*, F. Scherer, Industrial Market Structure and Economic Performance 502 (1971); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 704-06 (1967) (Stewart, J., dissenting); Standard Oil Co. v. F.T.C., 340 U.S. 231, 249 (1951).

I

In *Bargain Car Wash,* American Oil Company, the marketing subsidiary of Standard Oil Company of Indiana, like other major oil corporations,[6] was able to price discriminate[7] among competing American dealers because three conditions necessary for profit-maximizing price discrimination existed: The supplier had market power in that its dealers bought gasoline only from it; the supplier had divided the metropolitan area into zones and was able to charge different prices from zone to zone; and the supplier was able to prevent arbitrage, *i.e.,* the resale of gas by low-price zone dealers to high-price zone dealers.[8]

Market Power. A major oil company supplies gasoline to its dealers and leases the station and equipment from which the gas is sold.[9] Although the lease does not explicitly require the dealer to purchase his gasoline exclusively from his lessor-supplier,[10] a number of features of the supply contract, which is executed simultaneously with the lease, make it impractical for a dealer to purchase gasoline from suppliers

6. Classification of firms engaged in one or more levels of the oil industry into "majors" and "independents" is inevitably arbitrary. For purposes of this discussion, "major" refers to those companies which are integrated from crude production to refining and which lease most of their stations to self-employed dealers.

7. Such price discrimination at the wholesale level is intended to effect a change in retail prices. Majors generally use a 70/30 shared margin reduction formula. For example, the supplier will reduce his wholesale price 1.4¢ and suggest that the dealer lower the retail price by 2¢. *See* F. ALLVINE & J. PATTERSON, COMPETITION LTD.: THE MARKETING OF GASOLINE 181 (1972); *Hearings on Marketing Practices in the Gasoline Industry Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess., pt. 1, at 452 (1970) [hereinafter cited as *Hearings on Marketing Practices in the Gasoline Industry*]. A supplier is able to lower prices for a specific time period and an exact number of gallons by either retaining title to the gasoline while it is in the dealer's storage tanks or by a system of rebates granted to the dealer. *See* 2 *Hearings of the FTC Industry Conference on Marketing of Automotive Gasoline Before Subcomm. No. 4 on Distribution Problems of House Select Comm. on Small Business,* 89th Cong., 1st Sess., 1148-50, 1722, 1757 (1966) [hereinafter cited as *Hearings of the FTC Industry Conference on Marketing of Automotive Gasoline*]. These arrangements arguably run afoul of the Sherman Act's prohibition of maximum or minimum resale price maintenance, 15 U.S.C. § 1 (1970). Albrecht v. Herald Co., 390 U.S. 145, 152 (1968). While the conditioning of price allowances on minimum resale price is illegal, it is still unclear whether a supplier may condition dealer allowances on the posting of lower retail prices. Lehrman v. Gulf Oil Corp., 464 F.2d 26, 40 (5th Cir.), *cert. denied,* 409 U.S. 1077 (1972).

8. F. SCHERER, *supra* note 5, at 253; Telser, *Abusive Trade Practice: An Economic Analysis,* 30 LAW & CONTEMP. PROB. 488, 496 (1965).

9. The terms of the supply contract are frequently incorporated by reference into the lease; violation of any of the terms of the contract gives the lessor the option to cancel or terminate the lease. *See generally Hearings on Marketing Practices in the Gasoline Industry, supra* note 7. The leases usually run for a year, though some are executed for a term of three to five years. *See, e.g., Hearings on Problems of Small Business in Gasoline Marketing Before the Subcomm. on Activities of Regulatory Agencies Relating to Small Business of the House Select Comm. on Small Business,* 92d Cong., 2d Sess. 87-90 (1972) [hereinafter cited as *Hearings on Problems of Small Business in Gasoline Marketing*]. This subjects the relationship with the lessor-supplier to frequent review.

10. It does not for the simple reason that such an exclusive dealing arrangement is illegal under § 3 of the Clayton Act, 15 U.S.C. § 14 (1970). Standard Oil Co. of Cal. and Standard Stations v. United States, 337 U.S. 293 (1949).

other than American. In the supply contract the dealer agrees to accept deliveries of American gasoline.[11] The dealer also agrees not to mix American brand gasoline with other brands. American thus need only keep minimum quantities of its gasoline in the dealer's storage tanks to foreclose the dealer from alternative sources of supply. Moreover, if the dealer did sell another brand of gasoline, he would have to obliterate all American trademarks and insignia from the station and face the prospect of not having the lease renewed.[12]

Zone Pricing. Like other major oil companies, American divides a metropolitan marketing area into numerous zones through which it administers its price discrimination, changing wholesale prices from zone to zone[13] in response to the level of competitive stations' retail prices and in light of its overall volume goal for the metropolitan area.[14] The court in *Bargain Car Wash* found, and American officials acknowledged, that these zones do not represent actual competitive markets for the sale of gasoline.[15] In fact, they were drawn so narrowly that in spite of consumer mobility American had created twenty-two zones within a one and one-half mile radius of the plaintiff-dealer's station.[16]

