

File  
Mills Speed

*[Faint handwritten notes and markings]*

RECOMMENDATION

We recommend that we verify the prices being charged in the market areas. This will be necessary before a future judgment can be made.



ROBERT MORGAN  
ATTORNEY GENERAL

State of North Carolina  
Department of Justice

P. O. Box 629  
RALEIGH  
27602

February 19, 1974

MEMORANDUM

TO: ROBERT MORGAN

FROM: Jean Benoy and Don Jones

RE: Complaint by Max Hovis, President of United Dairies;  
Against Pet Milk Company, Greensboro, North Carolina

BRIEF STATEMENT OF COMPLAINT

On December 18, 1973, Max Hovis phoned this office and complained about predatory pricing practices of his competitor, Pet Milk Company. At that time he alleged that Pet had dropped its price of milk to customers in a selected market area of North Carolina. The area described by Hovis was the Burlington, Greensboro, Asheboro, and Winston-Salem markets. Because of the complexity of the complaint, I felt that I should have a personal interview with Mr. Hovis, so on December 31, 1973, I met with Mr. Hovis in his offices in Greensboro and got more particulars.

Mr. Hovis furnished price lists distributed by Pet showing that they had adjusted their prices on gallon containers of milk from \$1.61 per gallon down to \$1.49 per gallon. Simultaneously Pet had cut their rebates from 20.5% down to 15%. To qualify for a 15% rebate a customer must purchase in excess of \$13,000 worth of rebatable products per month and the minimum rebate allowed by Pet in this new schedule is 2% on those purchases ranging from \$100 to \$199.99. The rebate schedule ranges from this 2% up to a top of 15%. From the information furnished by Hovis at that time, it appeared that Pet may be selecting one portion of the State in an attempt to establish itself in the market.

After examining the net effect of Pet's action, the difference in the price to customers is very small. The price being paid to Pet by their large volume purchases based on the \$1.61 price carrying a discount of 20.5 is \$1.27.9 cents

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per gallon. The new price experienced by these same large volume customers of Pet carries a price of \$1.49 per gallon with a maximum of 15% discount the net price to the customer is \$1.26.6 cents per gallon; or 134 cents per gallon less. When we examined Pet's reconstructed price and discount schedule we find that on the other end of the scale the small purchaser or the person with the small dollar volume from Pet may be paying a cent or two more per gallon than they were under the old discount schedule.

#### STATUTORY PROVISION

Chapter 75-5(b)(5) provides that it is unlawful to sell goods at a price lower than is charged by such person for the same thing at another place where there is not good and sufficient reason on the count of transportation or the expense of doing business. The section provides that the market area is the State of North Carolina.

#### SUBSEQUENT ACTION

On January 14, 1974, I met with Mr. Harold Habeck, District Manager for Pet, Inc. During that interview we discussed in detail the complaint that this office had received and Mr. Habeck stated that the company had made a judgment decision to make their discount schedules more realistic and further to be competitive in the piedmont area of North Carolina. Mr. Habeck held the reservation that legal counsel for Pet should communicate with this office before an official company position could be formulated. As a result Mr. Robert Dusenburg, Attorney at Law, met with us on February 7, 1974, in our offices in Raleigh.

At this conference Mr. Dusenburg advanced the following points to show that his company had not violated any public policy of North Carolina:

1. He argued that the North Carolina Milk Commission has jurisdiction and if any provisions of the statutes had been violated, that agency's right to take action would prevent any action by this office. We disagree.
2. Mr. Dusenburg contends that this section of the law is unconstitutional and cited an unnamed case in South Carolina where the Supreme Court had held a similar law as being unconstitutional.

3. He contends that there is a good faith meeting of competition by Pet in this area and that the competitors whose price was being met by Pet is primarily those prices of Borden and Long Meadow.
4. Mr. Dusenburg states that pressure has been brought to bear on his company by retailers and this pressure is in such form that if the price is not met then the Pet Milk Products would have to be removed from the shelves.
5. If we make a recommendation to you that we should proceed with this case, Mr. Dusenburg requests the opportunity to talk with you. We agreed to this request.

Mr. Dusenburg expanded his argument by saying that the loss of sales in the particular market area was down five per cent, but they had attempted to maintain their volume by extending their market territory to the outskirts of Durham. He further says that all processors for the State do not have a single price structure and all processors vary their prices according to the competitive situation.

In attempting to analyze Mr. Dusenburg's position, we believe that on his argument No. 1 we have concurrent jurisdiction and there is no exclusive jurisdiction for the Milk Commission.

We believe that a point of proof of a good faith meeting of competition would negate the last section of the statute that provides that the act was done with the view to injure the business of another. Also, if the price of a competitor was a price that violated the statute that any subsequent price by Pet would not have been a price that was offered in good faith.

In order to build a proper background and develop the necessary facts on the case, there must be a complete market analysis including an individual analysis of each company involved in the market.

In evaluating the desirability to enter such an extensive and expensive investigation at this time, we must consider the budget consideration and other technical problems that would be involved in this undertaking. Once this judgment has been made, we may be unable to support or justify a lawsuit. This will only be known after a complete analysis is made of the entire market.

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The representatives of Pet argued that if we pursue under this section and bring an action that there will be a single price in North Carolina and the price will be at the highest possible level.

A recent analysis shows that the prices of milk in North Carolina do vary at the present time and some citizens in certain market areas are able to purchase gallon sizes ranging from the price of \$1.35 to \$1.49. This price is evident because there is competition in those particular areas. The representatives of Pet contend that this price structure will be destroyed if we attempt to move under this section. This position may be justified.

DHJ:dc