It is further ordered, That the allegations of the complaint that respondent engaged in predatory pricing practices be, and they hereby are, dismissed.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order set forth herein.

By the Commission, Commisisoner Anderson concurring in the result.

IN THE MATTER OF

THE ATLANTIC REFINING COMPANY

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

Docket 7471. Complaint, Apr. 13, 1959—Decision, Nov. 22, 1963

Order requiring a major integrated petroleum products marketing company to cease coercing its independent lessee-dealers in the "Delmarva Peninsula" area of Delaware, Maryland and Virginia, during a local price war, to sell its gasoline at uniform and non-competitive prices by means of a so-called "temporary consignment contract"; conspiring with such retail dealers to fix and maintain the uniform prices through the medium of the "consignment contracts"; and conspiring with its independent wholesale distributors to maintain the uniform consumer resale prices by granting the coconspiring distributors certain rebates to be passed on to their dealer customers maintaining the uniform prices.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Atlantic Refining Company, Inc., a corporation, hereinafter 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., Sec. 45), 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 with respect thereof as follows:

COUNT I

PARAGRAPH 1. Respondent, The Atlantic Refining Company, Inc.,* is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with

* Respondent's correct name is The Atlantic Refining Company.

its principal office and place of business located at 260 South Broad Street, Philadelphia 1, Pennsylvania. Respondent is a major oil company, and is now and for several years last past, has been, among other endeavors, primarily engaged in the offering for sale, sale and distribution of gasoline and other petroleum products throughout a seventeen state marketing area. Said gasoline is advertised and sold under the brand names of "Atlantic Gasoline" and "Imperial Gasoline", ("Atlantic" being the regular brand and "Imperial" being the hi-test or ethyl). Said gasoline enjoys wide public acceptance wherever it is marketed and is considered a major brand product. Respondent, one of the nation's leading producers and marketers of gasoline and other petroleum products, comprises an integrated unit in the petrolum industry in that it is engaged in the acquisition and exploitation of oil producing properties located in the United States as well as in foreign lands; the refining of crude oil and the subsequent manufacture therefrom of various petroleum products including gasoline; and the subsequent distribution and marketing at wholesale and retail of the products of its refineries in the United States and foreign lands. Respondent owns and operates refineries at Philadelphia, Pennsylvania, and Atreco, Texas. It owns or controls approximately twenty-five ocean-going tankers, as well as various pipe-line systems used for the transportation of crude oil and refined petroleum products. Furthermore, it owns and operates water terminals and bulk plants in different marketing areas from which its petroleum products are delivered to the various marketing outlets for subsequent sale to the consumer. In 1956 the gross sales, including petroleum products, of the respondent and its consolidated subsidiaries amounted to $544,864,558.

PAR. 2. Respondent markets its gasoline and petroleum products through its owned and operated service stations; through independent lessee-dealer service stations; and through independent distributors who in addition to supplying gasoline to service stations operated by them also sell to independent lessee-dealer service stations.

Respondent, in the delivery and sale of its gasoline to its various marketing outlets located in a seventeen state area, and in particular in eastern Pennsylvania and that area termed the "Delmarva" peninsula—said peninsula being comprised of portions of the three states, Delaware, Maryland and Virginia—has entered into agreements, contracts and/or leases, now in force, whereby respondent delivers and sells to independent distributors and independent lessee-dealers all of their respective requirements of respondent's brands of gasoline during the terms of such contracts. In the course of supplying said customers and making deliveries pursuant to the terms of said agreements, contracts and/or leases, respondent ships its gasoline from its refineries across state lines to bulk stations and other terminal or distributing facilities located in or near the various marketing areas. From these points it is delivered to independent distributors and/or independent lessee-dealers, for subsequent sale to members of the purchasing public. There is now, and has been at all times mentioned herein, a continuous stream of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said gasoline between respondent's refineries, terminals and bulk stations and said independent distributors and/or independent lessee-dealers in the areas set forth herein. All of said deliveries from respondent, and the receiving, as well as the purchases and resale by the said independent distributors and/or independent lessee-dealers have been in the course and furtherance of such commerce.

PAR. 3. Except to the extent that competition has been hindered, frustrated, lessened, manipulated and eliminated as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the distribution and sale of gasoline in commerce as that term is defined in the Federal Trade Commission Act.

PAR. 4. Certain conditions which create or contribute to temporary disturbances of the retail price structure of gasoline at the service station level, occur and have occurred on various occasions and at various times in the areas in which respondent markets its gasoline. These are sometimes referred to as "price disturbances", or as "depressed prices" but more commonly they are referred to and known as "price wars". "Price wars" may originate from any one of a number of casual factors. During such occasions, respondent has, under the guise and pretext of giving assistance to its lessee-dealers, conceived, adopted and put into operation certain plans or methods for the purpose, and with the effect, of controlling the prices at which gasoline is sold at respondent's lessee-dealer service stations.

In the "Delmarva Peninsula" area, as well as elsewhere, respondent has a number of retail outlets through which its refined petroleum products, including gasoline, are sold to the consuming public. A substantial number of such outlets are operated by independent businessmen, or who would be in the absence of the power and control exercised over them by respondent, who lease or sub-lease their service station properties from respondent and who have entered into supply contracts for gasoline and certain other requirements with respondent.

By means of various provisions in the leases, sub-leases and supply contracts and through a system of policing the business operations of the said independent lessee-dealers by constant inspection and surveillance, the respondent is able to and does, to a substantial extent and degree, dominate and control the manner in which said lessee-dealers operate the service stations leased or sub-leased from respondent. The power resident in respondent through such domination and control is exercised, exerted and used by respondent to persuade, influence, coerce and induce said independent lessee-dealers to abide by, agree to, adhere to, follow or acquiesce in, various plans, policies or methods of doing business which may be suggested by respondent or which respondent may desire or elect to place in effect and operation. At all times the independent lessee-dealer is conscious and aware of the power of respondent and is influenced by such power in the everyday decisions made by him in the conduct of his business.

Beginning in or about May 1967, respondent conceived, adopted and put into operation in the "Delmarva Peninsula" area a device, plan or scheme to enable it to fix the retail prices of the gasoline sold by its lessee-dealers to the consuming public.

To effectuate and carry out the plan, respondent, relying on the power and control it possesses and exerts over its independent lessee-dealers in the conduct of their business, influenced, persuaded or otherwise induced or caused its independent lessee-dealers to enter into agreements with it which are designated or commonly referred to and known as "temporary consignment contracts". By the use of such temporary contracts uniformity of price is achieved as between lessee-dealers of respondent and said uniformity of price contributes to a manipulation and/or stabilization of price competition in the market during a period of price disturbance as described above. In most, if not all, instances the said dealer was an unwilling party to the arrangement, having been coerced, pressured or otherwise persuaded or induced by various means and methods employed by respondent, to enter into such consignment contracts. Said contracts have been, and are now being, entered into and carried out with complete indifference as to an individual dealer's competitive situation, or need. During the period the agreement remains in effect, respondent is ceded the right by the lessee-dealer to establish the resale price of the gasoline to the purchasing public. Said dealer receives a certain designated commission on each gallon of gasoline sold at his service station but forfeits his customary margin of profit. In most instances, if not in all, the commission received by a dealer is not equal in amount to said usual and customary margin of profit. The amount of said commission to be paid is computed by a specific formula, operating in relation to the retail price or prices posted and the amount of the temporarily established consignment tank wagon cost (i.e., temporary wholesale price). To those dealers who do not participate in the consignment plan operation, the tank wagon price to them is more than is the cost to a participating dealer.

Respondent, through and by virtue of said plan is able to, and does, control the prices at which gasoline is sold at retail by its lessee-dealers and thus tends to, and does, during the period the plan is in operation, manipulate, eliminate, frustrate and prevent price competition between its lessee-dealers and with others. Such power and control removes any probability or possibility of price competition, thus, tending to insure uniformity of prices despite the presence of factors in the market which would, in the absence of this artificial restraint and control, encourage competition.

Respondent, in addition to its lessee-dealers, also sells its gasoline to wholesale distributors in this area, as well as in others. Said distributors in some instances operate service stations of their own and also sell to and have as customers other service stations selling respondent's brand of gasoline. Said distributors conduct their businesses and sell within established exclusive territories, said exclusive territories having been previously established by contract between the parties. In order to assure that the consignment plan of operations would achieve the aims and purposes intended, respondent, by various means and methods, caused the distributors to maintain the retail prices at their own stations as well as those posted at their dealer-customer stations in conformity with the prices posted by respondent's lessee-dealers operating under the aforesaid consignment plan. Furthermore, at times and on various occasions, respondent, acting on its own initiative, through various means and methods, attempted to and did cause the dealer customers of said distributors to post and maintain their retail price or prices in conformity with the price being posted by respondent's lessee-dealers operating under the aforesaid consignment plan.

PAR. 5. The acts and practices of respondent as herein alleged have a dangerous tendency to and have hindered, suppressed and restrained the sale and distribution of gasoline, in commerce, among and between the various States of the United States and the District of Columbia, and hindered and prevented normal, free and unrestrained competition in the sale of gasoline in commerce; have a dangerous tendency and capacity to repose, and do repose, in respondent the power and control sufficient to stabilize or contribute to the stabilization of prices in the area or areas where it markets its gasoline; created and continue to create an artificial price structure in which the free play of market forces is suppressed, hindered and prevented; make for price uniformity at the wholesale and retail levels of sale and distribution to the detriment of the purchasing public; and deprive the public and its lessee-dealers and others of the advantage of competition in price and otherwise which they would enjoy under a condition of normal, free and unrestrained competition.

PAR. 6. The acts and practices of the respondent as herein alleged are all to the prejudice of the public, and its lessee-dealers and the competitors of its lessee-dealers and its distributors and constitute unfair acts and practices and unfair methods of comeptition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PAR. 7. All of the allegations of Paragraphs 1 through 6 of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count II the same as if they were repeated herein verbatim.

PAR. 8. Except to the extent that competition has been hindered, frustrated, lessened, manipulated and eliminated as set forth in this complaint, respondent, its lessee-dealers and independent distributors have been and are now in substantial competition with other corporations, individuals and partnerships engaged in the distribution and sale of gasoline in commerce as that term is defined in the Federal Trade Commission Act.

PAR. 9. Beginning in or about May 1957, respondent, acting through its agents, officers, employees and its independent lessee-dealers (said lessee-dealers are to be considered as and are herewith alleged as unnamed co-conspirators), engaged in selling respondent's gasoline and other petroleum products in the "Delmarva Peninsula" area, and other areas, for the purpose of manipulating, suppressing, preventing, hindering or stabilizing price competition in the distribution and sale in commerce of gasoline during a price disturbance period, conspired to and have entered into, maintained and carried out a combination, planned common course of action, understanding or agreement, through which the price of gasoline sold in the service stations of said independent lessee-dealers could be fixed and maintained, and was fixed and maintained, and through which the price of gasoline being sold by others in the market could be and was manipulated. stabilized, controlled and affected.

PAR. 10. Pursuant to the conspiracy and in furtherance of the aforesaid unlawful combination, planned common course of action, understanding and agreement, respondent and the aforesaid independent lessee-dealers executed a written agreement purporting to be cast in the form of a legal consignment contract. Said contracts are cast in such form for the purpose and with the attempt to immunize and insulate a mere price manipulation scheme from the antitrust laws. Said agreements are nothing more than shams and subterfuges having as their primary purpose and function of a temporary illegal price fixing vehicle, which affects, manipulates, restrains and/or stabilizes price competition or contributes to artificial uniformity of gasoline prices in the market. The said consignment contracts as alleged herein bear no bona fide relationship to the business needs and requirements of either the respondent or its independent lessee-dealers, and in substance the status of gasoline purchaser and vendor did and does exist as between respondent and its independent lessee-dealers notwithstanding the representation by form to the contrary. Futhermore, in most, if not all, instances each dealer was an unwilling party to the arrangement, having been coerced, pressured or otherwise persuaded and induced, through various means and methods employed by respondent, to enter into such agreements.

PAR. 11. The unlawful planned common course of action as herein alleged is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors, distributors and retailers of gasoline, as well as to the competitors of respondent's lessee-dealers, in the "Delmarva Peninsula" area, as well as other areas where so employed, and has a dangerous tendency to and does unreasonably restrain, manipulate, hinder, suppress, and/or stabilize competition in the "Delmarva Peninsula" area, and other areas, between and among respondent's lessee-dealers; respondent's lessee-dealers and respondent's owned and operated service stations; respondent's lessee-dealers including its own service stations and the respective retail dealers of respondent's independent distributors; respondent's lessee-dealers including its own service stations and those distributors which market at retail; respondent's lessee-dealers including its own service stations and the retail dealers of other gasoline marketers; and between and among respondent and its independent distributors.

It has unreasonably restrained, manipulated, hindered, suppressed and/or stabilized competition therein in the distribution and sale of gasoline in commerce within the meaning of the Federal Trade

Commission Act and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT III

PAR. 12. All of the allegations of Paragraphs One through Six of Count I and Paragraphs Nine through Eleven of Count II of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count III the same as if they were repeated herein verbatim.

PAR. 13. Except to the extent that competition has been hindered, frustrated, lessened, manipulated and eliminated as set forth in this complaint, respondent, its independent distributors and lessee-dealers have been and are now in substantial competition with other corporations, individuals and partnerships engaged in the distribution and sale of gasoline in commerce as that term is defined in the Federal Trade Commission Act.

PAR. 14. Beginning in or about May 1957, respondent acting through its agents, officers, employees, and its independent distributors (said independent distributors are to be considered as and are herein alleged as unnamed co-conspirators) engaged in selling respondent's gasoline and other petroleum products to independent service stations as well as through their own service stations in the "Delmarva Peninsula" area, and other areas, for the purpose of manipulating, suppressing, preventing, hindering or stabilizing price competition in the distribution and sale in commerce of gasoline and for the further purpose of aiding, abetting and in furtherance of the consignment plan of distribution as alleged in Count I herein as well as the price manipulation, fixing and/or stabilization scheme as alleged in Count II Paragraph 9 hereof, conspired to and have entered into, maintained and carried out a combination, planned common course of action, understanding and agreement, through which they would maintain and fix, and did maintain and fix, the price at which gasoline was sold or would be sold at the wholesale level, as well as at retail in the gasoline service stations owned and operated or sold to by said distributors.

PAR. 15. Pursuant to the conspiracy and in furtherance of the aforesaid unlawful combination, planned common course of action, understanding and agreement respondent in conspiracy and combination with the aforesaid independent distributors, adhered to, performed and did the following acts and things:

(1) Agreed to and did grant certain allowances, discounts or rebates from the tank wagon price to the distributors' customers

on the condition that the dealer customer would conform his retail price to a price dictated by respondent.

(2) Agreed to and did provide to its distributors certain allowances, discounts or rebates from the distributors' cost upon the condition, understanding and agreement that said distributors provide their customers with certain alowances, discounts or rebates and further provided, that said customers of the distributors would adhere to and post the retail price or prices dictated by respondent.

(3) Pressured, threatened, coerced and otherwise persuaded and induced said dealer customers of said distributors to post and adhere to retail prices dictated by respondent from time to time.

PAR. 16. The unlawful planned common course of action as herein alleged is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors, distributors and retailers of gasoline, as well as to the competitors of said distributors, in the "Delmarva Peninsula" area, as well as other areas where so employed, and has a dangerous tendency to and does unreasonably restrain, manipulate, hinder, suppress and/or stabilize competition in the "Delmarva Peninsula" area, and other areas; between and among the independent retail customers of a distributor and the retail outlets owned and/or operated by a distributor; the retail customers of the distributors; the retail customers of the distributors and the independent lessee-dealers of respondent as well as those retail outlets owned and/or operated by respondent; the retail customers of the distributors including distributor owned and/or operated outlets and the retail dealers of other gasoline marketers; respondent's independent distributors; respondent's independent distributors and the distributors of other gasoline marketers; and between and among respondent and its independent distributors.

It has unreasonably restrained, manipulated, hindered, suppressed and/or stabilized competition therein in the distribution and sale of gasoline in commerce within the meaning of the Federal Trade Commission Act and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Rufus E. Wilson and *Mr. Alan Weber* for the Commission.

Mr. Edward F. Howrey and *Mr. Harold F. Baker* of *Howrey, Simon, Baker & Murchison*, Washington, D.C., and

Mr. Roy W. Johns and *Mr. Joel L. Carr* of the *Atlantic Refining Company, Philadelphia, Pa.*, for the respondent.

INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

March 7, 1962

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PRELIMINARY STATEMENT

The Commission, on April 13, 1959, issued a complaint against the respondent The Atlantic Refining Company (erroneously described as The Atlantic Refining Company, *Inc.*). The complaint has three counts.

Count I charges the respondent, which is described as a major oil company, with violating Section 5 of the Federal Trade Commission Act in the marketing of its gasoline and petroleum products through its owned and operated service stations; through independent lessee-dealer service stations; and through independent distributors, who, in addition to supplying gasoline to service stations operated by them, also sell to independent lessee-dealer service stations. It is alleged that respondent in the delivery and sale of its gasoline to its various marketing outlets, particularly in the territory known as "Delmarva Peninsula", comprised of portions of the States of Delaware, Maryland, and Virginia, has entered into agreements whereby respondent delivers and sells respondent's brands of gasoline to independent distributors and lessee-dealers in interstate commerce.

It is alleged under Count I that during disturbed market conditions in the retail sale of gasoline known as "price wars", under the guise and pretext of giving assistance to its lessee-dealers, respondent has put into operation certain plans or methods for the purpose and with the effect of controlling the prices at which gasoline is sold at respondent's lessee-dealer service stations. In this connection, it is alleged that by means of various provisions in the dealer leases, and through a system of policing the business operations of said independent lessee-dealers, the respondent, to a substantial extent, dominates and controls the operation of the service stations leased or subleased from respondent.

It is specifically alleged that, beginning in or about May 1957, respondent put into effect in the "Delmarva Peninsula" area such a device or plan to enable it to fix the retail prices of the gasoline sold by its lessee-dealers to the consuming public, and to effectuate and carry out said plan, respondent influenced, persuaded or otherwise induced or caused its independent lessee-dealers to enter into agreements with it designated and known as "temporary consignment contracts", by the use of which uniformity of price was achieved as between the lessee-dealers of respondent; and that said uniformity of price contributed to a stabilization of price competition in the market during a period of price disturbance hereinbefore mentioned. It is further alleged that in most instances the said dealers were unwilling parties to the arrangement, having been coerced by various means and methods employed to enter into such consignment contracts; that, under said contracts, the lessee-dealers received a certain designated commission on each gallon of gasoline sold at his service station, but forfeited his customary margin of profit; and that, in most instances, the commission received is not equal in amount to the dealer's usual and customary margin of profit. It is also alleged that those dealers who do not participate in the said consignment contract operation are charged the tank wagon price which to them is more than is the cost to a participating dealer.

It is further alleged in Count I that respondent, through and by virtue of said consignment contract plan, controls the prices at which gasoline is sold at retail by its said lessee-dealers and prevents price competition between said lessee-dealers and with others, thus tending to insure uniformity of prices despite the presence of factors in the market which would, in the absence of such artificial restraint and control, encourage competition.

It is further alleged under this Count that, in addition to said lessee-dealers, respondent also sells its gasoline to wholesale distributors in the "Delmarva Peninsula" area, which said distributors in some instances operate service stations at retail and also sell to retail customers selling respondent's brand of gasoline; and that in order to insure the success of the consignment agreement plan of operation and to achieve the aims and purposes hereinbefore mentioned, respondent, by various means and methods, caused the said distributors to maintain the retail prices of their own retail stations, as well as the dealer-customer stations, in conformity with the prices posted by respondent's lessee-dealers operating under the aforesaid consignment agreement plan.