Prevention of Arbitrage. Because American does not obligate itself to supply a dealer with all the gasoline he demands, it can prevent a

11. If the lease required the lessee-dealer to purchase gasoline from the lessor-supplier, an illegal tie-in could result. Section 2 of the Clayton Act, 15 U.S.C. § 14 (1970) and §§ 1 & 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2 (1970), prohibit the sale or lease of one item on the condition that a second "tied" product is purchased where the effect of the tied sale is to foreclose competitors from any "substantial" market. *See* Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 502 (1969); Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958); International Salt Co. v. United States, 332 U.S. 392 (1947). *But see* F.T.C. v. Sinclair Refining Co., 261 U.S. 463 (1923).

12. The economics of station rental also make it clear that a dealer will not be permitted to sell another supplier's gasoline. Major oil companies charge their dealers a rental amount that does not yield a fair market return on the value of real estate leased. *See, e.g., Hearings on Marketing Practices in the Gasoline Industry, supra* note 7, pt. 2, at 881-82, 903; *id.* pt. 3, at 111-12. In some cases the supplier is paying a third party more rent for the property than the supplier is charging the dealer. *Hearings on Problems of Small Business in Gasoline Marketing, supra* note 9, at 215; *Hearings on Marketing Practices in the Gasoline Industry, supra* note 7, 1st Sess., pt. 2, at 903. The lessor-supplier's profit on the station, however, is made up of more than the rent earned in the landlord-tenant relationship. 1 *Hearings of the FTC Industry Conference on Marketing of Automotive Gasoline, supra* note 7, at 202. The supplier obtains a number of outlets that will sell gas in the manner he wants it sold. If the dealer does not sell the gallonage the supplier expects from the station, it is in the supplier's economic self-interest to cancel or to fail to renew the lease and to find a new dealer. *Id.* at 465.

13. *See* note 7 *supra*.

14. High fixed costs of gasoline production and a marginal cost which decreases constantly until full capacity is reached place a premium on full utilization of refining capacity through maintenance of a constant volume of wholesale gasoline sales. *Hearings on Problems of Small Business in Gasoline Marketing, supra* note 9, at 290-91.

15. 466 F.2d at 1168.

16. *Id.* at 1169.

low-price zone dealer from reselling gasoline to a nonfavored high-price zone dealer. In addition, the rental structure of the station lease agreement inhibits such arbitrage. Rent is calculated on a cents-per-gallon-sold formula.[17] As a result, the wholesale price differential between dealers would have to exceed the per gallonage rental payment before resale would be profitable. American was thus able to charge the plaintiff-dealer in *Bargain Car Wash* more for American gasoline than it charged other nearby American dealers.

This elaborate and sophisticated zone price discrimination is the response of major oil companies to price competition in the retail gasoline market.[18] While major oil companies prefer to compete in terms of product differentiation, offering free road maps and engaging in extensive advertising to create brand loyalty, other segments of gasoline retailing compete more in terms of price.[19] Price discrimination enables majors to maintain city-wide volume while selectively lowering prices in areas where price competition is significant, thus confining price disturbances to a small area, limiting the number of American dealers involved, and maintaining a higher profit margin on a company-wide basis.[20]

II

Alleging injury caused by American's price discrimination in favor of competing American dealers, the plaintiff-dealer in *Bargain Car Wash* brought a treble-damage action under the Robinson-Patman Act[21] against his supplier. To invoke the substantive portions of the Act, a plaintiff must demonstrate two or more consummated sales in commerce[22] which occur reasonably contemporaneously and involve

17. Oftentimes a supplier will not charge the dealer the per gallon rent after some minimum number of gallons are sold in order to induce a dealer to reduce the retail price. *See Hearings on Marketing Practices in the Gasoline Industry*, *supra* note 7, pt. 1, at 166. When such arrangements are not available to all dealers, as was the case in *Bargain Car Wash*, the supplier is violating § 2(a) of the Act by "indirectly" price discriminating. 466 F.2d at 1169. Moreover, there cannot be a meeting competition defense to this second type of price discrimination. 466 F.2d at 1175 n.7.

18. *See* 466 F.2d at 1167.

19. *See generally* Dixon, *Oligopoly and Price Wars: A Case Study in Gasoline*, 1 ANTITRUST L. & ECON. REV. 53 (July-August 1967); Dixon, *Comment on Mueller's "Structural" Approach: Dimensions of Oligopolistic Interdependence in Gasoline*, 1 ANTITRUST L. & ECON. REV. 123 (Summer 1968); FORBES, Sept. 1, 1970, at 40; FORTUNE, June 1969, at 109; Note, *Competition in Gasoline Retailing: A Price War*, 101 U. PA. L. REV. 644 (1953).

