

FTC can issue rules, after all

By CAROLE SHIFRIN
(c) 1973, The Washington Post

WASHINGTON — Now that its rule-making powers have been confirmed by the courts, the Federal Trade Commission is expected to let loose a backlog of rules it has wanted to issue for more than a year. The agency also is expected to propose some additional ones.

The FTC got its shot in the arm last month when the United States Court of Appeals for the District of Columbia circuit ruled that the consumer protection agency does have the authority to issue rules defining unfair and deceptive trade practices.

That authority has been suspended since April, 1972, when U.S. District Court Judge Aubrey Robinson ruled in Washington that the agency didn't have the authority to require oil companies to post octane ratings on gasoline pumps, or to make any rules at all.

Commission officials were elated when the unanimous three-judge appeals court opinion was handed down. FTC chairman Lewis Engman called the decision "great. It appears to be a total endorsement of commission arguments," he said, promising that the agency now will issue rules which have been held in abeyance for more than a year and propose others.

At the time of the district court decision, the legality of a score of existing rules had been in doubt. Also included was one recently issued rule barring food stores from advertising "specials" unless they had an adequate supply of sale goods on hand, and another requiring clothes manufacturers to put permanent labels with washing or cleaning instructions on all garments.

PROCEDURES QUESTIONED

Pending rules, whose issuance was suspended, dealt with door-to-door sales, undelivered mail-order merchandise, franchising operations and unfair credit practices.

The specific rule at stake — the posting of octane ratings — will not go into effect immediately for the appeals court sent the case back to the district court for a hearing on whether the procedures the FTC used in issuing the rule were fair.

There is also the possibility that the 34 petroleum refiners and two trade associations which brought the challenge will appeal to the Supreme Court. Urvan Sternfels, an attorney for the national petroleum refiners — one of the associations which challenged the

association rule — said the plaintiffs haven't decided yet how to proceed but probably would do so within the next week.

The rule, which would have gone into effect in March, 1972, was designed to tell motorists the octane ratings of the various gasolines available to them to help them make better buying decisions. Each auto engine needs gasoline with an octane number high enough to prevent knocking, but gasoline with a higher-than-needed rating usually costs more and adds nothing to the car's performance.

Motorists pay between \$50 and \$75 too much each year for gasoline with a higher octane number than their cars need, commission staff estimated. Failure to post octane numbers would have been considered an "unfair method of competition" under the rule and companies could have been sued for violations.

THE ONLY WAY

A spate of differing state regulations requiring octane ratings could cause oil companies with interstate business much more trouble and expense than the FTC's rule with nationwide application.

Although in business since 1914, the FTC had been issuing rules only since 1962 when it became increasingly convinced that the only practical and fair way to deal with industry-wide practices it believed illegal was through broad rules binding on all in the industry, and promulgated after all who had an interest in a proposed rule had a chance to convey their views to the agency.

Noting that the agency is required under

the administrative procedure act to allow the public "a significant opportunity" to present views in a rule-making procedure, and that any rules are subject to judicial review, the Court of Appeals said, "Any fears that the agency could successfully use rule-making power as a means of oppressive or unreasonable regulation seem exaggerated."

Although the agency had moved along with work on some of the rules so that they could be issued if their authority was confirmed, it is clear that an adverse decision would have severely hampered the resource-limited agency in its antitrust enforcement and consumer protection work. The Court of Appeals said in its decision that the result of the lower court opinion "would render the commission ineffective to do the job assigned it by Congress."

The appeals court panel, comprised of Chief Judge David Bazelon and Circuit Judges J. Skelly Wright and Spottswood Robinson III, endorsed the agency's contention that, in fact, rule-making "was fairer to industry than case-by-case adjudication."

The issue of the octane-rating rule and rule-making generally, should this decision be appealed, is not yet resolved. The refiners' lawyer suggests that at least two of the three judges in the panel are considered "liberal" and could be reversed in the high court.

Others note that the supreme court has come down on the side of the agencies in recent decisions when the question of their powers was raised.

A standoff: Energy, ecology, Indians' rights

By GEORGE C. WILSON
(C) 1973, The Washington Post

LAME DEER, Mont. — The political leaders on this northern Cheyenne reservation close to the Custer battlefield are preparing for another last stand — this time to save what land they have left from being strip-mined for coal on the white man's terms.

The stakes could hardly be higher. For the Northern Cheyennes, the stakes include "tribal survival," as some of the Indians here see it; millions — and maybe billions — of dollars, and the land Cheyenne forbears walked from Oklahoma to claim for their people.