Finally, it is pleaded under Count I that the said acts and practices of respondent have a dangerous tendency and have hindered, suppressed, and restrained the sale and distribution of gasoline in interstate commerce and hindered and prevented free competition in the sale of gasoline in such commerce, and reposes in the respondent the power and control sufficient to stabilize prices in the said areas where it markets gasoline at wholesale and retail levels of distribution and deprives the public and the lessee-dealers and others of the advantage of competition in price which they otherwise would enjoy under the condition of normal, free and unrestrained competition.

Under Count II, all the allegations of Count I are adopted and incorporated by reference. In addition, it is specifically alleged that, beginning in or about May 1957, respondent, acting through its agents and independent lessee-dealers as unnamed co-conspirators engaged in selling respondent's gasoline and other petroleum products in the "Delmarva Peninsula" area and other areas, conspired and carried out a combination or planned common course of action through which the price of gasoline sold in the service stations of said independent lessee-dealers was fixed and maintained as well as the price at which gasoline was sold by others in that market.

It is further alleged under Count II that, pursuant to such conspiracy and planned common course of action, the respondent and the aforesaid independent lessee-dealers executed written agreements purporting to be consignment contracts which were nothing more than shams and subterfuges, having as their primary purpose and function a temporary, illegal price-fixing vehicle: that the said consignment contracts bear no bona fide relationship to the business needs and requirements of either the respondent or its independent lessee-dealers and that in most instances each dealer was an unwilling party to the arrangement, having been coerced through various means and methods employed by respondent to enter into such agreements.

Finally, it is alleged that said planned common course of action has a dangerous tendency to, and does unreasonably restrain and suppress or stabilize, competition in the "Delmarva Peninsula" area and other areas between and among respondent's lessee-dealers and between such dealers and respondent's owned and operated service stations and the respective retail dealers of respondent's independent distributors.

Under Count III, all the allegations of Counts I and II are incorporated by reference. In addition, it is specifically alleged that, beginning in or about May 1957, respondent, acting through its agents, officers, employees, and its independent distributors, and in furtherance of said consignment agreement plan of distribution, and the price-fixing agreement as hereinbefore alleged, conspired and entered into and carried out a combination and planned common course of action to maintain and fix the price at which gasoline was sold at the wholesale level, as well as at retail, in the gasoline service stations owned and operated by respondent's said distributors.

It is further alleged that, pursuant to said conspiracy and planned common course of action, respondent performed certain specific acts and things as follows:

(1) Agreed to and did grant certain allowances, discounts or rebates from the tank wagon price to the distributors' customers on the condition that the dealer customer would conform his retail price to a price dictated by respondent.

(2) Agreed to and did provide to its distributors certain allowances, discounts or rebates from the distributors' cost upon the condition, understanding and agreement that said distributors provide their customers with certain alowances, discounts or rebates and further provided, that said customers of the distributors would adhere to and post the retail price or prices dictated by respondent.

(3) Pressured, threatened, coerced and otherwise persuaded and induced said dealer customers of said distributors to post and adhere to retail prices dictated by respondent from time to time.

Finally, it is alleged under Count III that the said unlawful, planned common course of action has a tendency to and does unreasonably restrain, suppress, and stabilize competition in the "Delmarva Peninsula" area and other areas, between and among the independent retail customers of respondent's distributors and the retail outlets owned and operated by such distributors, between the retail customers of the said distributors and between the retail customers of the distributors and the independent lessee-dealers of respondent, as well as those retail outlets owned or operated by respondent.

Before respondent answered said complaint, an interlocutory plea in abatement was filed by respondent's counsel on June 16, 1959. This plea alleged that The Atlantic Refining Company was incorporated in 1870 in the State of Pennsylvania and has never been called or known as The Atlantic Refining Company, Inc., as alleged in the Commission's complaint; that at one time there was a company known as Atlantic Refining Company, Inc., a subsidiary of The Atlantic Refining Company, but that this company had not been in existence for many years.

Counsel, in support of the complaint filed an answer to respondent's plea in abatement on June 19, 1959, accepting the designation of The Atlantic Refining Company as the correct name of respondent. The Hearing Examiner, on June 24, 1959, entered an order denying the plea in abatement and fixing the date and place of the first hearing to be held July 20, 1959 in Georgetown, Delaware.

On June 30, 1959, counsel for respondent filed with the Commission an appeal from the order of the Hearing Examiner denying respondent's pleas in abatement. On the same date, counsel for respondent filed with the Commission a motion to dismiss Counts I and II of the complaint for lack of jurisdiction and brief in support thereof, and at the same time filed with the Hearing Examiner a motion for an extension of time within which to answer or otherwise plead until fifteen days after determination by the Commission of respondent's motion to dismiss Counts I and II of the complaint or respondent's appeal from the order of the Hearing Examiner denying respondent's plea in abatement, whichever date is later; also to postpone the date of July 20, 1959, now set for the initial hearing, to a date not less than twenty days after answer.

On June 30, 1959, the Hearing Examiner extended the time for respondent to file answer from July 1, 1959 to July 15, 1959.

On July 6, 1959, counsel in support of the complaint filed with the Commission his answer to respondent's appeal from the Hearing Examiner's order denying respondent's plea in abatement.

On July 8, 1959, counsel in support of the complaint filed with the Hearing Examiner an answer to respondent's motion for extension of time within which to answer or otherwise plead and postponement of the hearing date.

On July 10, 1959, counsel in support of the complaint filed with the Commission an answer to respondent's said motion to dismiss Counts I and II of the complaint for want of jurisdiction.

On July 13, 1959, the Hearing Examiner entered an order denying the motion for further extension of time within which to answer or otherwise plead and denying request for postponement of initial hearing.

On July 15, 1959, the Commission entered an order denying the interlocutory appeal of respondent from the Hearing Examiner's order denying respondent's plea in abatement. On the same date, the Commission denied respondent's motion to dismiss Counts I and II of the complaint.

On July 14, 1959, counsel for respondent filed a motion for a Bill of Particulars and memorandum in support thereof with the Hearing Examiner. No formal action was taken on said motion but, at the first hearing on July 20, 1959, the Hearing Examiner questioned counsel in support of the complaint with respect to the subject matter of the motion for a Bill of Particulars (Tr. 3–18), and the issues were somewhat clarified as a result. For instance, it was made respondent's lessee-dealers and "others", the word, "others", referred clear that in the allegation with respect to price competition between to dealers of major competitors of respondent. Also, as to the allegation of maintenance of prices and price competition, reference was made to the "Delmarva Peninsula" area, and that all price competition in that area would include both the retail and wholesale levels between the dealers of respondent and dealers of its major competitors. Where reference is made to the word, "distributors", in the complaint, reference is made to wholesalers who, however, operate some service stations of their own. It was also indicated by counsel in support of the complaint at the hearing that proof would be offered for the period of time subsequent to about April or May 1957. It was also stated by complaint counsel that all evidence with respect to the consignment agreement plan of operation would be restricted to the "Delmarva Peninsula" unless otherwise indicated in the course of the trial with sufficient notice in advance for respondent to be prepared.

Respondent finally filed its answer to the complaint on July 29, 1959, denying the material allegations thereof. It admitted, however, that price wars originated from time to time in various localities, including the "Delmarva Peninsula", and that it had from time to time sold its products to a number of independent service station dealers in the "Delmarva Peninsula", and had from time to time entered into consignment agreements for gasoline for certain of these dealers, whereby the said dealers sold respondent's gasoline to consuming motorists, receiving thereon a commission on each gallon of gasoline sold; and that, when it marketed its gasoline through dealer agents, it set the price at which its gasoline is so sold. It also admitted that it sold gasoline to wholesale distributors in the "Delmarva Peninsula", but denied all the allegations with respect to such sales. It admitted generally that it is in competition with other gasoline marketers and that its dealers competed with the dealers of competitors of the respondent in the distribution and sale of gasoline to the consuming public.

Respondent, in its answer, affirmatively alleged that it does many things to assist its dealers to compete with the dealers of other marketing oil compaines and encourages its dealers to provide efficient service to motorist consumers; that the activities of respondent all result from competition from competing oil companies, many of which are much larger and better known than respondent; that price is one of the many elements bearing upon competition for consumer motorists patronage; that, because of intense competition which exists in the marketing of gasoline, price wars are common occurrences; that during such price wars retail gasoline prices often are driven so low that respondent's dealers cannot stay in business and are faced with business failure unless they receive assistance from respondent; that, in such circumstances, respondent is faced with the decision whether to let its independent dealers fail, which could eliminate both respondent and its dealers as competitors, or to buy out its independent dealers and market its products directly at retail through company-owned and operated service stations or to assist its dealers so that they may be competitive price-wise with other brands of gasoline.

Respondent also alleged in its answer that, as a result of the foregoing situation, it has entered into a policy of offering and providing assistance to its dealers—one, by means of its local representatives respondent keeps itself informed of competitive conditions in each of its trading areas; two, when information is obtained in this way and market surveys show that the level of competitive prices is threatening to drain a substantial volume from its dealers, respondent offers to enter into consignment agreements with its dealers under which respondent agrees to assume the risks inherent in a price war situation in the retail marketing of gasoline. The purpose of this consignment method of marketing gasoline is to keep service station dealers in business and prevent business failures of dealers and at the same time allow respondent to remain as a competitive factor in the marketing of gasoline in competition with other and larger competing oil companies.

Respondent also affirmatively alleged that it has adopted the policy and practice of offering to all dealers in an affected area the option of becoming consignees of respondent when competitive conditions, based upon price surveys by respondent, require action by it to keep its dealers solvent and competitive.

Further testimony was taken in support of the allegations of the complaint during July and October 1959 and May 1960. On May 24, 1960, complaint counsel closed his case-in-chief. At that time an adjournment was taken to reconvene in Philadelphia on February 1, 1961, for the purpose of taking testimony in opposition to the allegations of the complaint. On October 14, 1960, motion was filed by counsel for respondent requesting this hearing be cancelled because he was engaged in the trial of another Federal Trade Commission case with another Hearing Examiner at that time and would be tied up until after May 16, 1961, with the trial of the other proceeding. On October 19, 1960, the Hearing Examiner entered an order granting the motion for the cancellation of the hearing date.

The Hearing Examiner retired, effective December 24, 1960, and returned to the employ of the Commission on May 2, 1961. The respondent, on August 18, 1961, requested an opportunity to avail itself of the privilege of disposing of the case by consent. However, nothing was accomplished and the case was set down for hearing by the Hearing Examiner on September 22, 1961, for October 24, 1961. In the meantime, on October 18, 1961, counsel for respondent filed a motion to strike the testimony of Howard T. Morris, beginning at line 9, page 764, and ending at line 18, page 765, of the transcript. This testimony related to the matter of exclusive dealing which was not involved in the complaint. Accordingly, the Hearing Examiner, on October 23, 1961, granted the motion and struck the testimony over the opposition of counsel in support of the complaint. On October 25, 1961, counsel for respondent rested his case, and, there being no further testimony offered in rebuttal, the Hearing Examiner closed the record for the taking of testimony and both counsel were allowed until January 15, 1962 within which to file their proposed findings. On the request of counsel for respondent for good cause shown, this time was extended to January 30, 1961.

On February 12, 1962, oral argument was held before the Hearing Examiner on the proposed findings.

Consideration has been given to the proposed findings submitted by counsel and the said oral argument and all the reliable probative and substantial evidence in the record upon all the material issues of fact, law, or discretion. Each of those proposed findings, which had been accepted, has been in substance incorporated into this initial decision. All proposed findings not so incorporated are herein rejected.

The Hearing Examiner, being of the opinion that some of the allegations of the complaint have been proven by substantial and reliable evidence, and that the Commission should take remedial action with respect thereto, appropriate Findings as to the Facts and Conclusions are hereinafter set forth.

FINDINGS AS TO THE FACTS

I. DESCRIPTION OF RESPONDENT

Respondent, The Atlantic Refining Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 260 South Broad Street, Philadelphia, Pennsylvania. For a number of years last past respondent has been primarily engaged in the production, sale, and distribution of gasoline and other petroleum products throughout a 17 State marketing area, including eastern Pennsylvania, Delaware, and the eastern shore of Maryland and Virginia, known as the "Delmarva Peninsula" region. Said respondent advertises and sells its regular gasoline under the brand name of "Atlantic", and its high test under the brand name of "Imperial".

Said respondent owns and operates refineries at Philadelphia, Pennsylvania, and in Atreco, Texas. It also owns or controls various transportation facilities for the transportation of crude oil and refined petroleum products, including tankers and pipeline systems. It also owns and operates certain water terminals and bulk plants in different marketing areas from which it delivers gasoline and other petroleum products to various marketing outlets for subsequent sales to consumers.

In 1956, respondent's gross domestic sales of petroleum and chemical products, including its consolidated subsidiaries, amounted to approximately $379,000,000.

II. METHODS OF DISTRIBUTION

(a) *Wholesale Distribution*

In a portion of the area known as the "Delmarva Peninsula", particularly in Sussex County, it sells its gasoline and other petroleum products to independent wholesale distributors, who, in turn, sell said products to large consumers and to small retail dealers located in villages off the main highways who, in turn, sell to the consuming public through dispensing equipment which sometimes is owned by the distributor and sometimes by the respondent or both.

(b) *Retail Distribution*

Respondent markets most of its gasoline and petroleum products through (1) independent dealers who own and operate their own stations and (2) lessee-dealers who operate stations leased to them by the owners. In some instances, respondent owns the station or land and building on which it is located and is under lease contract with the dealer.

(c) *Interstate Commerce*

Respondent, in the delivery and sale of its gasoline and other petroleum products to the aforesaid marketing outlets located in the "Delmarva Peninsula", usually enters into an agreement and contracts for the delivery of specific requirements of respondent's brands of gasoline. During the term of such contracts, it ships or transports gasoline and other petroleum products from its refineries by tankers and tank trucks through terminal centers in Norfolk, Virginia, Newark, New Jersey, and through its bulk distribution centers in Salisbury, Maryland, and Wilmington, Delaware, to the storage tanks maintained by said distributors, independent dealers and lessee-dealers located in the "Delmarva Peninsula", so that there is now, and has been at all times mentioned herein, a continuous stream of gasoline and other petroleum products in commerce as "commerce" as defined in the Federal Trade Commission Act, between respondent's refineries, terminals, bulk stations, and other distribution centers hereinbefore mentioned and said independent distributors, lessee-dealers, and other Atlantic dealers located in the "Delmarva Peninsula", and through said distributors, dealers and lessee-dealers to the consuming public.

III. COMPETITION IN THE INDUSTRY

The principal competitors of the respondent in the "Delmarva Peninsula" area during the time involved herein, 1956 and subsequently, were Standard Esso, Tydol Oil Company, Gulf Refining Company, Sun Oil Company. American Oil Company, Sinclair Oil Company, Socony Vacuum Oil Company, and The Texaco Company, who operate directly or indirectly through retail outlets located principally along the main highways running north and south in the States of Delaware, Maryland, and Virginia, and in resort cities in those States along the Atlantic coast.

IV. PRICE WARS

It is alleged in the complaint and the evidence in the record indicates that, during the year 1957, temporary disturbances of the retail price structure of gasoline at the service station level have occurred at various times in the "Delmarva Peninsula" market area served by respondent. Such price disturbances are usually referred to in the trade as "price wars".

Respondent, from time to time during the year 1957, made surveys of competitive conditions in the "Delmarva Peninsula", including New Castle County, Kent County, and Sussex County in Delaware, and Wicomico County in Maryland. On June 3, 1957, such a survey showed that in Area 1, which is in New Castle County in the northern part of the State of Delaware, in which Atlantic had 49 stations out of a total of 262, 166 stations reporting, 2 independent stations, Spur and Saveway, were selling regular gasoline at 24.9¢ per gallon; 15 other stations, including Esso, Gulf, Sun, Amoco, Calso, Sinclair, Spur, Texaco, and Tydol, were selling at 25.9¢ per gallon; 29 stations, including Esso, Gulf, Mobil Gas, Sun, Calso, Cities Service, Shell, Sinclair, Texaco, and Tydol, were selling at 26.9¢ per gallon; 119 stations, including 33 Atlantic stations, 26 Esso, 15 Gulf, 4 Mobil Gas, 17 Sun, 4 Amoco, 4 Calso, 1 Cities Service, 2 Sinclair, 9 Texaco, and 4 Tydol, were selling at 27.9¢ per gallon.

This same survey also showed that in Area 2, also in New Castle County, which had 21 retail gasoline stations, 4 stations were selling at 26.9¢ and 8 stations at 27.9¢. Only 2 of these stations in that area were Atlantic stations.

In Area 3 (Kent County) with a total of 71 stations of which 9 were Atlantic, the survey showed that out of a total of 44 stations reported, 2 were selling at 25.9¢ 24 at 26.9¢, 17 at 27.9¢, and 2 at 28.9¢. All of the Atlantic stations were on consignment and they posted a price of 27.9¢ on regular gasoline.

In Area 4 (Sussex County) which had 41 stations, 6 of which were Atlantic; out of a total of 15 competitive stations reported, 1 station was selling at 26.9¢, and 14 at 27.9¢. Of the 14 stations, Esso, Gulf, Mobil Gas, Sun, Calso, Pure Oil, Sinclair, Texaco, and Tydol were included. At that time, Atlantic Refining Company had put into effect its contract sales plan or consignment contract (which will hereinafter be further discussed) in Areas 1, 2, and 3 of the "Delmarva Peninsula", but had taken no action with respect to Area 4 (Sussex County; CX 230 A–E).

On June 25, 1957, the Atlantic Refining Company made another survey of the "Delmarva Peninsula" area, and it was found that the majority of the well known brand competitors in the northern part of the area in Areas 1, 2, and 3 were still posting retail prices at 26.9¢ on regular gasoline, and the recommendation was made by the official making the investigation that Atlantic reduce its postings on contract sales consignment operation from 27.9¢ to 26.9¢ per gallon, which was made effective on June 26, 1957 (CX 274).

According to a survey made by respondent of Area 4 (Sussex County) on or about July 1, 1957, 52 out of 55 competing retail gasoline stations reported were selling regular gasoline at 26.9¢ per gallon. They included 11 Esso stations, 2 Gulf stations, 2 Mobil (Socony) stations, 5 Sunoco stations, 7 Amoco stations, 4 Cities Service stations, 8 Pure Oil stations, 3 Shell stations, 4 Sinclair stations, and 5 Texaco stations. Some of the retail dealers received rebates off of their tank wagon price. It was reported that the Sun Oil Company was operating on a commission agreement plan similar to respondent's. On the basis of this report, respondent put into operation its contract sales or consignment agreement plan (CX 229A and B). This survey shows 96 stations in the area of which 16 were Atlantic. There is no explanation in the record of the variance between this exhibit and the previous exhibit as to the number of stations.

Prior to June, 1957, the normal retail price of regular gasoline by Atlantic stations located on Routes 13 and 113 in Sussex County, State of Delaware, in and around Seaford and Georgetown was 29.9¢ per gallon, although, as hereinbefore indicated, most competitors were selling at 26.9¢ per gallon. The Atlantic dealers and lessee-dealers were paying respondent a tank wagon (truck) price of 24.3¢ per gallon, giving the dealer a margin of slightly more than 5¢ per gallon. The Atlantic dealer at Rehobeth Beach was selling this grade for 30.9¢ per gallon and was paying Atlantic 25.3¢ per gallon.