20. 466 F.2d at 1168.

21. 15 U.S.C. § 15 (1970).

22. Jurisdiction under the Act has traditionally been held to require that at least one transaction cross a state line. *See, e.g.*, Lehrman v. Gulf Oil Corp., 464 F.2d 26, 36-37 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT § 4.9 (1962). In the field of gasoline marketing the requisite sales "in

commodities of like grade and quality, in which a different price is charged by the same seller to two or more purchasers for use, consumption, or resale within the United States or a territory thereof, and which may result in competitive injury.

The requisite competitive injury necessary to prove a violation of § 2(a) may occur on any one of three commercial levels: (1) injury at the level of the seller's competitors (primary-line injury), (2) injury at the buyer's level (secondary-line injury), or (3) injury at the level of the buyer's customers (tertiary-line injury).[23] As consumers are not in competition, there was no tertiary-line injury. While there can be supplier or primary-line injury in gasoline marketing,[24] the focus in *Bargain Car Wash* is on secondary-line injury: injury to competition in gasoline retailing.

Litigation under the Robinson-Patman Act has established that substantial price differentials for a significant period of time[25] are prima facie violative of § 2(a),[26] particularly where, as in gasoline marketing, competition is keen and the profit margin of buyers is narrow.[27] Actual competitive injury, therefore, need not be demonstrated; a reasonable possibility of injury is sufficient.[28] In *Bargain Car Wash* there was

commerce" have been found where the gasoline sold to a dealer was refined by the supplier in a state other than the one in which the sales were made. *See, e.g.*, Standard Oil Co. v. F.T.C., 340 U.S. 231, 236-38 (1951); Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana), 466 F.2d 1163, 1166 (7th Cir. 1972). On the other hand, where the supplier's refinery is within the state of resale to dealers, or where the dealer's supplier purchases all his needs from a source within the state of resale, it has been held that the supplier's sales to dealers were not made "in commerce" and hence no cause of action was stated under the Robinson-Patman Act. Belliston v. Texaco, Inc., 455 F.2d 175, 178-81 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); Abramson v. Colonial Oil Co., 390 F.2d 873 (5th Cir.), *cert. denied*, 393 U.S. 831 (1968).

Recently, however, in Littlejohn v. Shell Oil Co., 456 F.2d 225 (5th Cir. 1972), *petition for rehearing en banc granted*, No. 71-2090, 5th Cir., Jan. 2, 1973, the Fifth Circuit held that the "use of proceeds from interstate sales to underwrite intrastate price discrimination" stated a cause of action under the Robinson-Patman Act. *See* Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954). If *Littlejohn* is followed, jurisdictional problems under the Robinson-Patman Act may well be simplified. *See* 4 ST. MARY'S L.J. 204 (1972); 41 U. CIN. L. REV. 689 (1972). *But see* 86 HARV. L. REV. 765 (1973).

23. *See* F. ROWE, *supra* note 22, chs. 7, 8.

24. Supplier injury would occur, for example, if the price discrimination of one of the majors drove another supplier out of business.

25. American Oil Co. v. F.T.C., 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964) (price discrimination lasted only seventeen days and caused only a temporary economic dislocation that did not constitute substantial evidence of a probable lessening of competition); Bunty v. Shell Oil Co., 1972 Trade Cas. ¶ 74,252 (D. Nev. 1972) (discrimination for eighteen days out of three years is of transient impact, not sufficient to satisfy the § 2 (a) standard of injury to competition).

26. National Dairy Prods. Corp. v. F.T.C., 395 F.2d 517, 521 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968).

27. *See* Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana), 466 F.2d 1163, 1174 (7th Cir. 1972); E. Edelmann & Co. v. F.T.C., 239 F.2d 152, 154 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958); Sun Oil Co., 55 F.T.C. 955, 962 (1959), *rev'd on other grounds*, 294 F.2d 465 (5th Cir. 1961), *rev'd on different facts*, 371 U.S. 505 (1963).