For the Nixon Administration, the contest is viewed as a highly visible test of its new Indian policy of "self-determination," with another Wounded Knee a possibility if things go wrong. It also affects the Administration's master plan for finding new sources of energy, and holds up for public evaluation its whole platform on safeguarding the natural environment.

The order of battle is different from when Gen. George Armstrong Custer lost to the Cheyennes and Sioux near here in the Little Big Horn battle of 1876. For one thing, the white ranchers holding thousands of acres of land around the reservation are allied this time with Cheyennes against the coal companies. For another, the Cheyennes are not as united against the "intruders" as they were 97 years ago.

The "intruders," from the viewpoint of the Indians trying to mobilize the Cheyennes against them, are the coal companies and speculators who have discovered millions of tons of coal just under the surface of the reservation. They want to dig it out through strip mining.

Somewhat belatedly, the tribal council — the ruling body for the 3,000 Northern Cheyenne enrolled at the reservation — is trying to keep the coal from being mined as previously agreed under existing leases.

The council in March asked Secretary of Interior Rogers Morton to cancel the contracts for looking for coal on the reservation and digging it out. The council argued that the Bureau of Indian Affairs superintendent at the reservation failed to follow required procedures in granting the permits and leases, including failing to set forth rules for restoring the land after it is mined.

The Seattle law firm of Zientz, Pirtle, Morisset and Ernstoff — specialists in Indian land law — has just been retained by the Northern Cheyenne tribe. The firm asked Morton to delay acting on the council resolution until it had time to study the whole case — a request that the Interior Department has granted.

RIP UP FOR RIP-OFF?

How Morton ultimately rules will affect coal leases on other Indian reservations as well, including the coal-rich lands of the Crows adjacent to the Northern Cheyennes here.

The Indians' concern about what will happen to their land if it is strip-mined also is part of the

larger national picture — the argument over whether it is environmentally safe and sound to rip up the often fragile prairies to get at the coal.

The controversy, in geographic and mineral dimensions, is much larger than the one over strip mining of Appalachia. This is because most of the nation's remaining coal within easy reach lies in the West, not the East.

The Library of Congress, in a report prepared this year for the Senate Interior Committee, noted that almost half of the western lode of "black gold" is in Montana, North Dakota and Wyoming — the new frontier for the strip miners.

With President Nixon urging a stepup in coal production to ease expected energy shortages, the coal rush in the West is on. So, again, the Cheyenne controversy represents in microcosm the tough choices which this rush presents to the people living on top of the land covering the coal.

Rep. John Melcher (D-Mont.), whose congressional district includes the reservation and who has taken a leading role in controlling strip mining, said that on the southwest flatlands of Black

Mesa and Four Corners — the area where Arizona, New Mexico, Utah and Colorado meet — "they had development before they had protection" from strip mining.

The same thing must not happen in Montana and other western states where strip mining is just getting started, he said. "We must have protection before we have development," Melcher said. He added that the Indians' "sacred regard for land" and their conviction "it should be protected so it can be used by everybody" is "an attitude the rest of us are just swinging around to."

The Indians and their allies among the white ranchers trying to keep the land from being stripped are colliding with the Nixon Administration master plan to develop the energy resources of the West. Allen Rowland, the 47-year-old tribal chairman of the Northern Cheyennes, is the first to admit he is outgunned in this new fight.

The land involved — a country of prairie and roughed-rock

parapets — looks refreshingly untrammeled, with seemingly endless sky and prairie. In an interview in his modest home off the red dirt road

along a muddy creek, Rowland said if it's left up to him, the land he loves will stay this way. He is against strip mining on any terms. But he is not sure the whole tribe — perhaps not even the majority of it — stands with him. The council resolution asking a cancellation of the coal leases and permits is only his first line of defense.

If he does lose to the Interior Department, Rowland plans to set up a second defense line by taking the tribe's request to the courts. If he loses there, too, the tribal chairman intends to impose the toughest rules anywhere concerning what the coal companies would have to do toward restoring the dug-up land.

As he surveys the options, Rowland said he can feel the hunger of his fellow tribesmen for a way out of their spiritual and economic depression on the impoverished reservation of 440,000 acres. He knows they are faced with a cruel choice.

"If I got everybody in the tribe in a room and asked who is an environmentalist, who is for protecting our land, why everybody would raise their right hand. But when it came to voting by secret ballot who was for selling the coal I'm not sure how it would go."

This is why Rowland is not galloping into the battle with the Interior Department and coal companies but advancing carefully.