Atlantic dealers and lessee-dealers could not compete with such low retail prices of their major competitors. They appealed to the respondent for relief. Representatives of the respondent contacted their dealers and offered to put into effect what was known as a "Contract Sales Plan", which included a "consignment agreement" as hereinbefore indicated. This plan had been theretofore extended to the Atlantic dealers in Eastern Pennsylvania and in the northern areas (New Castle and Kent Counties) of the State of Delaware and was in effect at that time. The record contains a statement of respondent's gasoline pricing policy to dealers at or about this time (CX 151 A–C).

V. RESPONDENT'S CONSIGNMENT AGREEMENT POLICY

In the statement of policy in effect prior to and early in April 1957, it is recognized by the respondent that its primary method of marketing gasoline to dealers is by tank wagon delivery at prices competitive with those of major competitors, and that the success of their dealers depended on their promptly meeting the retail prices of competitive stations and marketing gasoline through comparable outlets in the same area. According to this policy, when price war conditions prevail in a given competitive trade area, so that the spread between the dealer price of Atlantic gasoline and the prevailing service station price at comparable service stations in a competitive trade area is less than four cents per gallon, all Atlantic dealers will have the choice of the following alternative courses of action:

(a) Continue to buy their gasoline at prices applicable under normal dealer operation; or

(b) Execute a Contract Sales Agreement which is also known as a consignment agreement and become consignee of the respondent for the retail sale of Atlantic owned gasoline; or

(c) Terminate all existing contractual relations with the respondent.

Under the provisions of this consignment agreement, the dealer was to receive a commission of 3.25¢ per gallon on Atlantic regular gasoline and 3.75¢ on Atlantic Premium Imperial gasoline.

This consignment agreement provided for a consignment inventory, replenishment delivery equal to the amount of gasoline sold out of consignment inventory and constituted the dealer as trustee of the proceeds from the sale of Atlantic gasoline. It also granted the dealer total commissions from the sale of respondent's gasoline of at least $400 per month, provided the dealer's average monthly gasoline gallonage for the preceding nine calendar months exceeds 5,999 gallons. Title to the gasoline delivered from time to time to the dealer to replenish or augment the original consignment inventory did not pass to the dealer, but was considered as though such gasoline had been a part of the original consignment inventory.

It was also provided in the original consignment agreement that, upon the termination of the agreement, the gasoline on hand in the dealer's tanks should be returned to Atlantic, or at the dealer's option he might purchase such gasoline at Atlantic's prevailing dealer price applicable at that location on the date of termination

The foregoing policy in effect in April 1957, was superseded by another policy quite similar, except that, instead of a flat commission per gallon, the dealer's commission was computed upon the basis of 23% of the service station price, including taxes, and adjusted to the nearest one tenth cent per gallon on Imperial gasoline and one-half cent per gallon on Atlantic regular gasoline (CX 157A–H).

Further changes were made in the respondent's policy with respect to consignment contracts on July 9 and July 18, 1957 (CX 167A–B and CX 171A–H). Important conditions of the plan in effect in July 1957 at the time of the said price war in Sussex County were as follows:

1. The Company will place gasoline on consignment with the dealer subject to prior approval by the Credit Department. At the time of each replenishment delivery, the volume of gasoline on consignment is to be brought to its original level. The dealer will settle in cash at the time of replenishment for the number of gallons equal to the replenishment delivery on the basis of Atlantic's posted service station price at the time at which the gasoline was sold, less a commission for Atlantic gasoline, representing 23% of the service station price for the product, excluding all taxes.

2. Atlantic will specify the service station price of gasoline posted by the dealer during the period of the consignment plan agreement, the dealer to be trustee of proceeds of sale.

3. Title to gasoline constituting any replenishment delivery shall not pass to the dealer.

The form used to obtain the acquiescence of the dealer, as finally adopted in July 1957 for dealers located in depressed price areas, is as follows (CX 173–F):

Your Salesman has explained to you Atlantic's Pricing Policy dated July 9, 1957, for Dealers located in depressed price areas.

Atlantic offers you two choices in accordance with said price policy.

(1) Continue to buy Gasoline at Atlantic's dealer price for your area.

(2) Sign a Consignment Plan Agreement and become our Consignee for the retail sale of Atlantic owned Gasolines.

Please sign the original copy of this letter indicating your choice in the space provided.

Cordially yours,

District Manager

I select choice No. ____. I understand that if I selected Choice No. 1 and wish to change my selection, it is my obligation to notify Atlantic and that my right of selection continues only as long as the above designated Pricing Policy remains in effect in the area in which I operate.

Date ________________________ Dealer ___________________________________

VI. THE CONSIGNMENT AGREEMENT IN OPERATION

One of respondent's lessee-dealers was located at Rehobeth Beach, Delaware, Mr. Raymond D. Crevison, who began to operate for Atlantic in March 1957. In June 1957, he was purchasing the regular brand of gasoline from respondent at 25.3¢ per gallon, which was the tank wagon price in that area at that time, and 28.8¢ per gallon for Imperial. He first entered into a consignment agreement which was in effect on July 1, 1957, as hereinbefore described, and later agreements were entered into in October 1957, June 1958, and August 1958. The consignment agreement was terminated by mutual consent on November 12, 1958, after Mr. Crevison asked to be released in a letter dated November 1, 1958. Mr. Crevison first heard of the price war from his customers when it was about 28 miles north near Milford in Kent County in June 1957. It was beginning to hurt his business as he couldn't lower his prices to meet the lower prices upstate.

Mr. Crevison was told by the Atlantic representative, a Mr. Martin, when the price war hit his community that, if he went on consignment, it would take care of the price war, that "it was a way of protecting me so that I could lower my prices". He was told he could stay on the plan as long as the price condition prevailed.

The record contains a copy of a Credit Memorandum, dated July 23, 1957, of The Atlantic Refining Company, crediting the account of Raymond D. Crevison with the value of gasoline in his inventory at the time of going on the Consignment Agreement on July 1, 1957, as follows: Atlantic regular gasoline 2,062 gallons at 25.3¢ per gallon, and Atlantic Imperial 786 gallons at 28.8¢ or a total credit of $748.06 (CX 119–A).

The storage tanks operated by Mr. Crevison have a capacity of 9,000 gallons, and they were normally checked once a month. After he went on consignment, at the time of each delivery he paid for the amount of gasoline that was delivered to replenish or replace the gasoline that had been sold. Beginning on July 5, 1957, gasoline was delivered to Mr. Crevison under the consignment agreement plan, and, according to invoices or delivery slips, which at first were in the same general form as the sales slips theretofore used, Mr. Crevison paid the new reduced retail price of 26.9¢, less tax of 8¢ State and Federal, and less 4.3¢ commission, or a net price, including tax for regular gasoline thus delivered, of 22.6¢ per gallon which he was instructed by Mr. Martin to sell at 26.9¢ per gallon to the public. At the same time, under a similar procedure, he paid 26.1¢ per gallon for Imperial, his commission being 4.8¢ per gallon. This arrangement continued on through the year 1957 until September 16, 1957 when he was required to raise his price to the public to 29.9¢ per gallon on regular gasoline. On the basis he was operating, his commission on sales on September 29, 1957 was 5¢ per gallon on regular gasoline, and 5.5¢ on Imperial gasoline. He was issued a Credit Memorandum on September 30, 1957 to account for the increase in price of consignment gallons between inventory and approved consignment level sold on contract sales plan prior to the price change on September 16, 1957. The gasoline was delivered by the same tank drivers, and he made payments to the driver for gasoline delivered, the drivers "sticking" the tanks before and after delivery to determine the exact quantity to be paid for.

During the time that Mr. Crevison was on consignment in July 1958, he ran out of regular gasoline and obtained permission from Mr. Martin to purchase some Atlantic regular gasoline from the wholesale distributor in that area, a Mr. Marsh, operating under the name of the Atlantic Oil Company, at Georgetown. This was the only time that he was allowed to make any gasoline purchases on behalf of The Atlantic Refining Company. According to the sales slip in the record, he paid the same price to the wholesaler for the regular gasoline delivered by the wholesaler that he had been paying Atlantic for the same gasoline, which at that time was 23.9¢ per gallon, which was then being sold at retail at 28.9¢ per gallon. The purchase from the wholesale distributor was made on June 29, 1958, and the next delivery of gasoline by Atlantic, according to delivery slips in the record, was on July 3, 1958 (CX 127-J).

While Mr. Crevison was operating on consignment, he made no changes in his signs at his place of business, which read, "R. D. Crevison, Proprietor". He carried his own liability insurance on his stock and equipment, except gasoline, kept the money from all sales in his cash register and did not keep monies from gasoline sales separate from his other sales in the cash register or in the bank, and did not keep a separate set of books for the sale of gasoline although the gasoline is entered as a separate item on the books. During the year 1958, he received the sum of $7,621 from The Atlantic Refining Company as gross commissions under his consignment contract on which he paid an income tax.

Another Atlantic lessee-dealer, who had a somewhat similar experience, was Mr. Howard T. Morris of Georgetown, Sussex County, Delaware. His service station was on Route 113. The respondent's consignment plan was first brought to his attention during the price war in July 1957 by respondent's salesman, Mr. Martin, who told him that the respondent was going to do something about the price war and try to help the dealers out. Mr. Morris entered into a consignment agreement with the respondent on July 2, 1957, which provided, among other things, that Mr. Morris would sell respondent's gasoline "at posted service station price designated by Atlantic from time to time." At the time that Mr. Morris went on consignment, all of the Atlantic dealers in that area were on consignment, except some small dealers, usually grocery stores, with one or two pumps and who were being sold gasoline by a wholesale distributor. Mr. Morris remained on consignment until the agreement was cancelled by mutual consent as of September 27, 1958.

The record contains a list of thirty-seven Atlantic dealers who were on consignment in Area No. 4 in 1957–1958, two of which were in Maryland and six of these replaced others (CX 406 A–C).

On September 13, 1957, respondent issued a price change on dealer retail posting on consigned dealers on gasoline in Delaware and Maryland, effective September 16, 1957, as follows (CX 258–A and B):

DELAWARE

New Castle County:

Above C&O Canal—no change—will remain at 26.9¢

Below C&O Canal to Kent County line—the retail posting on Atlantic will change from 26.9¢ to 27.9¢

Kent County:

Including entire city of Milford—the retail posting on Atlantic will change from 26.9¢ to 27.9¢

The new dealer spread will be 4.6¢ on Atlantic and 5.1¢ on Imperial.

Sussex County:

The dealer retail price will change from 26.9¢ to 29.9¢

The new dealer spread will be 5¢ on Atlantic and 5.5¢ on Imperial.

Delmar, Maryland will carry the Sussex County retail posting of 29.9¢. However, due to tax structure, their spread will be 4.8¢ on Atlantic and 5.3¢ on Imperial.

MARYLAND

Wicomico County

The special tank wagon price for Salisbury, Pittsville and Bivalve will be removed. The tank wagon price will revert to normal of 17.5¢ for Atlantic. Consignment will be removed at Bishop and Bishopville.

Thereafter the dealer costs in the respective areas were as follows:

New Castle County (Area 1)	22.6¢
(Area 2)	23.3¢
Kent County	23.3¢
Sussex County	24.9¢

In those same areas, the regular dealer tank wagon prices thereafter were as follows:

New Castle County (Area 1)	24.6¢
(Area 2)	24.6¢
Kent County	24.6¢
Sussex County	25.3¢

Representatives of the respondent called upon their consignment dealers on September 16, 1957 and changed the price of regular gasoline on the service station pumps from 26.9¢ to 29.9¢ throughout Sussex County, Delaware, and from 26.9¢ to 27.9¢ in Area 2 of New Castle County and Kent County, Delaware (CX 281–E), and in Area 1 of New Castle County no change was made (CX 342–A).

It will therefore be seen from the foregoing that, while apparently the price war was over in Sussex County, lower retail prices were still being posted by Atlantic on regular gasoline in New Castle County and Kent County.

Although most of the evidence in the record relates to the price war in Sussex County, which apparently ended on September 16, 1957, as hereinbefore indicated, one dealer located in Odessa, Delaware, which is in New Castle County, continued to sell at the higher price of 29.9¢ per gallon, and paid the regular tank wagon price throughout the Summer of 1957 and the Spring of 1958 when apparently the price war ended in that County, which is the northernmost County in Delaware. This dealer operated a small store and an auto salvage yard, and did not depend as much on the retail sale of gasoline as some of the other dealers. Mr. Carlisle was more independent than some of the others, and declined the offer of the respondent to go on the consignment agreement plan. Finally, in the Spring of 1958, he did cut the price just before the price war was over, and, at the request of representatives of the respondent, entered into a mutual agreement to cancel out his dealership. He then became a dealer for Texaco.

VII. THE WHOLESALER COOPERATION

In order to uphold the prices established by the respondent through its dealers operating on consignment agreements located along Routes Nos. 13 and 113 in Sussex County around Seaford and Georgetown, Delaware, an attempt was made by representatives of the respondent to secure the cooperation of respondent's wholesale distributors and the retail dealers sold by them in maintaining the prices established by the respondent during the time of the price war and subsequently. This was done by respondent creating a fictitious or constructed dealer tank wagon price, which was the price the wholesale distributor was to charge its dealers and was computed by using the fixed retail price, excluding tax, for respondent's consumer lessee-dealers in the affected area less 23%. The respondent then rebated two-thirds of the difference between the fictitious dealer tank wagon price and what would be the normal dealer price. The wholesale distributor absorbed the remaining one-third. In order for the wholesale distributors to obtain this rebate from the respondent, however, they had to satisfy three conditions:

(1) They must sell at the fictitious or reduced dealer tank wagon prices to those retail dealers located in a depressed or price-war area.

(2) They must furnish respondent evidence of such sale in an application for the rebate on forms previously supplied to them by the respondent. On these forms, they must indicate the dates and total gallonage sold at the reduced price and a list of the dealers to whom they gave the rebate.

(3) Upon receipt of the forms, the respondent calculated the amount of the rebate and remitted to the distributor, but only for the number of gallons sold to those dealers who had resold at respondent's fixed retail price established for its consignment lessee-dealer stations. The distributor had to sustain the full loss for sales to those dealers for whom the respondent disallowed the rebate.

As a matter of practice, it had been customary for many of the small dealers located off the main highways, who were being sold and serviced by respondent's distributors, particularly the Atlantic Oil Company in Georgetown, Delaware, to sell their gasoline to the public at a differential of 2¢ per gallon lower than the price at which the gasoline was sold by respondent's dealers and lessee-dealers on the main highways and in Rehobeth Beach and Georgetown. From July of 1957 until September 1957, the posted retail price for Atlantic regular gasoline at its consignment dealer stations was 26.9¢. In September 1957, as hereinbefore indicated, respondent increased this retail price to 29.9¢ per gallon, and the cooperation of the wholesaler distributors was sought and obtained by respondent to get all of Mr. Marsh's dealers to post this increase in price. Four small dealers would not post this higher retail price and respondent in October 1957 refused to rebate to the wholesale distributor on their purchases (CX 108A–H). After checking the retail prices of these dealers, representatives of the respondent called upon them, along with Mr. Marsh, the distributor, in an effort to get them to raise their price on regular gasoline to the same as that of the consignee dealers of the respondent in that general area. These representatives went so far as to threaten to revoke Mr. Marsh's franchise if these dealers did not cooperate, and Mr. Marsh was urged to pull their equipment, which he owned, and to send in their contracts to determine whether they could be broken. Mr. Marsh did not pull any of the equipment, but he did send in to respondent contracts with two of the dealers, but nothing happened to them as they could not be broken.

As a result of the pressure that was used by respondent's representatives and other retail dealers in the area and on the main highway, these four dealers did finally raise their prices to conform to the price being posted by respondent's lessee-dealers operating under the consignment plan, but only for a short time, as the necessary result of such compliance was the loss of sales. Subsequently, they dropped their price on regular gasoline back to 27.9¢ per gallon. As one witness testified, he was hurt by the gasoline war in the Summer of 1957, as he could not sell as much then because the consignment dealers on the highway were selling at the same low price. His margin of profit was so low he could not reduce his price further and, when the Atlantic consignment dealers advanced their prices on regular gasoline to 29.9¢ per gallon and this dealer did likewise, it was necessary for him to again reduce his price to 27.9¢ per gallon in order to maintain a volume necessary to continue in business. He estimated that, when he put his price up to 29.9¢, his regular gasoline sales fell off 45%.

Respondent was not successful in its attempt to get *all* the small dealers purchasing from wholesale distributors to maintain the posted retail prices at which its consignment dealers were selling gasoline in the Fall of 1957. However, since respondent allowed a rebate to Mr. Marsh based on Atlantic's posted price on date of delivery, and that it refused to make such a rebate allowance for only four dealers out of twenty, whose names and gallonage had been submitted to respondent for rebate, it may be inferred that the other sixteen dealers were maintaining the posted retail prices. In Commission's Exhibit 108–E, the definite statement is made that "we will not refund on his accounts not posting 29.9¢."

VIII. THE VOLUME OF ATLANTIC GASOLINE SOLD AT RETAIL AND WHOLESALE IN EASTERN PENNSYLVANIA REGION AND WILMINGTON, DELAWARE, DISTRICT

1. *Retail Sales*

(a) *In Eastern Pennsylvania Region*

As hereinbefore indicated, most of the evidence in this case relates to competitive conditions in Area 4 or Sussex County of Delaware. However, there is evidence in the record indicating that the other areas of the Wilmington, Delaware, District of the Eastern Pennsylvania Region were a part of respondent's general plan of operation. This Eastern Pennsylvania Region had separate Districts in Williamsport, Reading, Harrisburg, Wilkes Barre, and

Allentown, in addition to the Wilmington District in which Sussex County is located as Area 4. In order to get some idea of the ultimate probable effect of the practices disclosed in the record and discussed in this decision, consideration should be given to the total operation in that region and in the Wilmington District. For instance, in 1956, in the Eastern Pennsylvania Region approximately 1600 service stations, either dealer-owned and operated or owned and leased by Atlantic, dispensed Atlantic gasoline and the volume of sales of gasoline in that region was approximately 132,000,000 gallons. In 1957, there were approximately 1700 Atlantic service stations in that area, and the total volume of sales was approximately 94,000,000 gallons, and in 1958 there were approximately the same number of service stations and the volume of sales was approximately 76,000,000 gallons.

(b) *In Wilmington District*

In 1956, the total number of Atlantic service stations in the Wilmington District was approximately 204; in 1957, 208; and in 1958, 209. The total retail sales of gasoline in the Wilmington District in 1956 amounted to 20,000,000 gallons; in 1957, 11,800,000 gallons; and in 1958, 9,200,000 gallons (CX 205 and 206).

2. *Deliveries to Consignment Dealers*

During the years 1957 and 1958, the approximate volume of delivery of gasoline to service station dealers, pursuant to consignment agreements, in the entire Region was 48,500,000 gallons in 1957, and 71,900,000 gallons in 1958. In the Wilmington District, alone, in 1957, the volume was 8,600,000 gallons, and in 1958, 11,800,000 gallons (CX 210).

3. *Sales to Distributors*

During the years 1956, 1957, and 1958, the approximate sales of Atlantic to distributors in the entire Eastern Pennsylvania Region were as follows: In 1956, 81,800,000 gallons; in 1957, 72,700,000 gallons; and in 1958, 71,700,000 gallons. In the Wilmington District, alone, the sales to distributors were as follows: In 1956, 12,000,000 gallons; in 1957, 11,100,000 gallons; and in 1958, 10,600,000 gallons (CX 207).

IX. THE VOLUME OF REBATES OR ALLOWANCES TO DISTRIBUTORS

With respect to the gallons of gasoline upon which rebates or allowances were given by Atlantic to its distributors and the approximate dollar amounts in the total Eastern Pennsylvania Region during the period of time from January 1, 1957 to April 13, 1959, the totals were as follows: The gallons were 8,968,800, and the dollars were $126,915. In the Wilmington District, alone, the gallons were 605,400 and the dollars were $6,700. (CX 211.)