28. Corn Prods. Ref. Co. v. F.T.C., 324 U.S. 726, 742 (1945). While the "reasonable possibility" of injury has been held to be the standard in cases of secondary-line injury,

ample evidence that American's sales to competing dealers at a price eleven percent lower than to plaintiff were a substantial contributing factor to his loss of sales.[29]

Moreover, a broader analysis of the effects of such pricing practices demonstrates that price discrimination in the context of gasoline marketing tends to lessen price competition as well as to injure competitors. To be sure, a major supplier's price discrimination results in temporarily lower prices to consumers who patronize the supplier's favored dealers. Such systematic selective price cutting, however, may discourage the dealers of major brand suppliers, independent retailers, and independent refiner-marketers from engaging in price competition as actively as they might otherwise.[30]

The beneficial effect of the efforts of independent marketers on price competition in gasoline retailing has frequently been observed.[31] Subregular gasoline sold by some majors has also sparked price competition among suppliers more accustomed to price leadership and product differentiation.[32] If majors meet this price competition only to the extent necessary to keep area volume steady, the impact of such price competition is confined to narrow zones within the marketing area. As long as favored dealers make up the gallonage lost by nonfavored dealers, the major has succeeded in confining the area of what it terms "the price war."[33] This makes it more costly for price conscious competitors to increase their share of the market and tends to discourage both market entry and expansion.[34]

It is perfectly true, of course, that a dealer is less likely to reduce his prices if he knows that his competitor will do likewise than if he suspects that he might be able to win new customers by a price reduction that is not met. The Robinson-Patman Act does not protect competitors

primary-line cases had formerly insisted on the demonstration of actual injury before § 2(a) would be violated. *See, e.g.*, Anheuser-Busch, Inc. v. F.T.C., 289 F.2d 835, 840 (7th Cir. 1961). But in the most recent primary-line case to reach the Supreme Court, the possibility of a future lessening of competition was found sufficient to sustain a jury verdict for the plaintiff. *See* Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 699-700 (1967). *See generally* F. ROWE, *supra* note 22, at 180-95.

29. 466 F.2d at 1174.

30. M. DECHAZEAU & A. KAHN, INTEGRATION AND COMPETITION IN THE PETROLEUM INDUSTRY 476-82 (1959); Dirlam, *The Petroleum Industry*, in THE STRUCTURE OF AMERICAN INDUSTRY 301 (W. Adams ed. 1961); F. SCHERER, *supra* note 5, at 261; Note, *Meeting Competition and the* Sun Oil *Case: Repudiation of the* Enterprise *Doctrine*, 29 U. CHI. L. REV. 355, 365 (1962). *See generally* ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 186 (separate opinion of A. Kahn) (1955).

31. *See* N.Y. Times, May 27, 1973, § 3, at 4, cols. 1-6; F.T.C. v. Sun Oil Co., 371 U.S. 505, 523 (1963); M. DECHAZEAU & A. KAHN, *supra* note 30, at 383.

32. F. ALLVINE & J. PATTERSON, *supra* note 7, at 141-78; Dixon, *Oligopoly and Price Wars: A Case Study in Gasoline*, *supra* note 19, at 53, 68-70.

33. *See* p. 1709 *supra*.

34. *See* F.T.C. v. Sun Oil Co., 371 U.S. 505, 523 (1963).

from the possibility that a price reduction may be met in kind. If major suppliers were not permitted to charge different prices in artificially drawn zones, however, they would be forced to engage in city-wide price competition. Wholesale prices would reflect the competitive conditions of the entire metropolitan area. Price competitors could thus more easily enter and grow in the market.[35]

III

If proof of a § 2(a) violation is shown, a price discriminator can avoid a cease and desist order,[36] injunction,[37] or treble damages on proof of injury[38] by demonstrating that his lower price was made in good faith to meet an equally low price of a competitor.[39] Found in violation of § 2(a), American argued that it price discriminated to meet the competition it faced in the metropolitan area.[40] The meeting competition defense of § 2(b), if available, is absolute, irrespective of any adverse effect on competition caused by price discrimination.[41]

Given the exclusive dealing arrangements under which gasoline is marketed, however, it is unclear that the § 2(b) defense should be available to major oil companies like American. While the defense does not obtain where the seller's wholesale price discrimination is in response to price cuts generated solely at the buyer's level,[42] the following question is still unresolved: Is the § 2(b) defense available to American if its discriminatory price to one of its dealers is designed to meet an equally low price of a competitor of American (*e.g.*, Exxon) given to a competitor of the American dealer (*e.g.*, an Exxon dealer across the street)? Two answers have been given.

35. *See* J. Dirlam & A. Kahn, Fair Competition 256 (1954). While competitive injury in the form of injury to nonfavored dealers of a discriminating supplier is easier to prove and hence is the usual competitive injury alleged in litigation such as *Bargain Car Wash*, the broader injury to price competition would be an appropriate element of a complaint by the Federal Trade Commission. In F.T.C. v. Sun Oil Co., the Supreme Court recognized that both forms of injury to competition may arise when a major oil company price discriminates among its dealers in a metropolitan area. 371 U.S. 505, 523 (1963).

36. 15 U.S.C. § 21 (b) (1970).

37. 15 U.S.C. § 26 (1970).

38. 15 U.S.C. § 15 (1970).

39. Section 2 (b) of the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. § 13 (b) (1970).

40. 466 F.2d at 1175.