In addition to Charles Marsh at Georgetown and Frankford, and Walter Lister at Seaford, both in Sussex County, other distributors handling Atlantic gasoline in Delaware in the Wilmington District in July 1957 were the Clements Supply Co., Clayton, Delaware, and Hammond & Taylor, Wilmington, Delaware. Other distributors in that area were in Maryland.

CONCLUSIONS

It is concluded from a thorough consideration of the facts, as set forth in the foregoing findings as to the principal allegations of Counts I and II, that the respondent has utilized a legal method of procedure in meeting the competitive situation with which it was confronted in July 1957 in the "Delmarva Peninsula" in protecting its dealers from the price war that was prevalent in that area. The policy, which it adopted in the use of consignment contracts with its dealers making them its agents, brings the respondent within the principles laid down in the *United States* v. *General Electric Co.* case, 272 U.S. 476, decided in 1926, and legally gives the respondent control over the prices at which its gasoline is sold through its dealers and lessee-dealers to the consuming public.

The important features of the consignment agreement, which bring it within the principles of the *General Electric* decision, are:

1. Title to the gasoline is reserved to Atlantic, and it has the right to determine the amount of the consignment in the inventory of the dealer at any time.

2. All gasoline in inventory in the dealer's tanks remains the property of Atlantic until sold, and money received for the sale of gasoline by the dealer is held in trust for the Atlantic account.

3. Atlantic fixes the price at which the gasoline is to be sold by the dealer in all instances.

4. Atlantic is obligated to bear all expenses of delivery and removal of consigned gasoline.

5. Upon termination of the consignment agreement, the consignee has option of returning the consigned gasoline or purchasing it from Atlantic.

6. The consignee dealer is required to pay over proceeds of sales less fixed commission at regular intervals.

7. Atlantic assumes all risk of casualty loss where negligence or willful act of the dealer has not contributed to the loss.

8. Atlantic assumes all taxes on consigned stock.

Although it is contended by complaint counsel that these dealers were coerced, and that they had no alternative but to enter into the consignment agreements to stay in business, it is not believed that there is sufficient evidence of any form of coercion to destroy the validity of the agency relationship which is brought about by the signing of the consignment agreement and the posting of the retail prices by the respondent. So far as the record is concerned, it is clear that in all instances the respondent offered to help the dealer meet an impossible competitive situation. In each instance, the dealer was able to continue operation throughout the price war with commission allowances which enabled him to stay in business. It was to the interest of respondent that these dealers be kept in business to continue as a conduit for the dispensing of respondent's gasoline and other petroleum products to the consuming public. Complaint counsel contend that there is no absence of coercion in this case and no arm-length dealing—"you either sign or go out of business." On the other hand, the assurance is given the dealer that, if he will sign, he may remain in business. There was mutuality, both in the entering into the contract and in the termination of the contract. This is illustrated by the experience of Mr. Crevison, a Rehobeth, Delaware, dealer, which is set forth in considerable detail in the foregoing findings.

Although there is no decision of either the Court of Appeals or the United States Supreme Court passing specifically on the legality of consignment agreements by oil companies in meeting competitive situations in price wars, there is some indication in some of the decisions that such an agreement would be lawful. See *Standard Oil Company* v. *U.S.*, 337 U.S. 293, 296.

The experience of the one dealer in New Castle County that did not sign the consignment agreement and continued to handle Atlantic gasoline throughout the period of the price war in the Summer of 1957 is evidence that there was no coercion used. That dealer probably would not have survived except for the fact that his principal means of livelihood were other than from the sale of gasoline which he purchased at the usual tank wagon price. Even when the price war was about over and this dealer finally reduced his retail price out of spite, he was not compelled to break his lease or go out of business, but, as the record shows, there was mutual consent to terminate the lease. This dealer then became a Texaco dealer.

With respect to the allegations of Count III of the complaint, however, the record shows that the respondent was not satisfied to control the retail price of Atlantic gasoline in the large stations located on the main highways of the "Delmarva Peninsula", but deemed it necessary, in order to have one posted Atlantic retail price, to control, insofar as it was possible, the retail price of small dealers that were being sold by wholesale distributors of Atlantic gasoline. This respondent attempted to do by securing the cooperation of the wholesale distributors in selling retail dealers at prices suggested by Atlantic and in compelling their retail dealers to sell Atlantic gasoline at the same prices as respondent had posted at the service stations of the dealers that had signed consignment agreements. There were two wholesale distributors in Sussex County; one, the Atlantic Oil Company operated by Mr. Marsh in Georgetown, Delaware, on Route 113, who sold principally east of that highway; and the other was Lister Oil Company operated by Walter H. Lister, located at Seaford, Delaware, on Route 13, who sold principally west of that highway and between that highway and Route 113. By securing the cooperation of these two wholesale distributors, respondent attempted to fix and control the retail price of Atlantic gasoline in all retail gasoline stations in Area 4—Sussex County—and, admittedly, this was its purpose. Mr. Marsh, the owner of Atlantic Oil Company, was an unwilling conspirator, but he did cooperate to the extent indicated in the foregoing findings, and, although respondent was not successful in all instances in getting these small retail dealers to post retail prices which coincided with those fixed by the respondent under the consignment agreements, it was successful in most instances. Certainly the coercive methods used by representatives of the respondent to obtain the cooperation of the wholesale distributors and to compel their small dealer customers to raise their prices in September 1957 to coincide with the prices fixed by respondent in the service stations of the dealers on the main highways, are evidence of an intention to conspire with the wholesale distributors to fix uniform retail prices of Atlantic gasoline in that area.

Counsel for the respondent made the point in his oral argument that "it takes two to tango", suggesting thereby that there was no conspiracy, since there must be two or more parties to a conspiracy. That may be true, but sometimes an unwilling partner may be compelled to cooperate, and that is the situation in which Mr. Marsh found himself when representatives of the respondent took him with them to call upon his retail gasoline dealer customers to get them to raise their prices. He didn't want to do it, but he was threatened with the loss of his own franchise if he did not cooperate. His presence gave the customers the impression that he was consenting to the activities of respondent's representatives, even though he said nothing. It was a joint call and the respondent's representatives were the voice of the conspiracy. It is believed that the allegations of this Count have been substantially sustained by competent and reliable evidence in the record.

The contention of counsel for respondent that the activities of respondent to secure the cooperation of wholesale distributors to maintain prices of gasoline by retail dealers sold by them are not in interstate commerce is rejected for the reason that such activities are a part of the over-all conspiracy to fix and maintain wholesale and retail prices and involves the sale of a product by the wholesaler and retailer which took on interstate character when it was loaded in the tank car or tank truck at Salisbury, Maryland, and did not lose that character until it was put in the automobile of the customer in the retail gasoline station, since the only break in the continuous and regular flow of the product was a temporary one in the tank of the wholesaler and the tank of the retailer, only long enough to serve the ultimate purchaser.

It is unrealistic to cut the flow of the product in two or three segments to deprive the Commission of jurisdiction over the activities of the respondent to keep the sale of the product from unlawful interference by agreements to fix the wholesale and retail prices at which it is sold to the consuming public.

Assuming, as has been concluded above, that respondent has legally fixed the prices at which it sells gasoline at retail through dealers on consignment, it does not follow that it can protect that price by securing the cooperation of wholesale distributors and retail dealers sold by them whereby the wholesalers sell at prices suggested by respondent and whereby the retail dealers agree to sell and do sell at the prices fixed and posted by respondent. Such activities on the part of respondent constitute an illegal restraint on the sales activities of such cooperating wholesalers and retailers and, since the Atlantic retail price sought to be protected admittedly is a sale by respondent in interstate commerce, the agreement or cooperative activity is also in such commerce.

Counsel for respondent cite and rely upon *Standard Oil Co.* v. *FTC*, 340 U.S. 231, and footnote 6 on page 238, as authority for their contention that the transactions involved in this case in Count III are not in interstate commerce and the Commission does not have jurisdiction. At best, this reference is dicta, since the transaction involved in that case was a sale to the retail dealer.

The facts in the present case bring it more in line with the principle enunciated in the case of *Walling* v. *Jacksonville Paper Com-*

pany, 317 U.S. 564, at pp. 568–9. That case involved the Fair Labor Standards Act and employees of a wholesale paper company who are engaged in the delivery, from company warehouses in the State to customers within the same State, after a temporary pause at such warehouses, of goods procured outside of the State upon prior orders from or pursuant to contracts with such customers. It was held that such goods retain their interstate commerce character until finally delivered to the customer; and they are not divested of that character by the temporary pause at the warehouse, or *by the fact that title to them passes to the company upon their delivery at the warehouse.* Also, where the customers are recurrent as to the kind and quantity of merchandise, and the manager can estimate with precision the needs of his trade, such transactions would be included in the group held to be "in commerce".

So, in the present case, applying the rule of that case, where the retail dealer holds the gasoline in his tank for sufficient length of time to make deliveries by pumps to regular customers even though title passes to the retail dealer upon delivery to his tank, the gasoline is still in interstate movement until delivery is made to the automobile owner—the ultimate consumer.

In view of the foregoing, it is therefore concluded that respondent, acting through its agents, officers, and employees, and its wholesale distributors, engaged in selling respondent's gasoline and other petroleum products to independent service stations in the "Delmarva Peninsula" area for the purpose of suppressing, preventing, hindering, and stabilizing price competition in the distribution and sale in commerce of Atlantic gasoline at retail, as well as wholesale, has entered into and carried out a planned common course of action, understanding and agreement with its said wholesale distributors to maintain and fix the price at which Atlantic gasoline was sold or would be sold at the wholesale level, as well as at retail, in gasoline service stations sold to by said distributors, all in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, The Atlantic Refining Company, a corporation, its officers, directors, agents, representatives, or employees, directly or through any corporate or other device in, or in connection with, the offering for sale, sale, or distribution of its gasoline or other petroleum products, in commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from coercing, persuading, inducing, or otherwise unduly influencing, directly or indirectly, its independent wholesale distributors to enter into, cooperate in, or carry out any planned common course of action, understanding, arrangement, agreement, combination, or conspiracy to establish, fix, stabilize, maintain, or adhere to, by any means the wholesale price at which said products are sold by said wholesale distributors or the retail prices at which its said products are to be resold by retail service stations owned and operated by said distributors and/or retail dealer customers of said wholesale distributors.

Opinion of the Commission

MAY 16, 1963

By MacIntyre, *Commissioner:*

This matter is before the Commission upon the cross appeals of respondent and counsel supporting the complaint from the hearing examiner's initial decision in part sustaining and in part dismissing the charges of the complaint.

The complaint alleges that respondent,* a major petroleum products marketing company, individually and in combination with others, engaged in practices which had the purpose and effect of unlawfully fixing and maintaing the resale prices of gasoline in violation of Section 5 of the Federal Trade Commission Act. Although the complaint deals with essentially a single basic factual situation, it is divided into three counts. In Count I it is alleged that the respondent individually violated the Act by coercing and forcing its lessee-dealers through means of a system known as a "temporary consignment contract", to sell at uniform and non-competitive prices. Count II of the complaint incorporates all of the allegations of Count I by reference. This Count, however, charges a conspiracy between respondent and its unnamed lessee-dealers to fix and maintain uniform and non-competitive prices. The medium through which the alleged conspiracy was allegedly effected is the aforesaid "temporary consignment contracts" between respondent and the co-conspirator lessee-dealers. Count III incorporates all of the allegations of Counts I and II, and in addition charges a conspiracy between the respondent and its unnamed independent wholesale distributors of gasoline. The alleged vehicle of this conspiracy differs somewhat from that charged as existing between respondent and its lessee-dealers. Count III charges that uniform consumer resale prices were fixed and maintained by grant-

* Respondent's correct name is The Atlantic Refining Company.

ing the co-conspiring distributors certain allowances or rebates which they were to pass on to their dealer customers who would agree to adhere to the prices fixed by respondent in its illicit practices involving its lessee-dealers.

The hearing examiner found that only Count III of the complaint had been sustained, and issued an order which directed the respondent to cease and desist from fixing or maintaining the "wholesale price" at which its products are sold by "wholesale distributors" or the retail price at which its products are to be resold by retail service stations owned or served by wholesale distributors. Complaint counsel are appealing the dismissal of Counts I and II of the complaint, and respondent is appealing the finding and order with respect to the allegedly illegal practices charged in Count III.

* * * * * * *

The respondent is a Pennsylvania corporation, primarily engaged in the production, sale and distribution of gasoline and other petroleum products throughout a 17-state marketing area. Its "regular" gasoline is sold under the brand name "Atlantic", and its high test fuel under the name "Imperial". Respondent owns and operates refineries at Philadelphia, Pennsylvania, and Atreco, Texas. In 1956 its gross domestic sales of petroleum and chemical products, including sales of its consolidated subsidiaries, amounted to approximately $379,000,000.

The respondent markets its gasoline in two ways. It sells directly to the operators of retail gasoline service stations who either own and operate their own stations, or lease the premises from the respondent or others. The second marketing system entails sales to wholesale distributors who in turn resell to retail service station dealers. In the geographic area with which the facts of this case are concerned, respondent used both systems.

The controversy in this case centers chiefly in an area referred to by the examiner as the "Delmarva Peninsula". As a glance at the map will show, the Delmarva Peninsula is that body of land which separates the Chesapeake Bay from the Delaware Bay and Atlantic Ocean. It acquires its name from the fact that it lies within the boundaries of the States of Delaware, Maryland and Virginia. In 1957 a gasoline price war erupted on the Peninsula. The allegedly unlawful acts and practices of this respondent were performed in connection with this price war.

The practices engaged in by the respondent in the Delmarva price war were not spur of the moment expedients but constituted the implementation of pre-determined company policy. The respondent states "under price war conditions it is the policy and practice of respondent to assist its retail dealers to remain in business. It is likewise the policy and practice of respondent to assist its distributors in order that they may, in turn, sell to their retail dealers at a price which allows such retail dealers to be generally competitive and thus not suffer economically and competitively or be forced out of business."

* * * * * * *

Since, as aforesaid, the respondent utilized two methods of distribution, their "assistance" to dealers in a price-war area, was accomplished in different fashions. As alleged in Counts I and II of the complaint, on direct sales to retail service stations, the respondent utilized temporary consignment contracts. This procedure was devised and implemented by the company in early 1956. It provided: "When price war conditions prevail in a given competitive trade area so that the spread between the dealer [tank wagon] price of Atlantic gasoline and the prevailing service station price at comparable service stations is less than 4¢ per gallon, all Atlantic dealers * * *" will be offered the opportunity to "execute a contract sales agreement and become our contractors for the retail sale of Atlantic-owned gasoline".

It is important to note that the company's program as planned and implemented, did not entail forcing dealers, including lessee-dealers, operating on company-owned premises, to execute the consignment agreements but under the circumstances, such overt control was unnecessary. Any dealer faced with a price-war situation was offered the consignment program or nothing. In other words, the company would not reduce its prices to him to enable him to independently set his own resale price and thereby meet competition as he saw fit. He was offered, in effect, "Hobson's Choice" of continuing to buy at the normal dealer price, entering a consignment agreement, or terminating all existing contractual relations with the respondent. As several of the dealer-witnesses testified, it was a case of either signing the consignment contract or going out of business. Respondent argues that the only coercive force present in the situation was engendered by the price war market conditions, which the record shows it did not create. But this is no answer. One cannot justify offering a hot poker to a drowning man by averring that the water was to blame. To the extent that the lessee-dealers had no alternative but economic death to entering a consignment-agreement with respondent, it must be found that they were pressured or coerced to enter such contracts and the hearing examiner's finding to the contrary is in error. However, there does not appear to be any evidence in this record that the respondent used its position of economic power over its lessee dealers to force them into entering the contract. Under the business conditions which existed, such pressure was unnecessary.

The basic charge made in Counts I and II of the complaint is that the consignment program as practiced by the respondent, resulted in illegal price fixing. The factual complex in which the allegedly illegal scheme was utilized is described by the hearing examiner at pages 1426 and 1427 of the initial decision. In summary, he found that from time to time during early 1957, the respondent surveyed the consumer prices charged by various gasoline companies' outlets in the Delmarva Peninsula. The survey disclosed that in respondent's areas 1 and 2, both in Newcastle County, Delaware, the major marketing companies' outlets were selling regular gasoline at prices ranging from 25.9 to 27.9 cents per gallon. In Kent County, Delaware (respondent's area 3), prices ranged from 25.9 to 28.9 cents. In Sussex County, Delaware (respondent's area 4), there were only two prevalent prices, 26.9 cents and 27.9 cents.

By June 1957 the respondent had already placed its consignment program into effect in its areas 1, 2 and 3 but had taken no action in this respect with respect to the Sussex County area.

In June 1957, Atlantic made another survey of the Delmarva Peninsula area and found that the majority of the major brand competitors in the areas 1, 2 and 3 were posting retail prices at 26.9 cents per gallon on regular gasoline. Effective June 26, 1957, respondent reduced the consumer price at its contract sales consignment stations in these areas from 27.9 to 26.9 cents per gallon.

By July 1, 1957, it appeared that most of the gasoline stations in the Sussex County area were then posting a price of 26.9 cents per gallon for regular gasoline. The examiner found that the stations selling at this price included "11 Esso stations, 2 Gulf stations, 2 Mobil (Socony) stations, 5 Sunoco stations, 7 Amoco stations, 4 Cities Service stations, 8 Pure Oil stations, 3 Shell stations, 4 Sinclair stations, and 5 Texaco stations. Some of the retail dealers received rebates off of their tank wagon price. It was reported that the Sun Oil Company was operating on a commission agreement plan similar to respondents."

At this time the Sussex County lessee-dealers were paying respondent 24.3 per cent per gallon for regular gasoline. The examiner found that at this cost price, "Atlantic dealers and lessee-dealers could not compete with such low retail prices of their major competitors. They appealed to the respondent for relief." In response to this appeal, the respondent's representatives contacted the dealers and offered them the consignment agreement which respondent refers to as its "contract sales agreement."

There is no dispute concerning the basic details of the consignment program. The hearing examiner succinctly explains it at page 1429 of his initial decision, in the following terms:

1. The Company will place gasoline on consignment with the dealer subject to prior approval by the Credit Department. At the time of each replenishment delivery, the volume of gasoline on consignment is to be brought to its original level. The dealer will settle in cash at the time of replenishment for the number of gallons equal to the replenishment delivery on the basis of Atlantic's posted service station price at the time at which the gasoline was sold, less a commission for Atlantic gasoline, representing 23% of the service station price for the product, excluding all taxes.

2. Atlantic will specify the service station price of gasoline posted by the dealer during the period of the consignment plan agreement, the dealer to be trustee of proceeds of sale.

3. Title to gasoline constituting any replenishment delivery shall not pass to the dealer.

The record reveals that respondent entered consignment agreements with 37 of its dealers in its area number 4 during 1957 and 1958. Two of these dealers were located in Maryland and the remainder in Delaware. Although the price war was over in Sussex County, Delaware, by September 13, 1957, dealers in that County remained under the consignment program until as late as September 1958. The price war continued for a longer time in Newcastle and Kent Counties in Delaware, and there too the consignment-agreements remained in effect during 1958.

There can be no doubt but that respondent, through the operation of this consignment program as above described was able to, and did, in fact, fix uniform retail prices for gasoline sold to consumers by its lessee-dealer service stations in its areas 1, 2, 3 and 4, located on the Delmarva Peninsula. But in order to maintain the prices established by the respondent through the consignment program, it was necessary to secure the compliance of these dealers who did not buy directly from respondents but through an intervening wholesale distributor. Respondent's announced policy on pricing is:

There will be only one retail price at all times in any given pricing area. This will be called Atlantic's posted retail price.

A reasonable relationship will always be maintained between posted retail price, posted dealer tank wagon price, and posted consumer tank wagon price.

Since the dealers buying from a wholesale distributor were his customers and not those of the respondent, control over their prices could only be maintained and secured by enlisting the cooperation of the wholesale distributor who served them. The hearing examiner found that the respondent did secure the cooperation of its sometimes unwilling distributors, and thereby conspired with them to fix prices as charged in Count III of the complaint and in violation of Section 5 of the Federal Trade Commission Act.

The system pursued was to grant the wholesale distributor a lower price to enable him to in turn sell at a lower price to such dealers as would maintain the consumer price set and fixed by respondent for its direct buying dealers operating under the consignment plan. The simple mechanics of the pricing procedure utilized are explained in an Atlantic bulletin to its district managers, as follows:

> A fictitious dealer tank wagon price will be computed by using the retail price, excluding tax, that we have established on contract sales operation less 23%. For example, if we are on contract sales operation at 26.9, the fictitious dealer tank wagon price for use by the distributor would be 13.8. This is the price which we would expect distributors to charge their dealers within the area where we are on contract sales operations * * *.

If a wholesaler sold to a dealer at the "fictitious dealer tank wagon price" under certain conditions prescribed and enforced by the respondent, he would, upon application to respondent, be rebated two-thirds of the difference between the price he charged the dealer and what would be a normal dealer price. He was required to absorb the remaining one-third. The conditions prescribed by the respondent for a wholesaler to meet in order to secure his rebate, were:

(1) They must sell at the fictitious or reduced dealer tank wagon prices to those retail dealers located in a depressed or price-war area.

(2) They must furnish respondent evidence of such sale in an application for the rebate on forms previously supplied to them by the respondent. On these forms, they must indicate the dates, gallonage sold and list the dealers to whom they gave the rebate.

(3) Upon receipt of the forms, the respondent calculated the amount of the rebate and remitted to the distributor, but only for the number of gallons sold to those dealers who had resold at respondent's fixed retail price established for its consignment lessee-dealer stations. The distributor had to sustain the full loss for sales to those dealers for whom the respondent disallowed the rebate.

The way in which respondent's pricing plan worked with distributors is indicated by the experience of the Atlantic Oil Company of Georgetown, Delaware, one of respondent's distributors in Sussex County, Delaware. Charles B. Marsh, the witness representing this distributor, testified that the company had around 18 dealer customers. During the price wars in Sussex County in 1957, respondent assisted the Atlantic Oil Company in aiding the latter's dealers by granting refunds (in effect a lower tank wagon price) on sales. Atlantic Oil Company sold its dealers at a reduced price and in turn applied to the respondent for refunds based on the dealer assistance.

These compensatory refunds were granted by the respondent to Atlantic Oil Company on the understanding, the evidence shows, that the distributor would lower its prices to dealers and that the dealers in turn would post pump prices suggested by the respondent.

Mr. Marsh testified that J. White, an employee of respondent, checked on the pump prices of Marsh's dealers and reported this information to Marsh. This same employee also accompanied Marsh on inspection tours of Marsh's dealers. At such times White asked the dealers to raise their price to the figure recommended by respondent. Most of Marsh's dealers posted uniform pump prices during the 1957 price wars but there were four notable hold-outs. These were: Bunting, Frankfort, Delaware; Burton, Georgetown, Delaware; R. J. Campbell, Frankfort, Delaware; and McGee & West, Somerville, Delaware. When these dealers refused to sell at the pump prices specified by respondent, Atlantic Oil Company was denied compensatory refunds on transactions with them. This is revealed by the testimony as well as documentary evidence.

Various employees of respondent, such as Mr. White and Mr. Hughes, contacted witness Marsh about the four nonconforming dealers and insisted that they raise their prices. Mr. White recommended as possible action against these dealers, if they refused to conform to the recommended prices, that Marsh take out their pumps and insignia. Marsh was also threatened with the loss of his franchise if he did not bring these dealers into line. Mr. Zinn, District Sales Manager of respondent, requested from Marsh and received the contracts that this distributor had with such dealers. Mr. Marsh testified that the explained purpose of obtaining the contracts was to see if they could be broken. However, no such action was taken. The four recalcitrant dealers all thereafter raised their prices, although some did this only as a temporary measure and shortly returned to their prior prices.

* * * * * * *

As aforestated, the hearing examiner dismissed Counts I and II of the complaint, dealing with the consignment program. The dismissal is based upon his belief that the decision of the Supreme Court in *United States* v. *General Electric Co.* (272 U.S. 476, 1926), "legally gives the respondent control over the prices at which its gasoline is sold through its dealers and lessee-dealers, to the consuming public."

Before embarking on a discussion of this phase of the hearing examiner's decision, it must be clearly understood that the Commission, by discussing consignment separately, is not adopting and endorsing the seriatim treatment afforded this matter by the hearing examiner. The Commission considers the respondent's consignment program to be an integral and inseparable part of its overall pricing policy. In restraint of trade matters, and particularly those involving conspiracies, the legality of conduct is not to be judged by dismembering the evidence and viewing it as separate and distinct entities. *United States* v. *Patten*, 226 U.S. 525, 554 (19); *American Tobacco Co., et al* v. *United States*, 147 F. 2d, 93, 106 (6th Cir. 1944). Separate discussion is here afforded the consignment plan solely because of the unique and separate defense entered with respect to it.

The obvious point of departure in any discussion involving price fixing is *Socony-Vacuum Oil Co.* v. *United States* (310 U.S. 150, 222–223 (1940)) wherein it was held that any device which has the purpose and effect of fixing prices is an illegal restraint of trade. It is illegal, per se, without regard to whether prices were actually fixed or whether the device was completely unsuccessful in that regard. It is the act of conspiracy or combination itself which is unlawful, and no further showing need be made.

Without doubt this record shows that respondent did agree, conspire and combine with its lessee-dealers through the medium of this consignment program to fix and stabilize the consumer price of gasoline in the area under consideration. Under the *Socony-Vacuum* doctrine such a course of action is clearly unlawful unless the respondent is afforded shelter within the aegis of the *General Electric* case. It is the Commission's view that *General Electric* does not afford the respondent the needed shelter and that the hearing examiner's contrary finding that it does was in error, and must be reversed.

There is a clearcut distinction between the facts presented by the *General Electric* litigation and the instant matter. During the period prior to 1926, General Electric had managed to purchase all of the outstanding patents necessary for the manufacture of incandescent lamps. It, in turn, licensed other corporations, including competitors such as Westinghouse, to manufacture and sell lamps produced through the General Electric patent. All licensees were required to adhere to an agency-type distribution plan set up by General Electric, and were permitted to sell only at the prices set by General Electric.

In 1924 the government filed a petition against General Electric and others charging that the agency system of lamp marketing employed by them was violative of the Sherman Act. The case was tried in 1925 in the United States District Court for the Northern District of Ohio, and the Government's petition was dismissed (15 F. 2d 715). This decision was appealed to the Supreme Court, which in 1926 affirmed the District Court (272 U.S. 476). The Supreme Court decided that the agency method of distribution employed by the defendant was in fact a valid agency and not a disguised purchase-and-sale arrangement, and that General Electric as the owner of the patent, entirely controlling the use and sale of incandescent lamps, was within its rights in imposing upon its licensees conditions that their sales should be at prices fixed by General Electric.

As we see it, there is a wide difference between General Electric's permanently implemented and universally applied agency distribution of products produced under its patent and the activity of the respondent as demonstrated by this record. In this case, respondent attempted to make its dealers genuine agents, but the change made was merely of form and not of substance. Dealers continued to operate their businesses after entering into consignment agreements in practically the same manner as before, except that they could not determine their own gasoline resale prices to consumers. They commingled money from the sale of gasoline with their receipts from the regular sale of products other than gasoline. They continued to hold themselves out as full proprietors of their stations. They received gasoline and paid out money for its value, and they then sold it at retail as before.

A dealer entering the consignment program did not receive actual payment for his gasoline inventory. The value of the gasoline was put into an escrow account. If more gasoline was needed to bring the dealer's inventory up to the pre-determined consignment level, the dealer also paid for this, and this sum was put into escrow. When the inventory was replenished, the dealer supposedly was paying for gasoline already sold, but in actual fact he was paying for gasoline delivered at the time of payment.

Unlike General Electric, the agency distribution program was not respondent's regular method of selling its products. The system is only used at irregular intervals and in certain markets during price wars. The temporary nature of the program and the shifting back and forth of customers from dealer status to so-called agency status, emphasizes that the consignment plan is a device to fix and stabilize prices, rather than a good faith marketing method.

Furthermore, decisions subsequent to the *General Electric* case have made it clear that where the antitrust acts are involved, the crucial fact is the impact of the particular practice upon competition, not the label it carries. For example, in *United States* v. *Masonite Corp.* the Supreme Court held that the result must turn not on the skill with which counsel has manipulated the concept of "sale" and "agency", but on the significance of the business practices in terms of restraint of trade (316 U.S. 265, 280; 1942). Judge Yankwich, in *United States* v. *Richfield Oil Corp.*, 99 F. Supp. 280 (U.S.D.C. S.D. Cal. 1951), *affirmed per curiam* 343 U.S. 922 (1952), stated:

> We must in each case, get behind the facade which the organization has created,—as did the Supreme Court in the *Masonite* case when it went behind a *del credere* agency, which, at first blush, seemed to be a fiduciary relationship established by the concern for its own purposes, and found, instead, a means for monopolization. The Court did not then hesitate to declare the agency a mere cloak for restraints * * *. (99 F. Supp. 289).

It is apparent from the facts that respondent very clearly desired to stifle price competition among Atlantic dealers and it sought the complete control of Atlantic retail prices in the price war area. Respondent utilized the consignment system of marketing as a device to control prices admittedly to avoid the impact of the Clayton and Sherman Acts. Doubtless the respondent felt that it had devised a consignment program valid in that it met all of the criteria of consignment as prescribed in the law of agency and it may well be that for purposes other than antitrust law enforcement this consignment program could be upheld. But, as here employed, to effect and participate as an integral unit of a horizontal and vertical price fixing scheme, the respondent's consignment program must be held as a violation of the Federal Trade Commission Act.

Insofar as Count III of the complaint alleging a conspiracy involving respondent and its wholesale distributors is concerned, we agree with the hearing examiner's finding that this Count has been sustained.

In *United States* v. *Bausch & Lomb Optical Co., et al*, 321 U.S. 707, 723 (1944), the Court said: "Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial." See also *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960). Here the participation of distributors in the scheme is shown. Distributor Marsh cooperated by following the procedures established by respondent for the fixing and the control of prices. Marsh also accompanied respondent's representatives on inspection tours of dealers' stations for the purpose of influencing such dealers to follow respondent's recommended resale prices. That this was effective is shown by the fact that four recalcitrant dealers changed their prices following such visits, although only temporarily in some cases. Such was acquiescence by the distributor in the illegal scheme coupled with assistance in effectuating its purpose. The hearing examiner found that distributor Marsh was an unwilling conspirator, but that fact is no defense where the party actually participates in the conspiracy. See *United States* v. *Line Material Co.*, 333 U.S. 287 (1948). There is also evidence of the participation of distributor Lister. Thus, a combination or conspiracy to maintain resale prices was organized in violation of the Federal Trade Commission Act.

The consignment agreement arrangement was an integral part of the plan to fix and maintain resale price levels in the price war areas in the "Delmarva Peninsula". Through such agreements respondent was able to generally maintain a uniform level of prices on sales made through its dealers. This uniformity along with the actions resulting in the fixing of prices on gasoline sold to dealers buying through distributors gave to the respondent general control of price levels among dealers dispensing Atlantic gasoline in the affected areas. The consignment agreements are unlawful as a part of the whole unlawful course of conduct. They were essential to the success of the price fixing scheme just as it was necessary to the success of the venture for the dealers buying through distributors to maintain recommended prices. Where the whole course of conduct is illegal, specific practices, although in themselves lawful, may be prohibited as part of the illegal whole. *Cf. United States* v. *Bausch & Lomb Optical Co., et al.* 321 U.S. 707 (1944). *In the Matter of Snap-On-Tools Corporation*, Docket No. 7116 (Decision of the Commission, November 1, 1961) [59 F.T.C. 1035]. We hold in the circumstances that respondent is in violation of the law as charged in Counts I, II, and III of the complaint.

Respondent argues that its practices which the examiner found to be unlawful were not in interstate commerce. The position taken is that the commerce involved in the sale of gasoline at wholesale and at retail, with which the acts and conspiracies charged in the complaint are concerned, were purely local sales and not in interstate commerce. Section 5 prohibits unfair methods of competition in (interstate) commerce and unfair or deceptive acts or practices in (interstate) commerce. Our determination of the question turns on whether or not the course of conduct found to be unfair has been engaged in in interstate commerce.

Respondent clearly does business in interstate commerce and the gasoline involved in the resale price maintenance scheme moved in interstate commerce. Respondent shipped its gasoline from its refineries through terminal centers in Norfolk, Virginia, Newark, New Jersey, and its bulk distribution centers in Salisbury, Maryland, and Wilmington, Delaware, to storage tanks maintained by distributors, and lessee-dealers in the "Delmarva Peninsula". Respondent, with main offices in Philadelphia, Pennsylvania, and with its regional office covering the "Delmarva Peninsula" area in East Reading, Pennsylvania, entered into sales contract agreements with lessee-dealers in several states, including Delaware and Maryland.

The methods and practices used by respondent in obtaining the acquiescence and cooperation of its wholesale distributors in the price fixing scheme and their assistance in effectuating its purpose were engaged in in interstate commerce. The parties themselves, that is, respondent on the one hand and distributors on the other, were located in different states and contracts between them involved interstate commerce. Various documents used to carry out the scheme were transmitted across state lines. For instance, requests for refunds by distributors for dealer assistance were made on forms sent to Reading, Pennsylvania. Other evidence of the interstate character of the transactions relating to the price fixing scheme includes correspondence, bulletins and other matter which moved across state lines.

Thus, there was a transaction or a scheme of an interstate character, regardless of the nature of the commerce involved in the local distribution of the gasoline. *Cf. Holland Furnace Company* v. *Federal Trade Commission*, 269 F. 2d 203 (7th Cir. 1959), *cert. denied* 361 U.S. 932; *General Motors Corporation, et al* v. *Federal Trade Commission*, 114 F. 2d 33 (2nd Cir. 1940); *Ford Motor Company* v. *Federal Trade Commission*, 120 F. 2d 175 (6th Cir. 1941), *cert. denied* 314 U.S. 668; *United States* v. *Food and Grocery Bureau of Southern California*, 43 F. Supp. 966, 972 (U.S.D.C. S.D. Cal. 1942). We hold, therefore, that the methods of competition, acts and practices herein found to be unfair were engaged in in "commerce" within the meaning of that term as used in the Federal Trade Commission Act.

The Commission is fully aware of the difficulties faced by tradesmen at all levels of commerce when price wars erupt in the sale of gasoline. It is realized that efforts often are made by some suppliers to cooperate with and assist their dealers in various ways so as to enable them to compete in the course of price wars. However, in doing so they should avoid transgressions of the antitrust laws. A seller may apply to the Commission for advice on appropriate, legal methods for meeting the problem in the particular circumstances it faces. The solution, we are sure, does not lie in the use of price fixing schemes violating the antitrust laws. Respondent here cannot justly claim that it was acting only in self-defense or the defense of its dealers since its course of conduct went beyond any such objective and reached into the area of unlawful price fixing. Such conduct we must condemn. Even if respondent had proceeded from entirely good motives, that circumstance would be no justification here for the infractions of law disclosed. *Fashion Originators Guild of America, Inc., et al* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Paramount Famous Lasky Corporation, et al* v. *United States*, 282 U.S. 30, 44 (1930).

The examiner found in the initial decision that on the forms for refunds on dealer assistance the distributors indicate "the dates and total gallonage sold at the reduced price and a list of the dealers to whom they gave the rebate." This appears to be incorrect and, while it is not a crucial finding, we believe it should be changed. The words "total" and "sold at the reduced price" will not be adopted as part of the Commission's findings.

The exceptions to the initial decision of respondent are rejected and the exceptions of counsel supporting the complaint are sustained to the extent indicated. An appropriate order will be entered.

Commissioner Elman does not concur.

Commissioners Anderson and Higginbotham did not participate in the decision of this matter, the former for the reason that he did not hear oral argument, and the latter by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

Order Partially Adopting Initial Decision and Providing for the Filing of Objections to Proposed Order and Reply*

MAY 16, 1963

The Commission having rendered its decision in part allowing and in part disallowing complaint counsel's exceptions to the initial decision and disallowing all of respondent's exceptions thereto:

It is ordered, That the Findings of Fact numbered I through IX of the Initial Decision be and hereby are adopted as the Findings of the Commission, excepting that the words "total" and "sold at the reduced price" in item numbered (2) of part VII thereof are incorrect and are not adopted. Those parts of the initial decision not expressly adopted are set aside and do not constitute part of the decision of the Commission.

* Proposed Final Order is omitted in printing since it was entered as the Final Order of the Commission.

It is further ordered, That respondent may, within twenty (20) days after service upon it of this order and the attached Opinion of the Commission, file with the Commission its exceptions to the Proposed Final Order herein set out, a statement of its reasons in support thereof, and a proposed form of order appropriate to the Commission's decision; and that counsel supporting the complaint may, within ten (10) days after service of respondent's exceptions, file a statement in reply thereto, supporting the Proposed Final Order.

It is further ordered, That if no exceptions to the Commission's Proposed Final Order are filed within twenty (20) days, the said Order shall then become the Final Order of the Commission.

Final Order

NOVEMBER 22, 1963

Pursuant to § 4.22(c) of the Commission's Rules of Practice, published May 16, 1962, 27 Fed. Reg. 4609, 4621 (superseded August 1, 1963), respondent was served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of the order which the Commission contemplates entering; and

Respondent having timely filed its exceptions to the order proposed, which exceptions were opposed by a reply filed by counsel supporting the complaint and the Commission, upon review of these pleadings, having determined that respondent's exceptions should be disallowed and that the order as proposed should be entered as the final order of the Commission:

It is ordered, That the respondent, The Atlantic Refining Company, a corporation, its officers, directors, agents, representatives, or employees, directly or through any corporate or other device in, or in connection with, the offering for sale, sale, or distribution of gasoline, in commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, arrangement, agreement, contract, or conspiracy with any person or persons not parties hereto, to establish, fix, adopt, maintain, adhere to, or stabilize by any means or method, prices, terms or conditions of sale at which its gasoline is to be sold.

2. Establishing, maintaining, continuing, cooperating in, or carrying out, or attempting so to do, any plan, policy, program, or any consignment policy in combination with any other person or persons not parties hereto, for the purpose or with the

effect of enabling respondent to establish or fix the prices, terms or conditions of sale at which its gasoline is to be resold by a dealer after purchase from respondent.

3. Coercing, persuading, inducing, or otherwise unduly influencing, directly or indirectly, its independent wholesale distributors to enter into, cooperate in, or carry out any planned common course of action, understanding, arrangement, agreement, combination, or conspiracy to establish, fix, stabilize, maintain, or adhere to, by any means the wholesale price at which gasoline is sold by said wholesale distributors or the retail prices at which gasoline is to be resold by retail service stations owned and operated by said distributors and retail dealer customers of said wholesale distributors.