41. Standard Oil Co. v. F.T.C., 340 U.S. 231 (1951).

42. In F.T.C. v. Sun Oil Co., 371 U.S. 505 (1963), the Supreme Court held that the § 2(b) meeting competition defense applies only to the competition of the seller (primary-level competition), not the competition faced by a customer of the seller (secondary-level competition). The § 2(b) defense, therefore, does not obtain when the supplier is price discriminating among its dealers to enable them to meet competition generated solely at the retail level, *e.g.*, competition from a self-service station that reduces retail prices through a decrease in overhead costs.

In 1955, in *Enterprise Industries v. Texas Co.*,[43] a federal district court said no: A seller may offer a buyer a lower price only when that particular buyer has been offered an equally low price by a competitor of the seller. In gasoline marketing a major supplier has no competition for customers—his dealers. Thus on this reading of § 2(b), American may never avail itself of the meeting competition defense, there being no competition to meet at the wholesale level. This reading shall be referred to as the *Enterprise* doctrine.

Since 1967, however, the Federal Trade Commission has ignored the *Enterprise* decision and has interpreted § 2(b) to mean that the defense may be available to a major gasoline supplier if the supplier is meeting the wholesale price of another major supplier or is meeting the competition of an integrated refiner-marketer.[44] According to this view, American can selectively reduce its wholesale price to American dealers to meet an ostensibly legal wholesale price reduction by Exxon to some Exxon dealers, or to meet a lower retail price posted by a retail station owned by an independent refiner. This view of § 2(b) shall be referred to as the "Commission's position."

An analysis of these two conflicting interpretations requires an understanding of the rationale of the meeting competition defense. The defense was written into the Robinson-Patman Act because Congress realized that a seller who price discriminated in response to an

43. 136 F. Supp. 420 (D. Conn. 1955), *rev'd on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957).

44. *The Federal Trade Commission's Report on Anti-competitive Practices in the Marketing of Gasoline*, 3 TRADE REG. REP. ¶ 10,373, at 18,245 (1967). The Federal Trade Commission's current reading of the § 2(b) defense has a rather tortuous history, the Commission having reversed its position twice on the issue. Before the *Enterprise* decision the Commission thought the § 2(b) defense would in some cases be available to a supplier even though there was no competition for sales to his dealers. *See Hearings on Distribution Problems Before Subcomm. No. 5 of the House Comm. on Small Business*, 84th Cong., 1st Sess., pt. 2, at 852-53 (1955). But in Senate hearings on gasoline price wars in 1955, the Commission declared its earlier view to be a "mistake" and embraced the *Enterprise* holding. *Hearings on Gasoline Price War in New Jersey Before a Subcomm. of the Senate Select Comm. on Small Business*, 84th Cong., 1st Sess., pt. 2, at 450-51 (1955). The *Senate Report* following the hearings concluded that the failure of the Commission to prevent price discrimination was a substantial cause of the chaotic marketing conditions under investigation. Armed with the *Enterprise* decision, the *Report* said, the Commission "should move promptly against any major supplier still granting discriminatory price allowances." S. REP. No. 2810, 84th Cong., 2d Sess., 28 (1956). The Commission did just that in *Sun Oil*, urging the Supreme Court to adopt the *Enterprise* doctrine. *See* note 42 *supra*.

After its limited victory in *Sun Oil*, however, an entirely new set of Commissioners declared a general amnesty for oil companies then under complaint and decided to hold still more hearings on gasoline marketing practices. S. OPPENHEIM & G. WESTON, II THE LAWYER'S ROBINSON-PATMAN ACT SOURCEBOOK 1182 (1971). In 1967 the Commission issued a report on its hearings. By a 3-2 vote the Commission reversed itself again, abandoned the *Enterprise* doctrine, and enunciated its more lenient current position. Neither the hearings nor the *Report* focused on the *Enterprise* doctrine. Indeed, the *Report* failed even to mention the *Enterprise* decision or the FTC's former support for it in *Sun Oil*. *See* 3 TRADE REG. REP. ¶ 10,373 (1967).

apparently lawful lower price offer of a competitor would not normally cause any injury on the buyer level, a lower price already being available to the buyer from the competing seller.[45] The supplier's price cut can thus be viewed as nothing more than "self-defense against a price raid by a competitor."[46]

In gasoline marketing, however, the de facto exclusive dealing arrangement between a supplier and its dealer means that the supplier never encounters a price raid by a competitor. In *Bargain Car Wash* American did not price discriminate to prevent an American dealer from purchasing gasoline from Exxon, Texaco, Shell, or any other competing supplier. Moreover, American's price discrimination caused the injury at the buyer level. Had American refrained from price discrimination and sold to all its dealers at the uniform price area-wide demand dictated, the nonfavored plaintiff-dealer would not have been injured relative to nearby competing American dealers.