Provided, however, That nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, 82nd Cong. 2nd Sess., approved July 14, 1952).

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist set forth herein.

By the Commission, Commissioner Elman not concurring; and Commissioners Anderson and Higginbotham not participating, the former for the reason that he did not hear oral argument, and the latter by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

IN THE MATTER OF

WINSTON SALES CO., INC.

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

Docket 8531. Complaint, Sept. 27, 1962—Decision, Nov. 22, 1963*

Order requiring a Chicago distributor to cease misrepresenting his merchandise by such practices as video demonstrations purportedly proving that a certain kitchen knife would never become dull by using it to saw a nail

* Reported as amended by Hearing Examiner's orders of Nov. 26, 1962 and Mar. 13, 1963.

in half, when the nail had been partially cut through prior to the demonstration and the cutting edge used in slicing a tomato to demonstrate that the sharpness had not been affected, was not the same edge used to cut the nail; and misrepresenting the regular prices for the knife and a food chopper in offering both for the purported usual price of one.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Winston Sales Co., Inc., a corporation, has violated the provisions of said 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 Winston Sales Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 4100 West Grand Avenue in the city of Chicago, State of Illinois.

Par. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of general merchandise, including a kitchen knife and a food chopper.

Par. 3. In the course and conduct of its business, respondent now causes and for some time last past has caused, its said products, when sold, to be shipped from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintains and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Par. 4. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of knives and food choppers of the same general kind and nature as those sold by respondent.

Par. 5. In the course and conduct of its business, and for the purpose of inducing the sale of a kitchen knife and a food chopper, respondent has made representations with respect to the quality of said knife and to the regular retail selling price of said knife and of the said food chopper. Said statements and representations have been made in television broadcasts.

Among and typical of the said representations, but not all inclusive thereof, are the following:

I'd like to show you something you probably wouldn't believe if you weren't watching me with your own two eyes. Here is a regular two-inch box nail that I'M going to saw in half with this knife to prove absolutely that this knife will never, never get dull. I'm going to place this nail into a vise.

(A reproduction is attached hereto marked Exhibit 1 and made a part hereof.)*

One thing I want you to realize and understand, you can use this knife for every job in the kitchen and one of the jobs, of course, is sawing frozen food in half. Anothing thing you can use it when you're carving chicken or turkey and you come across a bone. You have no problem when it comes to cutting through it.

(A reproduction is attached hereto marked Exhibit 2 and made a part hereof.)*

You notice one thing, it isn't too easy to cut a nail in half but this knife does it exactly the same as a saw and yet you have a knife that's just as sharp as when I started.

(A reproduction is attached hereto marked Exhibit 3 and made a part hereof.)*

As sharp as a razor.

(A reproduction is attached hereto marked Exhibit 4 and made a part hereof.)*

Proof positive is right here. Here's balance of a tomato and I'm going to show you that this knife still goes through that tomato just exactly the same as a hot knife going through butter.

(A reproduction is attached hereto marked Exhibit 5 and made a part hereof.)*

Here's the offer we have for you, the stainless steel edged knife, regular retail price $3.00, all we ask you to spend is $2.98. If you spend $2.98 at no additional cost you get our regular $2.98 food chopper. In other words you get both items for $2.98 if you order now.

PAR. 6. Through the use of the aforesaid television commercial, including the video demonstration, respondent has represented directly or by implication that:

(a) Its kitchen knife will never get dull;

(b) That said demonstration proves that its kitchen knife will never get dull;

(c) The said demonstration proves the ability of its kitchen knife to cut through a regular two-inch box nail;

(d) The said demonstration proves that the sharpness of the cutting edge of its kitchen knife is unaffected after having cut through a regular two-inch box nail.

PAR. 7. Respondent, by means of the aforesaid television commercial also represents that the usual and regular retail price for the kitchen knife regularly retails at $3 and that the regular retail price for the food chopper is $2.98.

PAR. 8. In truth and in fact:

(a) The kitchen knife will become dull as a result of normal use.

(b) The said demonstration does not prove:

1. That the kitchen knife will never get dull.

2. The ability of its kitchen knife to cut through a regular two-inch box nail. Prior to the demonstration the nail used had been partially cut through.

* Pictorial exhibits are omitted in printing.

3. The sharpness of the cutting edge of its kitchen knife after having cut through a regular two-inch box nail. The cutting edge used to demonstrate that the sharpness had not been affected by cutting through the two-inch box nail was not the same cutting edge used to cut through said nail.

(c) $3.00 is substantially in excess of the usual and regular retail price of said kitchen knife in the trade areas in which it is offered for sale.

(d) $2.98 is substantially in excess of the usual and regular retail price of said food chopper in the trade areas in which it is offered for sale.

Therefore, the statements and representations referred to in Paragraph 5 were, and are, false, misleading and deceptive.

PAR. 9. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondent's products, by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Charles J. Connolly and *Mr. Walter T. Evans* supporting complaint.

Mr. Eli E. Fink and *Mr. Herbert L. Nudelman*, for respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

The Federal Trade Commission issued its complaint on September 27, 1962, charging respondent with violation of the Federal Trade Commission Act by reason of alleged false, misleading, and deceptive representations constituting unfair methods of competition and unfair and deceptive acts and practices in commerce.

A pre-hearing conference was held November 23, 1962 at which certain television advertising was viewed and the complaint was amended. Said conference was recessed three times at the request of both parties for the purpose of granting them an opportunity to enter into a dispositive stipulation.

On January 14, 1963, the parties stipulated, and on January 21, 1963, counsel supporting the complaint moved for an Initial Decision on the basis of said stipulation. Respondent opposed the immediate entry of an Initial Decision and requested time within which to prepare proposed findings, conclusions, a brief and an order. On January 29, 1963, the hearing examiner, by order, granted the motion of counsel supporting the complaint for judgment and made the January 14, 1963, stipulation the record in the case. Said order also granted both parties until February 27, 1963, to file proposed findings of fact, conclusions, a brief, and a proposed order. At the request of both parties, the time for filing was extended to March 15, 1963.

Prior to the filing of proposed findings, counsel supporting the complaint by motion filed March 8, 1963, sought reopening of the proceeding, to amend the complaint and to introduce further evidence. He also sought to enlarge the filing time to March 29, 1963. On the representation that counsel for respondent had no objection thereto, orders were issued reopening the record, admitting additional evidence, amending the complaint and extending the time for filing.

Proposed findings, conclusions, briefs, and orders were filed March 29, 1963.

Counsel for respondent, in his proposed findings dated March 25, 1963, stated:

> Inasmuch as the stipulations of facts did, in effect, admit the truth of all of the facts alleged in the Complaint, it is assumed that the Hearing Examiner will enter findings of fact herein substantially in accordance with the well pleaded facts as set forth in the Complaint.
>
> The sole issue remaining is a question of law as to the appropriate breadth of an order to be issued in this matter.

After considering the entire record, the hearing examiner makes the following findings, conclusion and order. All findings and conclusions not made in terms or in substance are rejected as immaterial or erroneous.

FINDINGS OF FACT

1. Respondent Winston Sales Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 4100 West Grand Avenue in the City of Chicago, State of Illinois.

2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of general merchandise, including a kitchen knife and a food chopper.

3. In the course and conduct of its business, respondent now causes and for some time last past has caused, its said products, when sold, to be shipped from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintains and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of knives and food choppers of the same general kind and nature as those sold by respondent.

5. In the course and conduct of its business, and for the purpose of inducing the sale of a kitchen knife and a food chopper, respondent has made representations with respect to the quality of said knife and to the regular retail selling price of said knife and of the said food chopper. Said statements and representations have been made in television broadcasts.

Among and typical of the said representations, but not all inclusive thereof, are the following:

I'd like to show you something you probably wouldn't believe if you weren't watching me with your own two eyes. Here is a regular two-inch box nail that I'm going to saw in half with this knife to prove absolutely that this knife will never, never get dull. I'm going to place this nail in a vise.

(A still photographic reproduction of the video action at this point is attached to the complaint and marked Exhibit 1.)*

One thing I want you to realize and understand, you can use this knife for every job in the kitchen and one of the jobs, of course, is sawing frozen food in half. Another thing you can use it when you're carving chicken or turkey and you come across a bone. You have no problem when it comes to cutting through.

(A still photographic reproduction of the video action at this point is attached to the complaint and marked Exhibit 2.)*

You notice one thing, it isn't too easy to cut a nail in half but this knife does it exactly the same as a saw and yet you have a knife that's just as sharp as when I started.

(A still photographic reproduction of the video action at this point is attached to the complaint and market Exhibit 3.)*

As sharp as a razor.

(A still photographic reproduction of the video action at this point is attached to the complaint and marked Exhibit 4.)*

* Pictorial exhibits are omitted in printing.

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Proof positive is right here. Here's balance of a tomato and I'm going to show you that this knife still goes through that tomato just exactly the same as a hot knife going through butter.

(A still photographic reproduction of the video action at this point is attached to the complaint and marked Exhibit 5.)*

Here's the offer we have for you, the StaKeen Edge knife, regular retail price $3.00, all we ask you to spend is $2.98. If you spend $2.98 at no additional cost you get our regular $2.98 food chopper. In other words you get both items for $2.98 if you order now.

6. Through the use of the aforesaid television commercial, including the video demonstration, respondent has represented directly or by implication that:

(a) Its kitchen knife will never get dull;

(b) That said demonstration proves that its kitchen knife will never get dull;

(c) The said demonstration proves the ability of its kitchen knife to cut through a regular two-inch box nail;

(d) The said demonstration proves that the sharpness of the cutting edge of its kitchen knife is unaffected after having cut through a regular two-inch box nail.

7. Respondent, by means of the aforesaid television commercial also represents that the usual and regular retail price for the kitchen knife regularly retails at $3 and that the regular retail price for the food chopper is $2.98.

8. In truth and in fact:

(a) The kitchen knife will become dull as a result of normal use.

(b) The said demonstration does not prove:

(1) That the kitchen knife will never get dull.

(2) The ability of its kitchen knife to cut through a regular two-inch box nail. Prior to the demonstration the nail used had been partially cut through.

(3) The sharpness of the cutting edge of its kitchen knife after having cut through a regular two-inch box nail. The cutting edge used to demonstrate that the sharpness had not been affected by cutting through the two-inch box nail was not the same cutting edge used to cut through said nail.

(c) $3 is subsantially in excess of the usual and regular retail price for the said knife in the trade areas in which it is offered for sale.

(d) $2.98 is substantially in excess of the usual and regular retail price of the food chopper in the trade areas in which it is offered for sale.

Therefore, the statements and representations referred to in Paragraph Five were, and are, false, misleading and deceptive.

9. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondent's products, by reason of said erroneous and mistaken belief.

CONCLUSION

1. The aforesaid acts and practices of the respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

2. The only question presented in this proceeding is the form of the order to be issued. Paragraphs Four and Five of the form of order attached to the complaint are substantially the same as those contained in the Commission's order issued December 29, 1961, *In Matter of Colgate*, Docket No. 7736 [59 F.T.C. 1452]. After remand from the Circuit Court, the Commission, in its opinion dated February 18, 1963 [62 F.T.C. 1269], stated that such portion of the order "* * * appear[s] to have been wanting in the necessary clarity." Accordingly, a different form of proposed order was issued. The proposed order issued after remand is therefore adopted with appropriate modification to fit the facts in this proceeding. Respondent's other proposal to limit misrepresentation as to savings to those arising from statements of price is without merit.

ORDER

It is ordered, That respondent Winston Sales Co., Inc., a corporation, and its officers, and respondent's agent, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of kitchen knives and food choppers, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication that respondent's kitchen knives will not become dull;

2. Using the term "retail price" or any other words of similar import or meaning to describe a price higher than the usual and customary retail price of any such merchandise in the trade area or areas where the representation is made;

3. Misrepresenting in any manner the savings available to purchasers of respondent's merchandise;

4. Advertising any product by presenting a visual test or demonstration represented to be actual proof of a claim made for the product, where the test or demonstration does not constitute actual proof because of manipulating the product in a misleading manner, tampering with the object on which it is demonstrated, or employing any other misleading illusion.

5. Advertising respondent's knives or any other hardware product by claiming for it qualities or merits that the product does not in fact possess.

Order Modifying and Adopting Initial Decision

This matter has been heard on respondent's appeal from the initial decision of the hearing examiner, filed April 2, 1963. The Commission has determined that respondent's appeal should be granted with respect to paragraph 5 of the order contained in the initial decision, and denied in all other respects. Accordingly,

It is ordered, That the initial decision be, and it hereby is, modified by deleting the language of paragraph 5 of the order contained therein and substituting for such language the following:

"Misrepresenting, in any manner, directly or by implication, the quality or merits of respondent's knives."

It is further ordered, That the initial decision and the order contained therein, as modified, be, and they hereby are, adopted as the decision and final order of the Commission.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form in which respondent has complied with this order.

IN THE MATTER OF

THE PROCTER & GAMBLE COMPANY

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 6901. Complaint, Sept. 30, 1957—Decision, Nov. 26, 1963

Order requiring the leading producer in the United States of soap and detergent products and a major producer of food products, toilet goods and paper products—sold both as consumer household brands and in bulk quantities, to laundries, hotels, institutions, the baking industry and other industrial users—to divest itself absolutely, within one year, of all assets, properties, rights and privileges, tangible and intangible, acquired as a result of its acquisition in August 1957 of the Nation's leading manufacturer of household liquid bleach, whose annual sales before the acquisition represented almost 50 percent of the national total—the divestiture to be subject to the provisions in the order below set forth and upon terms and conditions approved by the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act (U.S.C., Title 15, Sec. 18) as amended and approved December 29, 1950, hereby issues its complaint, pursuant to Section 11 of the aforesaid Act (U.S.C. Title 15, Sec. 21) charging as follows:

PARAGRAPH 1. Respondent, The Procter & Gamble Company (hereinafter referred to as "respondent") is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business at The Procter & Gamble Building, 301 East Sixth Street, Cincinnati, Ohio.

PAR. 2. The Clorox Chemical Co. (hereinafter referred to as "Clorox") was, prior to August 1, 1957, a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 850 – 42nd Avenue, Oakland, California.

PAR. 3. Respondent, directly and through various completely owned subsidiary corporations, is engaged principally in the manufacture and sale of packaged soaps and detergents, paper products, shortening and other food products, and shampoos, dentifrices and home permanents, which are sold under advertised brand names. The respondent is the leading producer in the United States of soap and detergent products and a major producer in its other principal product fields. The most important consumer household brands which are sold by respondent to retail and wholesale grocery and drug outlets, department stores and variety stores are as follows:

Soaps, Detergents and Cleansers:

- Ivory Soap
- Ivory Flakes
- Ivory Snow
- Camay—toilet soap
- Lava—pumice hand soap
- Duz—detergent
- Tide—detergent
- Cheer—detergent
- Dreft—detergent
- Oxydol—detergent
- Dash—low sudsing detergent
- Joy—liquid detergent
- Comet—household scouring cleanser
- Cascade—automatic dishwasher detergent
- Spic and Span—paint and linoleum cleaner
- Zest—toilet detergent bar

Food Products:

- Crisco—shortening
- Golden Fluffo—shortening
- Big Top—peanut butter
- Duncan Hines—prepared mixes—16 kinds

Toilet Goods:

- Crest—fluoridated toothpaste
- Gleem—toothpaste
- Drene—shampoo
- Prell—shampoo
- Shasta—shampoo
- Lilt—home permanent
- Pin-It—home permanent.

Paper Products:

- Charmin—toilet tissue
- Lady Charmin—toilet tissue
- Charmin—facial tissue
- Charmin—napkins
- Charmin—towels
- Evergreen—industrial paper products

Respondent is also marketing "American Family" soap, flakes and detergents in the greater Chicago area. Selected market areas are being used by respondent to market "Biz" liquid detergent, "Whirl" liquid shortening, "Secret" personal deodorant, "Ivory" liquid detergent, "Jif" peanut butter and "Velvet Blend" shampoo.

Respondent also manufactures soaps, detergents, shortenings and edible oils for sale in bulk quantities to laundries, hotels, institutions, the baking industry and other industrial users; vegetable oils and chemicals chiefly for use in its own products; and by-products, such as glycerine, for sale to industrial users.

Respondent does a substantial manufacturing and marketing business abroad in consumer products similar to those manufactured and marketed in this country. Said business is conducted through completely owned subsidiary corporations located in Canada, England, Cuba, the Philippines, Indonesia, Mexico, Venezuela, and Belgium.

PAR. 4. Respondent, directly and through its completely owned subsidiaries, maintains factories for the manufacture of household and industrial soaps and detergents, shortenings, toilet goods, edible vegetable oils and food products in the United States at the following locations:

Cincinnati and St. Bernard, Ohio
Chicago, Illinois
Staten Island, New York
Kansas City, Kansas
Macon, Georgia
Dallas, Texas
Dayton, Ohio
Lexington, Kentucky
Baltimore, Maryland
St. Louis, Missouri
Long Beach, California
Sacramento, California
Portsmouth, Virginia
Quincy, Massachusetts
Iowa City, Iowa
Jackson, Mississippi
Omaha, Nebraska

In addition to the aforementioned locations, respondent and its completely-owned subsidiaries own vegetable oil mills located at Augusta and Macon, Georgia; Charlotte and Raleigh, North Carolina; Montgomery and Selma, Alabama; Corinth and Jackson, Mississippi; Memphis, Tennessee; Little Rock, Arkansas; New Madrid, Missouri; Louisville, Kentucky; Fort Worth, Texas; Baltimore, Maryland; Long Beach, California; and Toronto, Canada. Respondent and its completely-owned subsidiaries also operate chemical pulp plants at Memphis, Tennessee, and Foley, Florida; research facilities at Venice, Ohio; and paper production facilities at Green Bay and West DePere, Wisconsin, and a wood pulp plant at Green Bay.

PAR. 5. Respondent is engaged in the sale of products designated in Paragraphs 3 and 4 herein in commerce, as "commerce" is defined in the Clayton Act. During the fiscal year ending June 30, 1956, respondent's net sales of such products were $1,038,290,374. Estimated net sales for the fiscal year ending June 30, 1957, are $1,148,000,000.

PAR. 6. According to the latest information available, respondent accounted for the following percentages of the total United States market in its designated major product fields by value of shipments:

Product field	Percentage of U.S. market
Toilet Soaps (bar soaps)	24
Laundry Soaps (bar soaps)	91
Package Soap Chips	52
Package Soap Powders	51
Liquid Detergents	45
Packaged Detergents	58
Shampoos	24
Toothpastes	34
Vegetable Shortenings	36

PAR. 7. Respondent has increased its size, operations, sales, profits, assets and earned surpluses tremendously in recent years. Since 1946 respondent's net worth, net sales and net profit have increased over 300%. Respondent now employs over 18,000 persons in the United States and over 8,000 persons abroad. Respondent is constantly diversifying its operations and manufacturing and selling new products. Respondent has also entered into the production and sale of additional products by acquiring assets and stock of existing producers of said products. Among such acquisitions in recent years have been the following:

Year	Company	Product or activity
1955	W. T. Young Foods, Inc.	"Big Top" Peanut Butter and peanut products.
1956	Prepared Mix Division of Nebraska Consolidated Mills, Inc.	Cake mixes.
1956	Hines-Park Foods, Inc.	Distributor of food products, principally cake mixes.
1956	Duncan Hines Institute, Inc.	Licenses for prestige eating establishments.
1957	Charmin Paper Mills, Inc.	Paper tissues and related paper products.
1957	Clorox Chemical Co.	Liquid Bleach.

Respondent has also acquired numerous soap and detergent companies since 1905. Respondent was originally founded in 1837 and has constantly expanded by acquisition, by integration, and by diversification to reach its present standing.