Despite the compatability of the *Enterprise* doctrine with the rationale of the § 2(b) defense, several arguments were raised against it in litigation culminating in the Supreme Court's decision in *F.T.C. v. Sun Oil Company*.[47] Though the Court did not consider the *Enterprise*[48] doctrine, its reasoning supports that decision.

Sun Oil argued that gasoline dealers are in reality conduits through which retail demand is registered at the wholesale level and that a supplier should therefore be allowed to reduce its wholesale prices discriminatorily to a dealer being undersold by a competing dealer.[49] The Court found, however, that the change from the broader "meeting competition" language of the original Clayton Act[50] to the narrower "meet an equally low price of a competitor" language of § 2(b)

45. [W]here in fact the favored buyer has received a low nondiscriminatory offer from a competing seller, the seller who meets that offer with a discriminatory price cut is injuring the disfavored buyers no more than they would be injured anyway.
C. KAYSEN & D. TURNER, ANTITRUST POLICY (1965); F. ROWE, *supra* note 22, at 214.

46. Standard Oil Co. v. F.T.C., 340 U.S. 231, 250 (1951).

47. Based on the *Enterprise* doctrine which it then endorsed, the FTC issued a cease and desist order against Sun Oil Co., 55 F.T.C. 955 (1959). The Fifth Circuit reversed, rejecting the *Enterprise* holding, Sun Oil Co. v. F.T.C., 294 F.2d 465 (5th Cir. 1961). The Supreme Court reversed, F.T.C. v. Sun Oil Co., 371 U.S. 505 (1963), holding that the § 2(b) defense does not allow a supplier to price discriminate to enable one of its dealers to meet competition from another retail-dealer. *See* note 42 *supra*.

48. The Court declined to express or intimate any opinion as to the content of § 2(b) where it is shown (1) that no lower competitive offer was made to the favored dealer by another supplier (371 U.S. at 529 n.19), or (2) where the favored dealer faces competition from an integrated supplier dealer (371 U.S. at 512 n.7).

49. *See* the Fifth Circuit's decision, Sun Oil Co. v. F.T.C., 294 F.2d 465, 476-78 (1961), *citing* the dissenting opinion in Standard Oil Co. of Cal. and Standard Stations v. United States, 337 U.S. 293, 323 (1949) (Jackson, J., dissenting).

50. 38 Stat. 730 (1914).

indicated that the § 2(b) defense applies to competition at the level of the discriminator—here the supplier.[51]

The Court also rejected the argument that price discrimination should be permitted to protect small gasoline retailers. Sun Oil argued that certain of its dealers could not meet the competition they faced without price allowances.[52] It further pointed out that the Robinson-Patman Act was passed in large part to protect small, independent retailers.[53] The Court read the legislative history as establishing no guarantee to businessmen from possible loss. The harm proscribed was price discrimination.[54] Major oil companies price discriminate to profit maximize, not to keep small retailers in business. Moreover, when one dealer is favored with a lower price, the supplier's nonfavored dealers, themselves small independent retailers, are injured.

Finally, Sun Oil argued that denial of the ability to price discriminate would lead to forward integration by major oil companies. They would then operate service stations with their own employees, avoid the jurisdiction of the Act, and be able to set whatever retail prices they desired from station to station.[55] Such a result, it was said, would conflict with the broader purposes of a statute designed to promote local ownership and to protect the small independent businessman.[56]

The Court considered the argument irrelevant because Congress in the Robinson-Patman Act foreclosed judicial consideration of whether price discrimination is a greater evil than forward integration.[57] The Court also considered the argument dubious because the decision of major oil companies to lease rather than operate their stations was made for economic reasons, uniformly compelling among major oil companies.[58]

51. 371 U.S. at 524-25. *See* F. ROWE, *supra* note 22, at § 9.1; Note, *supra* note 30, at 362.
52. 294 F.2d at 479.
53. 371 U.S. at 520.
54. *Id.* at 519.
55. Brief for Appellee at 29-33, Brief for Texaco, Inc. as Amicus Curiae at 51-53, F.T.C. v. Sun Oil Co., 371 U.S. 505 (1963).
56. This was the argument of the Fifth Circuit. 294 F.2d at 478-81.
57. 371 U.S. at 528.
58. *Id.* at 528-29. To avoid the interference of the Robinson-Patman Act with their pricing decisions, majors tried to set retail prices through a consignment arrangement. This was outlawed as vertical price fixing in Simpson v. Union Oil Co., 377 U.S. 13 (1964). Despite such frustrations the majors have not integrated forward, preferring to maintain costly zone pricing systems, to employ salesmen to survey retail prices contionally and to incur the transaction costs associated with an annual dealer turnover rate as high as thirty-five percent. *See* N.Y. Times, May 27, 1973, § 3, at 4, cols. 1-6; BUSINESS WEEK, May 13, 1972, at 143.