PAR. 8. Prior to August 1, 1957, Clorox was engaged in the production and sale of sodium hypochlorite liquid bleach and disinfectant. Said product was sold nationally under the trade name "Clorox," in commerce, as "commerce" is defined in the Clayton Act. In the fiscal year ending June 30, 1956, net sales of "Clorox" were $36,409,197.70. Net sales of "Clorox" for the fiscal year ending June 30, 1957, were approximately $40,000,000. Clorox is, and has been for many years, the largest producer of household liquid bleach in the United States. In 1956 Clorox produced and sold approximately 48% of all household liquid bleaches sold in the United States. The number two producer in this field accounted for approximately 16% of all household liquid bleaches sold. The remaining producers, approximately forty in number, accounted for the remaining 36% of sales of household liquid bleach in the United States in 1956. Within the latter group of producers, no single liquid bleach producer enjoyed over 5% of the national household liquid bleach market.

PAR. 9. On or after August 1, 1957, respondent acquired Clorox as a going concern, including all of Clorox's assets, trademarks, business and good will. The acquisition was achieved by respondent exchanging 8½ shares of its stock for every 10 shares of Clorox stock outstanding. The market value of respondent's exchanged stock was approximately $30,300,000. The assets of Clorox were valued at approximately $15,000,000 at the time of the acquisition.

Under the terms of the acquisition agreements, respondent was given the exclusive right to the name "Clorox." Respondent formed a new Ohio corporation, The Clorox Company, as a completely owned subsidiary, to commence the manufacture and sale of "Clorox" liquid bleach and transferred the assets and intangibles obtained from Clorox to said subsidiary corporation. The Clorox Chemical Co. was dissolved after its officers distributed respondent's exchanged stock to the stockholders of Clorox Chemical Co. under the ratio of exchange.

PAR. 10. Prior to the aforementioned acquisition, Clorox was the dominant factor in the household liquid bleach market. Said position had been achieved through extensive advertising which had made the product "Clorox" well known and accepted in American households. Production of "Clorox" took place at factories in Atlanta, Georgia; Boston, Massachusetts; Camden, New Jersey; Charlotte, North Carolina; Chicago, Illinois; Cleveland, Ohio; Houston, Texas; Jersey City, New Jersey; Kansas City, Missouri; Los Angeles, California; Oakland, California; Seattle, Washington; and Tampa, Florida, prior to the acquisition. These regional production plants enabled Clorox to reduce freight costs of its finished product. Said freight costs are a significant factor in the sale of household liquid bleach.

Clorox had experienced a pattern of constant growth and expansion in the five years prior to the aforementioned acquisition and its share of the household liquid bleach market had been constantly increasing. Clorox produced no product in addition to "Clorox" bleach. At the time of the aforementioned acquisition Clorox was dominant in its product market, was operating profitably and its product "Clorox" was firmly established by public acceptance. Said public acceptance and the value of the well known and widely advertised name "Clorox" is demonstrated by the fact that respondent paid Clorox far in excess of the value of Clorox's assets in the acquisition aforementioned, said excess amount representing the value of the trade-name "Clorox" and the good will of Clorox.

PAR. 11. Respondent, by virtue of the acquisition of Clorox, has entered a market in which it did not formerly compete or offer a competitive product. Respondent, in so doing, has replaced the dominant factor in that market with its own dominant ability to produce and sell which threatens the household liquid bleach market with extremely adverse competitive effects. Prior to the aforementioned acquisition, Clorox—with assets of approximately $15,000,000; accumulated retained earnings of approximately $6,000,000; annual net income of approximately $2,000,000; and annual net sales of approximately $40,000,000—was gaining a steadily larger share of the household liquid bleach market as the market share of the other household liquid bleach producers constantly diminished. As a result of the acquisition, said household liquid bleach producers must now compete with respondent—with assets of approximately $726,000,000; accumulated retained earnings of approximately $409,-

000,000; annual net income of approximately $60,000,000; and annual net sales of approximately 1.2 billion dollars.

PAR. 12. In addition to its economic strength and ability, as delineated heretofore, respondent is a recognized leader in the merchandising of household or grocery store products. The vast majority of respondent's products, and "Clorox," are sold in grocery stores at low prices and in large volume. Such products require consumer acceptance in order to obtain critically short and valuable shelf space in the grocery stores. Such consumer acceptance of these products, especially soaps, detergents, cleansers, bleaches and toilet goods is obtained by extensive advertising. Respondent is the second largest advertiser of all products in the United States, having spent approximately $79,000,000 for advertising of its products in 1956, utilizing all media and means of reaching the consuming public.

In conjunction with its advertising, respondent has been extremely successful in promoting its household products. Respondent has utilized various promotional devices—including "two-for-one" sales, free samples, price-reducing coupons, reduced prices, and premiums for purchase—to a high degree.

PAR. 13. The ability of respondent to utilize advertising and promotional devices to gain shelf space and to sell its products, as set forth in Paragraph Twelve, has been vividly demonstrated in the recent past. Respondent introduced a new toothpaste, "Gleem," in 1953, and another new toothpaste "Crest," in 1956. By utilizing its advertising and promotional ability, as aforesaid, "Gleem" had acquired 25% of the toothpaste market by 1955 and "Crest" acquired an additional 13% of said market in its first year of production.

In a field more directly related to liquid bleaches, the household cleanser market, respondent introduced in 1956 a new product, "Comet." By utilizing its advertising and promotional ability, as aforesaid "Comet" acquired approximately 29% of the household cleanser market by March, 1957, nine months after it was first introduced. In said promotions respondent distributed approximately 30,000,000 miniature samples of "Comet" at an estimated cost of 3.3 million dollars.

These examples of the effectiveness of respondent's merchandising and advertising ability and power with new and previously unknown products demonstrate the impact on the household liquid bleach market that respondent, as a result of the acquisition of Clorox, can now accomplish with the already existing, dominant, well-known and established product "Clorox." Said impact will be to the competitive disadvantage of household liquid bleach manufacturers and the household liquid bleach industry.

PAR. 14. Respondent, by virtue of the acquisition, has expanded its line of soaps, detergents and cleansers with a closely allied product, household liquid bleach. While respondent had not, prior to the acquisition of Clorox, produced a product competitive with household liquid bleach, respondent's soaps, detergents, and cleansers are used by housewives in conjunction with, and as a complement to, household liquid bleach. Therefore, respondent can now offer grocery stores a complete line of cleansing and laundry products. Said complete line increases respondent's ability to obtain the aforementioned valuable and difficult to obtain grocery store shelf-space and is to the competitive disadvantage of household liquid bleach companies, none of whom possess the complete line of cleansing and laundry products as respondent now does.

PAR. 15. Respondent has violated Section 7 of the Clayton Act, as amended, in that the acquisition of the assets and business of Clorox, as described in Paragraph 9 hereof, may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of household liquid bleaches in the United States and in each of them.

More specifically, the aforesaid effects include the actual or potential lessening of competition and a tendency to create a monopoly in violation of Section 7 of the Clayton Act, as amended, in the following ways, among others:

1. Actual and potential competition generally in the production and sale of household liquid bleaches may be substantially lessened.

2. The Clorox Chemical Co. has been permanently eliminated as an independent competitive factor in the household liquid bleach industry.

3. Household liquid bleach producers may be unable to compete with respondent due to any one, any combination of, or all of the following factors:

(a) Respondent's market position;

(b) Respondent's financial and economic strength;

(c) Respondent's advertising ability and experience;

(d) Respondent's merchandising and promotional ability and experience;

(e) Respondent's "full-line" of cleansing and laundry products;

(f) Respondent's ability to command consumer acceptance of its products and of valuable grocery store shelf space;

(g) Respondent's ability to concentrate on one of its products, or on one selected section of the country, the full impact of its advertising, promotional, and merchandising experience and ability.

4. Respondent's competitive position in the production and sale of household liquid bleaches may be enhanced to the detriment of actual and potential competition.

5. Industrywide concentration of the production and sale of household liquid bleaches may be increased.

6. The acquisition gives respondent the facilities, the market position and the dominant ability to monopolize or to tend to monopolize the household liquid bleach market.

PAR. 16. The foregoing acquisition, acts and practices of respondent, as hereinbefore alleged and set forth, constitute a violation of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950.

Mr. J. Wallace Adair and *Mr. V. Rock Grundman, Jr.*, for the Commission.

Mr. Kenneth C. Royall, *Mr. Frederick W. R. Pride* and *Mr. Robert D. Larsen* of *Royall, Koegel, Harris & Caskey*, Washington, D.C., for the respondent.

OPINION OF THE COMMISSION

JUNE 15, 1961

By the Commission:

The complaint in this matter charges respondent, The Procter & Gamble Company, with violating Section 7 of the Clayton Act, as amended, by acquiring the assets and business of Clorox Chemical Co. (hereinafter referred to as Clorox). The hearing examiner has filed his initial decision holding that the acquisition violated Section 7, as alleged, and the matter is now before the Commission on cross-appeals of respondent and counsel supporting the complaint. The complaint alleges in substance that the acquisition of the dominant firm in the household liquid bleach field by the leading producer in related product fields may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of household liquid bleach. It specifically charges in this connection that producers of household liquid bleach may be unable to compete with respondent due to any one, any combination of, or all of the following factors:

(a) Respondent's market position:

(b) Respondent's financial and economic strength;

(c) Respondent's advertising ability and experience;

(d) Respondent's merchandising and promotional ability and experience;

(e) Respondent's "full-line" of cleansing and laundry products;

(f) Respondent's ability to command consumer acceptance of its products and of valuable grocery store shelf space;

(g) Respondent's ability to concentrate on one of its products, or on one selected section of the country, the full impact of its advertising, promotional, and merchandising experience and ability.

As the hearing examiner has pointed out, this case involves a conglomerate acquisition and is therefore one of first impression. In all previous Section 7 proceedings before the Commission, the challenged acquisitions were of either a vertical or horizontal nature. Here, however, the acquiring firm was neither a supplier or customer, nor a competitor of the acquired. Such a merger, therefore, does not have the effect of automatically foreclosing to competitors any market outlet or source of supply as in a vertical merger, nor does it have the effect of automatically eliminating a competitor as in a horizontal merger. Nevertheless, such a merger violates Section 7 if it has the proscribed effect. We repeat here with emphasis our recent holding in the *Scott Paper* case:[1] "Under Section 7, as amended, any acquisition whether it be vertical, conglomerate or horizontal is unlawful if the effect may be substantially to lessen competition or to tend to create a monopoly in any line of commerce."[2] Therefore, respondent's contention that this type of acquisition is not embraced by Section 7 has no merit and is rejected.

The question in this proceeding thus is whether the proscribed effect may in fact result from this particular acquisition where the only immediate effect is the replacement of one competitor by another. In making this determination, the same tests apply as in any other matter coming within the purview of Section 7, but since a conglomerate acquisition does not have the above-mentioned "automatic" effects of a vertical or horizontal merger, such a determination is necessarily difficult to make from a consideration of evidence relating solely to the competitive situation existing in the relevant market prior to the acquisition and to the pre-merger status of the

[1] *In the Matter of Scott Paper Company,* Docket 6559 (Dec. 16, 1960) [57 F.T.C. 1415, 1440].

[2] This holding follows both from the language of the statute and from relevant legislative history. The House Committee report stated:

"* * * the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition * * * or tending to create a monopoly." (H.R. Rep. No. 1191, 81st Cong. 1st Sess. p. 11 (1949).)

acquired and acquiring corporations. Consequently, a consideration of post-acquisition factors is appropriate.

In this case, the hearing examiner has placed considerable emphasis on evidence relating to the post-acquisition activities of Clorox. Relying primarily on this evidence, he has concluded that the dominant market position held by Clorox in the production and sale of liquid bleach has been enhanced to the detriment of actual and potential competition; that there is an increasing tendency of concentration of competitors in the liquid bleach industry and that other liquid bleach producers will be unable to expand their operations by normal methods of competition. While we are of the opinion that, in the circumstances of this case, he was correct in considering this evidence, we do not agree that it supports his conclusions with respect to the probable effects of the acquisition.

The hearing examiner has found in this connection that, subsequent to the acquisition, Clorox has systematically countered the promotional activities of Purex Chemical Company, the second largest producer of liquid bleach, by its own advertising and promotional campaigns in various market areas throughout the country. With one exception, however, the effectiveness of these counter promotional activities cannot be determined from the record. The evidence discloses that in one market area, Erie, Pennsylvania, Purex was unsuccessful in its attempt to conduct a market test by reason of respondent's counter promotions. We do not believe that it can be inferred from this one showing, however, that the same results would occur in other market areas that Purex or other producers may attempt to enter or in which they may attempt to expand their operations.

The hearing examiner has also found that, subsequent to the acquisition, Clorox's market share of the total household liquid bleach sales had increased substantially. This finding is based on data obtained from reports covering the period August, 1957, to November, 1958, made by the A. C. Nielsen Company Marketing Service. It appears that the increase in the Clorox market share in the first twelve months of this period was 0.3 of one Nielsen point and, in the entire sixteen months, 0.42 of one Nielsen point. This increase, however, is only about half of the average increase of 0.8 of one Nielsen point made by Clorox in each of the five years prior to the acquisition. The hearing examiner's failure to consider this pre-acquisition growth trend of Clorox detracts from his conclusion that there had been a substantial increase in the dominant market position held by Clorox as a result of the acquisition.

In our opinion, the post-acquisition data neither supports the hearing examiner's conclusions nor does it indicate in any manner that the acquisition will not result in a substantial lessening of competition or tendency toward monopoly. As pointed out by counsel supporting the complaint, very few of respondent's merchandising techniques were used during the first eight months after the acquisition. Thereafter, when consumer promotions were used, although only on a limited basis, the market share of Clorox increased sharply. Moreover, counsel supporting the complaint contend that, during the sixteen month period after the acquisition, respondent had put into effect only a few of the changes which it might reasonably be expected to make in the production and merchandising of liquid bleach. These changes did not extend to the use of respondent's manufacturing facilities, the use of respondent's sales force in place of independent brokers, coordination of the advertising and promotion of Clorox with respondent's full line of related products and the use of national television advertising. According to counsel supporting the complaint, it is only when respondent begins to use the merchandising techniques and methods by which it has achieved spectacular successes against major competition in the soap and detergent fields that the full impact of this financially powerful corporation will be made on competition in the liquid bleach industry.

The record as presently constituted does not provide an adequate basis for determining the legality of this acquisition. In the circumstances, we might dismiss the complaint and direct our staff to maintain continuing surveillance of this market, with the possibility of bringing another complaint in the future if we think it warranted. We believe, however, that the public interest will be better served and the respondent not unduly inconvenienced by our remanding the case for the taking of additional evidence. This is likely to obviate the necessity of a plenary proceeding in the future that would be more costly in time and money to both the Commission and respondent than adding to the present record. Moreover, this disposition of the matter, providing as it will a more complete and detailed post-acquisition picture, has the advantage of allowing the Commission an informed hindsight upon which it can act rather than placing too strong a reliance upon treacherous conjecture.

The case will, therefore, be remanded to the hearing examiner for the reception of evidence relating to the competitive situation as it presently exists in the liquid bleach industry. This evidence should relate to events occurring subsequent to November 1958, and should include market share data in each of the geographical regions specified on page 17 of the initial decision, as well as information directed to more clearly delineating the production and merchandising facilities and techniques which have been utilized by Clorox under the control of respondent.

Chairman Dixon and Commissioner Elman not participating.

Order Remanding Proceeding to Hearing Examiner

JUNE 15, 1961

Counsel supporting the complaint and respondent having filed cross-appeals from the initial decision in this matter; and

The Commission having determined that the record as presently constituted does not provide an adequate basis for informed determinations as to the actual or probable effects of respondent's acquisition of Clorox Chemical Co. on competition in the production and sale of household liquid bleach, and being of the opinion that the record should be supplemented in this respect to the end that all of the issues involved in the case may be finally and conclusively disposed of on their merits:

It is accordingly ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for the reception of such further evidence concerning the competitive effects of the aforementioned acquisition as may be offered in conformity with the views expressed in the accompanying opinion of the Commission.

It is further ordered, That after the receipt of such additional evidence the hearing examiner make and file a new initial decision on the basis of the entire record herein.

By the Commission, Chairman Dixon and Commissioner Elman not participating.

Second Initial Decision by Everett F. Haycraft, Hearing Examiner

FEBRUARY 28, 1962

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PRELIMINARY STATEMENT

A. THE PLEADINGS AND PROCEEDINGS.

The Commission, on September 30, 1957, issued a complaint against The Procter & Gamble Company, an Ohio corporation, sometimes hereinafter referred to as P & G, with its principal office and place of business located in Cincinnati, Ohio, charging it with violation of Section 7 of the Clayton Act, as amended December 29, 1950, through the acquisition on August 1, 1957, of the assets, trademarks, business and goodwill of the Clorox Chemical Company, a Delaware corporation, sometimes hereinafter referred to as Clorox Chemical, with its principal office and place of business located in Oakland, California.

Specifically, the complaint alleges that the effect of the acquisition of the assets and business of Clorox Chemical, "may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of household liquid bleaches in the United States and in each of them."

More specifically it is alleged that the effect of the acquisition was the actual or potential lessening of competition and a tendency to create a monopoly in the following ways, among others:

1. In the production and sale of household liquid bleach.

2. The elimination of Clorox Chemical as an independent, competitive factor in the household liquid bleach industry.

3. Household liquid bleach producers may be unable to compete with the respondent due to one or more of the following:

a. Respondent's market position.

b. Respondent's financial and economic strength.

c. Respondent's advertising ability and experience.

d. Respondent's merchandising and promotional ability and experience.

e. Respondent's "full line" of cleansing and laundry products.

f. Respondent's ability to command consumer acceptance of its products and of valuable grocery store shelf space.

g. Respondent's ability to concentrate on one of its products, or on one selected section of the country, the full impact of its advertising, promotional, and merchandising experience and ability.

4. Enhancement of respondent's competitive position in the production and sale of household liquid bleach to the detriment of actual and potential competition.

5. The industry-wide concentration of the production and sale of household liquid bleach may be increased.

6. The respondent is given the facilities, the market position and the "dominant ability" to monopolize, or tend to monopolize, the household liquid bleach market.

In its answer, filed November 4, 1957, respondent denied all charges of illegality contained in the complaint.

The taking of evidence commenced in Cincinnati, Ohio, on December 16, 1957. Additional hearings were held in San Francisco, Los Angeles, Chicago, Philadelphia, New York, Boston, Buffalo, Detroit, and Washington, D.C., at which testimony was taken in support of the allegations of the complaint. Counsel in support of the complaint closed their case-in-chief on August 26, 1958.

Counsel for respondent presented evidence in opposition to the allegations of the complaint at hearings held in Washington, D.C., on November 17–26, 1958, and January 5–9, 1959.

Rebuttal testimony was received in Washington, D.C., commencing January 26, 1959. The hearings were concluded on February 12, 1959, when each party stipulated that its case was closed. Proposed findings were filed by the opposing parties in May 1959, and oral argument was held on June 16, 1959. Numerous briefs have been filed both before and after the oral argument, the last one having been filed in November 1959. The record consists of approximately 6,300 pages of transcript and several hundred exhibits, many of which consist of several pages.

Consideration having been given to the proposed findings and all the reliable, probative and substantial evidence in the record upon all material issues of fact, law or discretion, the examiner was of the opinion that the material allegations of the complaint had been proven by substantial and reliable evidence, and that the Commission should take remedial action in the premises. Appropriate findings as to the facts, conclusions and order of divestiture were issued by the examiner on June 17, 1960.