Major suppliers have several good reasons to stay out of retailing. As independent businessmen, dealers of the same supplier cannot aggregate their buying power to make demands on the supplier without violating the Sherman Act. Not being employees of the supplier, dealers cannot organize into unions, the collective bargaining power of

Furthermore, the Commission's formulation of the meeting competition defense is unworkable from the standpoint of public and private detection and enforcement, and a close examination of the "pricing system" exception to the defense suggests that the FTC position may actually be an inarticulate proxy for the *Enterprise* doctrine.

The FTC position is unworkable because it depends on identification of the original source of price competition in the area of declining retail prices. A major oil company's discriminatory pricing is justified under the FTC position if it is made in good faith[59] in response to nondiscriminatory wholesale price reductions by other oil companies. In many cases, however, it is impossible to determine the source of price competition faced by the major. Consider, for example, the case of an American dealer surrounded by an independent retail outlet, a retailer owned by an independent refiner, and a major supplier marketing a less expensive third subregular brand of gasoline. It would be difficult to determine whose competition American is meeting when it reduces its wholesale price to this dealer in the face of falling retail prices. The problems of detection and proof under the FTC position would be compounded if another supplier were to lower its wholesale price allegedly in response to American's reduction.

Moreover, close scrutiny of the FTC position and the "pricing system" exception which has been grafted onto it reveals that the FTC position may, however unwittingly, not be significantly different from the *Enterprise* doctrine. The courts have generally refused to allow the § 2(b) defense when the seller's price discrimination is the result of a "pricing system"[60] rather than a response to individual competitive demands.[61] Discriminatory price cuts made as part of a "pricing system" are not closely enough related to the threatened loss of a customer

which would no doubt be considerable given the volumetric interdependence of the various levels of the petroleum industry, the economics of refining, and the desire of majors to avoid dual marketing whenever possible. Further, not being the dealers' employers, oil companies avoid federal social security and minimum wage and hour legislation, as well as state unemployment insurance and workmen's compensation laws. *See* S. WHITNEY, 1 ANTITRUST POLICIES 125 (1958); Brief for F.T.C. at 54, F.T.C. v. Sun Oil Co., 371 U.S. 505 (1963).

59. Good faith requires the seller to demonstrate "the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." F.T.C. v. A. E. Staley Mfg. Co., 324 U.S. 746, 759-60 (1945). Good faith is lacking when the seller is meeting a price offer he knows or should know is itself illegally discriminatory. National Dairy Prods. Corp. v. F.T.C., 395 F.2d 517, 524 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968); Standard Oil Co. v. Brown, 238 F.2d 54, 58 (5th Cir. 1956).

60. Pricing systems became suspect under § 2(b) as an outgrowth of early cases denying the defense to companies that illegally adopted a single industry-wide pricing formula, such as base point pricing (F.T.C. v. Cement Institute, 333 U.S. 683 (1948); F.T.C. v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945)) and industry zone pricing schemes (F.T.C. v. National Lead Co., 352 U.S. 419 (1957)), because these pricing formulas were adopted not to meet competition between the firms but to eliminate it.

61. *See* F. ROWE, *supra* note 22, at § 9.7.

to satisfy the conception of the meeting competition defense. Since this defense was designed to insure a seller "the right of self-defense against a price raid by a competitor,"[62] price discrimination resulting from the marketing scheme of the seller has at times been denied the § 2(b) defense.[63]

The unilateral pricing decisions of major gasoline suppliers may be held to be the result of the supplier's pricing system rather than the bilateral bargaining that the meeting competition defense contemplates.[64] The rationale for denying a supplier the § 2(b) defense because of his use of a "pricing system" would be similar to the *Enterprise* court's rationale: There is no competitive offer to this buyer by another supplier to meet.

Thus even if the Commission's view of § 2(b) is adopted, major oil companies still have to clear the "pricing system" versus "individual competitive demands" hurdle.[65] In *Bargain Car Wash* the court ordered scrutiny of the construction of the metropolitan zones to determine their legal and economic justification. This may lead to results not unlike the *Enterprise* doctrine. If zones are drawn with reference to independent retailers or to those heavily-trafficked areas where aggressive major suppliers are likely to initiate an illegal price discrimination, it is clear that the § 2(b) defense will not obtain, though not because of the "pricing system" itself. In the former instance the majors would

62. Standard Oil Co. v. F.T.C., 340 U.S. 231, 249 (1951).

63. Standard Motor Prods. v. F.T.C., 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959). *But see* Calloway Mills Co. v. F.T.C., 362 F.2d 435 (5th Cir. 1966), holding that price discrimination according to a firm's volume discount schedule does not per se deny the availability of the § 2(b) defense. "It is only when no reasonable and prudent person would conclude that the adopted system is a reasonable method of meeting the lower price of a competitor that it is condemned." *Id.* at 442. The possibility that the prices the seller was meeting were themselves illegally discriminatory and hence could not be met in good faith was not raised. *See* Surprise Brassiere Co. v. F.T.C., 406 F.2d 711, 715 (5th Cir. 1969). The development of the "pricing system doctrine" is criticized in Note, *Pricing Systems and the Meeting Competition Defense*, 49 U. VA. L. REV. 1325 (1963).

64. In Ingram v. Phillips Petroleum Co., 259 F. Supp. 176 (D.N.M. 1966), the court found Phillips' discrimination between jobbers to be the result of a customary industry pricing system, *i.e.*, not to meet any specific competition but because Humble, Texaco, and Shell had reduced their prices to meet price cuts from independents. *Id.* at 184.

65. The Seventh Circuit recently indicated as much in *Bargain Car Wash* by stating that while it was inclined to accept the Commission's current reading of § 2(b),

> American may not sustain its burden of proving that it was merely meeting the equally low price of a competitor simply by proving that its price cuts conformed to its own [zone pricing] system unless the record demonstrates a valid economic justification for that system . . . . In short we must know the competitive nature of the system in its operation and its impact on individual competing American dealers. Only then can the court intelligently pass upon the availability of the Section 2(b) defense in a zone operation.

466 F.2d at 1176. That it is the nature of the pricing system itself, and not the degree of competitive injury, that could bar use of the § 2(b) defense under the court's interpretation is clear when it is recalled that the meeting competition defense is absolute, irrespective of any competitive injury that may be found. Standard Oil Co. v. F.T.C., 340 U.S. 231 (1951).

be violating the rule of *Sun Oil,* and in the latter, if the initial price discrimination is known to be illegal, there could be no good faith meeting of competition. Thus the "pricing system" versus "individual competitive demands" question seems to serve as but a proxy for the underlying *Enterprise* doctrine.

IV

The *Enterprise* doctrine is a sound interpretation of § 2(b). It would prompt a major supplier to establish one wholesale price based on area-wide demand for its product[66] rather than setting different prices in each zone in response to the demand generated within the major's artificially created and maintained submarkets. This would tend to encourage majors to be more price competitive in their marketing efforts. To the extent that marketing profits are thereby reduced, suppliers would have an incentive to eliminate marginal gasoline stations.[67] Given the presence of price conscious private brand marketers, the net result may well be lower average prices than would otherwise prevail and fewer stations with higher volume per station.[68]

By contrast, the FTC's current position is unexplained and unexplainable.[69] It is largely unworkable and uncertain in application and serves no articulated goals. The meeting competition defense should not be available to a gasoline supplier which discriminates among its captive dealers.

66. This would not mean that price reductions would have to be made over an unwarrantedly large geographic area. The Supreme Court in *Sun Oil* stated that the courts and the FTC are capable of recognizing appropriate area submarkets. 371 U.S. at 526-27 & n.17.

67. There is reason to believe majors tend to overbuild gas stations, not because consumers demand so many outlets, but because the logic of the depletion allowance and vertical integration in the oil industry encourage companies to have assured outlets for their refinery products. *See* J. BAIN, THE ECONOMICS OF THE PACIFIC COAST PETROLEUM INDUSTRY, Part III, at 95 (1947). *See also* Dirlam, *supra* note 30, at 277, 303; Rostow and Sachs, *Entry Into the Oil Refining Business: Vertical Integration Re-examined,* 61 YALE L.J. 856, 913 (1952). Indeed, major oil companies seem to concede as much when they argue that a ban on localized price discrimination would mean that some of their dealers would be forced out of business. *See* 1 *Hearings of the FTC Industry Conference on Marketing of Automotive Gasoline, supra* note 7, at 559; Schwartz, *Potential Impairment of Competition,* 98 U. PA. L. REV. 10, 37 (1949).

68. Such a conclusion is necessarily speculative, but the experience of one major oil company may be suggestive. Pure Oil Co. (since merged into Union Oil Co.) changed some "Pure" trademarked stations into independent-named stations. Upon reducing the price by 0.5¢ from the price for which Pure gasoline sold, volume at the stations doubled. When Pure did the same to other "Pure" stations and reduced price by 2¢ (the more customary major-independent price differential), volume increased almost tenfold. 2 *Hearings of the FTC Industry Conference on Marketing of Automotive Gasoline, supra* note 7, at 1792.

69. It is clear that the FTC did not abandon the *Enterprise* doctrine in the belief that uniform area-wide pricing by suppliers would be undesirable. In January the Commission issued a complaint against Standard Oil Co. of Ohio. Proposed relief includes a ban on supplier sales to its dealers at other than a uniform wholesale price throughout an appropriate competitive area. 3 CCH TRADE REG. REP. ¶ 20,134, complaint issued Jan. 31, 1973, *id.* at ¶ 20,208 (1973).