Thereafter, an appeal was taken to the Commission from the initial decision and oral argument was had before the Commission. On June 15, 1961, the Commission entered an order remanding the proceeding to the hearing examiner for the reception of such further evidence concerning the competitive effects of the aforementioned acquisition as may be offered in conformity with the views expressed in the accompanying opinion of the Commission. It was further ordered that after the receipt of such additional evidence, the hearing examiner should make and file a new initial decision on the basis of the entire record. The following statement was made in the order as the basis for the remand:

> The Commission having determined that the record as presently constituted does not provide an adequate basis for informed determinations as to the actual or probable effects of respondent's acquisition of Clorox Chemical Co. on competition in the production and sale of household liquid bleach, and being of the opinion that the record should be supplemented in this respect to the end that all of the issues involved in the case may be finally and conclusively disposed of on their merits:

In the course of the opinion, the following appears as further indication of the extent of the remand:

> The case will, therefore, be remanded to the hearing examiner for the reception of evidence relating to the competitive situation as it presently exists

in the liquid bleach industry. This evidence should relate to events occurring subsequent to November 1958, and should include market share data in each of the geographical regions specified on page 17 of the initial decision, as well as information directed to more clearly delineating the production and merchandising facilities and techniques which have been utilized by Clorox under the control of respondent.

Pursuant to the foregoing order of the Commission, hearings were held in Washington, D.C., on December 1, 1961, for the purpose of taking testimony and other evidence submitted by counsel in support of the complaint, and on December 12, 1961, at which testimony and other evidence was received in opposition to testimony presented by counsel in support of the complaint on December 1, 1961. At the December 12 hearing, both counsel rested and the hearing examiner closed the taking of testimony and allowed both counsel until January 15, 1962, within which to file proposed findings based on the testimony and evidence submitted at these hearings and both counsel were also allowed until February 1, 1962, within which to file reply, if desired.

B. STATEMENT OF THE ISSUES AND OPINION

Section 7 of the Clayton Act, as amended December 29, 1950, provides in part as follows:

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of any such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

The House Report accompanying the bill amending Section 7, as above, stated:

Under (Section 7) a merger or acquisition will be unlawful if it may have the effect of either (a) substantially lessening competition, or (b) tending to create a monopoly. These two tests of illegality are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act. Thus, it would be unnecessary for the Government to speculate as to what is in the "back of the minds" of those who promote a merger; or to prove that the acquiring firm had engaged in actions which are considered unethical or predatory; or to show that as a result of a merger the acquiring firm had already obtained such a degree of control that it possessed the power to destroy or exclude competitors or fix prices.[1]

[1] H.R. Report No. 1191 of 81st Congress, 1st Session, Page 8.

It will be noted from the foregoing that among the first things to be determined in this case, and the necessary issues, are:

1. The Statutory "Line of Commerce" involved in the transaction.

2. The Statutory "Section of the Country" involved in the transaction.

3. The effect on competition in such "Line of Commerce" and/or such "Section of the Country".

a. Does the acquisition tend to substantially lessen competition, or

b. Tend to create a monopoly in the line of commerce or section of the country where the respondent and the acquired corporation are engaged in business.

In the Senate report accompanying the amendment to Section 7 of the Clayton Act in 1950, the following language is found:

What constitutes a section (of the country) will vary with the *nature of the product.* (Emphasis suppliesd.) Owing to the difference in size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition was based on miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product such as milk, and

* * * Hence, an acquisition is not to be interpreted merely in terms of either its effect on competition or its tendency to create a monopoly *"in the Nation as a whole."* The act is to be violated if, as a result of the acquisition, there would be a substantial lessening of competition or a tendency to create a monopoly *in any section of the country.* (Emphasis supplied.)[2]

Another issue is whether or not the acquisition involved in this case, a so-called conglomerate merger, comes within the language of the statute, since there was no competition between P & G and Clorox Chemical prior to the acquisition. The House Report (*supra*) states as follows:

Because Section 7, as passed in 1914, prohibited, among other things, acquisitions which substantially lessened competition between the acquiring and acquired firms, it has been thought by some that this legislation applies only to the so-called horizontal mergers. But in the proposed bill, as has been pointed out above, the test of the effect on competition between the acquiring and the acquired firm has been eliminated. One reason for this action was to make it clear that this bill is not intended to prohibit all acquisitions among competitors. *But there is a second reason, which is to make it clear that the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal,* which have the specified effects of substantially lessening competition * * * or tending to create a monopoly. (Emphasis supplied.)[3]

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[2] Senate Report 1775, 81st Congress, 2nd Session, Pages 5 and 6.

[3] Ibid, Page 11.

Consideration has been given to the proposed findings and all the reliable probative and substantial evidence in the record upon all material issues of fact, law or discretion, including the evidence received at hearings held pursuant to the Commission's order of June 15, 1961, remanding the proceeding to the Hearing Examiner for the taking of additional evidence. Each of those proposed findings which has been accepted, has been, in substance, incorporated into this initial decision. All proposed findings not so incorporated are hereby rejected.

The examiner is of the opinion that the material allegations of the complaint have been proven by substantial and reliable evidence and that the Commission should take remedial action in the premises. Appropriate Findings as to the Facts, Conclusions and Order of Divestiture are hereinafter set forth.

FINDINGS AS TO THE FACTS

I. DESCRIPTION OF THE RESPONDENT AND THE INDUSTRIES IN WHICH IT WAS ENGAGED IN 1957

Respondent P & G and various of its subsidiaries in 1957 were engaged principally in the manufacture and sale in interstate commerce of soaps, synthetic detergents and cleansers. It also manufactured and sold some food products, including meat food products, paper products, shampoos, dentifrices and home permanents. P & G was, and now is, the largest producer in the United States of soap and synthetic detergent products, and one of the major producers in its other principal product fields. The more important consumer household brands manufactured by P & G and its subsidiaries are sold to retail and wholesale grocery and drug outlets, department stores and variety stores. P & G was, and now is, one of the leading national advertisers in the United States and expends large sums of money in advertising and promoting many of its products in the household soap, detergent, food and toilet goods fields. P & G's overall expenditures for advertising in the United States of approximately thirty-five products manufactured by it and sold under its brand names were somewhat in excess of $79,000,000 for its fiscal year ended June 30, 1957. There is no evidence in the record relating to P & G advertising expenditures subsequent to that date.

As of June 30, 1957, P & G had total assets of $688,272,623 and total capital and retained earnings of $462,097,281. For the fiscal year 1957, consolidated net sales amounted to $1,156,389,726, and consolidated net earnings were $67,807,376.

As of June 30, 1961, P & G had total assets of $1,022,525,434 and total capital and retained earnings of $677,686,077. For the fiscal year 1961, consolidated net sales amounted to $1,541,904,779, and consolidated net earnings were $106,632,804.

Since 1946, P & G's net sales have increased approximately 400%, and total assets have increased more than 400%. A large percentage of this growth is attributable to the development of new products. For instance, it has developed and brought on the market a new detergent, a new deodorant toilet soap bar, two new brands of toothpaste, and an abrasive cleanser, all of which have proved very popular. P & G's president testified that approximately 70% of P & G's household product volume comes from products not in existence in 1946.

P & G has also grown by acquiring going businesses and, in so doing, entered new fields and diversified its operations. For instance, in August 1955 P & G acquired S. T. Young Foods, Incorporated, which manufactured peanut butter; in August 1956 P & G acquired the Duncan Hines prepared cake mixes from Nebraska Consolidated Mills, Incorporated, of Omaha; and in January 1957 it acquired Charmin Paper Mills, Incorporated, manufacturer of paper products.

The Duncan Hines and Charmin products were added to the P & G list of consumer brands during the fiscal year ended June 30, 1957. In P & G's annual report of 1957 the following statement appears:

> Procter & Gamble's technical knowledge and manufacturing experience fit very well into the development and production of these types of products. In addition, both prepared mixes and paper tissue products are low priced, rapid turnover, household items sold primarily through grocery, drug and department stores—the type of goods which the company is accustomed to market.

A further explanation is made of such acquisitions in the following language by the P & G Board Chairman:

> Since our recent purchase of the Duncan Hines Cake Mix business, and our interest in the paper products field, it would be natural for any shareholder to ask, "Why do we go into businesses like cake and other flour and shortening mixes, peanut butter and paper tissues?" Our answer would be simply that we feel *our experience and marketing skill* qualify us carefully to diversify our operations, and that by choosing subsidiaries well and applying Procter & Gamble's merchandising methods to related consumer products businesses, we add to the stability and profits of the business. (Emphasis supplied.)

The Executive Vice President of P & G at the time of the acquisition of Clorox Chemical, in a press release, stated:

> While this is a completely new business for us, taking us for the first time into the marketing of a household bleach and disinfectant, *we are thoroughly at home in the field of manufacturing and marketing low priced, rapid turn-over consumer products.* [Emphasis supplied.]

II. THE CLOROX CHEMICAL COMPANY

The Clorox Chemical Company was, prior to August 1, 1957, a Delaware Corporation, with its office and principal place of business in Oakland, California, and was engaged in the production and sale in the interstate commerce of 5¼% sodium hypochlorite liquid bleach and disinfectant under the trade name of "Clorox". At that time, and certainly since 1952, Clorox Chemical was the largest producer of household liquid bleach in the United States. It had thirteen plants for the manufacture and bottling of household liquid bleach, located at Atlanta, Georgia; Boston, Massachusetts; Camden, New Jersey; Charlotte, North Carolina; Chicago, Illinois; Cleveland, Ohio; Houston, Texas; Jersey City, New Jersey; Kansas City, Missouri; Los Angeles, California; Oakland, California; Seattle, Washington; and Tampa, Florida.

Net sales and net income of Clorox Chemical for the fiscal years ending June 30, 1952, through June 30, 1957, were as follows:

Net sales		Net income	
1952	$23,625,026	1952	$1,255,005
1953	27,714,435	1953	1,348,618
1954	30,284,650	1954	1,343,511
1955	33,874,181	1955	2,041,251
1956	36,409,197	1956	2,032,861
1957	39,999,114	1957	2,569,166

As of June 30, 1957, Clorox Chemical had total assets of $12,629,425 and an earned surplus of $7,127,015.

The foregoing net sales figures represent almost entirely sales of household liquid bleach which, with the exception of a small amount of industrial bleach, has always been Clorox Chemical's only product.

It will be seen from the foregoing table that the net sales of Clorox Chemical reflect a steady, continuous and substantial growth in each of the fiscal years from June 30, 1952, through June 30, 1957.

In each of the years during the period from August 1, 1952, through July 31, 1957, there was also a steady and continuous growth in Clorox Chemical's market share of all household liquid bleach sold in the United States through grocery stores. Such market shares were as follows:

Year ending July 31	Clorox brand share
	Percent
1953	45.3
1954	46.4
1955	47.1
1956	47.8
1957	48.4

Clorox Chemical sold its product through approximately 80 distributors, acting as principals, to the grocery trade—shipments being made direct to the retail customer as well as to the distributor, with the freight paid by Clorox Chemical.

Clorox Chemical's success in the household liquid bleach industry had been achieved through extensive national advertising which had made the name Clorox well-known and accepted in American households as a quality product at a reasonable price.

The record indicates that Clorox Chemical was generally considered the price leader in the household liquid bleach industry. While a few brands, such as Purex, Linco, Prescott, 101, Hilex, and Roman Cleanser, sold at substantially the same premium price as Clorox, most of the brands manufactured by regional manufacturers sold for less than Clorox. Most private label and local brands generally sold for even lower prices. There is evidence that in a few isolated regional situations, certain competitive bleaches have been sold at a higher price than Clorox.

Clorox Chemical spent approximately $1,750,000 for newspaper advertising, $560,000 for magazine advertising, $1,150,000 for television, $113,000 for radio, and $145,000 for billboard advertising during the fiscal year ended June 30, 1957. It began to use TV spot advertising in July 1956, which was intended to add "extra impact to the tremendous selling support provided by Clorox national advertising."

During the period 1952 through July 31, 1957, Clorox Chemical had utilized no so-called consumer promotional devices or methods, such as the distribution of price-off coupons, free samples, premiums, contests or tie-in sales, although many of its competitors had utilized some or all of these devices.

Clorox Chemical commenced to use what is known as special spring and fall housecleaning campaigns in 1956. These campaigns were directed primarily to the grocer and offered nothing special to the consumer. These campaigns lasted approximately six weeks, the spring campaign beginning in March, and the fall campaign in September. They were continued during 1957, the fall campaign being announced in a letter to the trade dated July 31, 1957, just prior to its acquisition by P & G.

III. THE ACQUISITION OF CLOROX CHEMICAL

Respondent considered entering the household liquid bleach market by purchasing the Clorox Chemical Company approximately two years prior to the date of acquisition. In a confidential study of that market, by employees of respondent P & G in October 1955, it was reported that liquid bleaches would continue to dominate the market volumewise since they were by far the most economical for the consumer to use. It was believed at that time that the household liquid bleach market would continue to grow for the following reasons:

a. 75% of the homes now use a bleach.

b. Younger women bleach more than do older women.

c. Automatic washing machine homes use more bleach than do conventional washing machine homes.

It was estimated in this report that the total household liquid bleach market in 1955 amounted to about 44,000,000 (3-gallon case) cases, and the market was divided as follows:

Clorox (National), 44%
Purex (Sectional), 16%
All others, 40%

This report, which was prepared by a man in the promotional department of respondent, recommended that the company should acquire the Clorox business rather than try to enter the market by introducing a new brand, or by trying to expand a sectional brand. This was because it was felt that the latter course would require "a very heavy investment" to achieve a major volume in the field. It was recommended that:

taking over the Clorox business, however, could be a way of achieving a dominant position in the liquid bleach market quickly which would pay out reasonably well.

The report contained a history of the net sales and earnings of Clorox Chemical with the following comment:

We understand that Clorox sells through a broker jobber setup, and that while they are No. 1 nationally, there are many important markets where their share of the bleach market is quite low. We feel that with our sales, distribution and manufacturing setup, we could effect a number of savings that could possibly increase the net profit of their business considerably—say to a net profit of $3,000,000 on net sales of $33,000,000.

In a later report by another member of the promotional department of respondent P & G, dated February 28, 1957, it was definitely recommended that P & G purchase the Clorox Chemical Company at a price of approximately $30,000,000 of P & G stock. Among the reasons for recommending the purchase were the following:

First, the total bleach market was then a "*large and expanding one.*" Liquid bleaches account for approximately 95% of the total volume, and it was believed that the bleach market would continue to grow for the same reasons assigned in the previous 1955 report hereinbefore mentioned.

Second, Clorox was the nation's dominant bleach brand, with a total market share, reported by Neilson, in excess of 42%, or approximately half of the total household liquid bleach market.

Third, it was unlikely that the growth of dry bleaches would cut into the liquid bleach volume for many years to come.

Other factors taken into consideration were as follows:

We are advised that Clorox spent $2,660,000 in the last half of 1956 for advertising, or at the rate of $5,320,000 a year. We believe that *P & G advertising philosophies and economies* applied to an advertising expenditure of this size can be expected to further advance the Clorox business. (Emphasis supplied.)

It is conceivable that the profitability of the Clorox business may be improved. Recognizing that Procter & Gamble overhead charges, if applied to the Clorox P & L statement, might appear to reduce the profitability or at least to off-set any economies under P & G operation, there remains such possibilities as a 5 cent to 10 cent increase in the price per case (using Clorox 12 quart case as a base), which could conceivably be accomplished without an increase in the retail price, thereby expanding profit.

We may be able to derive additional value from the Clorox name for other new and related products, which may not perhaps be measurable in exact dollars, but should nevertheless be considered a value returned on the investment.

Pursuant to an agreement dated May 28, 1957, between Clorox Chemical and P & G, Clorox Chemical agreed to exchange and transfer substantially all of its assets and business as a going concern to P & G on the terms, conditions and provisions set forth in said agreement, which provided, among other things, that the closing of such exchange and transfer, subject to prior approval by Clorox Chemical stockholders, would be August 1, 1957.

To implement the transaction, P & G caused a wholly owned subsidiary named The Clorox Company to be incorporated under the laws of the State of Ohio. On August 1, 1957, this subsidiary, pursuant to the plan of reorganization set forth in the said agreement, exchanged 639,578 shares of P & G's fully paid and non-assessable two-dollar par value common stock (about 3.1% of the issued and outstanding stock) for substantially all of the assets and business of Clorox Chemical as a going concern. Clorox Chemical was then dissolved and the P & G stock received by it was distributed among Clorox Chemical's stockholders. The market value of the P & G stock exchanged was approximately $30,000,000.

IV. HOUSEHOLD LIQUID BLEACH IS THE LINE OF COMMERCE IN THIS PROCEEDING

The product involved in this case is household liquid bleach, which quite uniformally consists of 5¼% sodium hypochlorite solution with 94¾% water. It is either manufactured from basic chemicals (chlorine and caustic soda) or it is converted by the producer from bleach concentrate by the addition of water.

Household liquid bleach is used by the housewife principally in the laundry as an adjunct to soaps and detergents to bleach cottons and fine fabrics. It is also used extensively as a germicide, to disinfect garbage cans, toilets, kitchen sinks, etc.

It is sold principally through grocery stores, in various sized glass containers, including pint, quart, half gallon and gallon bottles, packed in cases as follows: 24 pints, 12 quarts, 6 half gallons, and 4 gallons to a case, respectively.

It is contended by the respondent that the line of commerce involved in this proceeding should include dry bleach as well as liquid bleach, asserting that approximately 10% of the total household bleach market consists of dry bleach.

Dry bleach is not competitive with liquid bleach because, among other reasons, it has differing functional uses. Liquid bleaches are quicker and more thorough than dry bleaches, and they are considered more in the heavy duty category, while dry bleaches are in the light duty area. In addition, dry bleach is more expensive to use, is much less effective than liquid bleach for laundry purposes, and accounts for only about 5% of all laundry functions.

Clorox Chemical did not manufacture dry bleach, and the evidence indicates that dry bleach will not materially cut into the liquid bleach market in the forseeable future or ever replace liquid bleach in the home.

It is, therefore, found that the line of commerce in this case is household liquid bleach.

V. THE SECTIONS OF THE COUNTRY AND COMPETITORS IN EACH SECTION

A. *The Sections of the Country Involved Herein*

There is a national market for household liquid bleach in the sense that it is universally sold throughout the United States in grocery and drug stores. However, this national market is made up of a series of regional and local markets, the geographical confines of which cannot be fixed with any exactitude. There are in the household liquid bleach industry a substantial number of small producers which are located and sell in various local or regional areas. The weight of household liquid bleach, packed in cases of glass or plastic containers for shipment, results in high freight costs, and necessarily restricts the region served by any one production facility. In the main, each producer markets its products in the region in which it has manufacturing facilities, and which it considers can be economically served by such facilities. In consequence, different competitive factors and conditions are to be found to some degree in each regional market.

Clorox Chemical was the only household liquid bleach manufacturer which sold its product throughout the United States. Purex Ltd., the second largest household liquid bleach producer, marketed its brand in areas of the United States containing approximately 48% of the population at the time of the acquisition of Clorox Chemical by P & G. In October 1958, Purex acquired the plants of John Buhl Products Company, a subsidiary of Sterling Drug, Inc., manufacturing and selling a brand of household liquid bleach known as "Fleecy-White", and, as a result, Purex now markets household liquid bleach in areas of the United States containing approximately 64% of the population. With the possible exception of one or two other producers, all of the other members of the industry sold only in smaller regional or local areas.

In all but two of those regional areas, Clorox Chemical, prior to the acquisition by P & G, was a strong competitive factor. However, in two of the regional areas one of the competitive manufacturers occupied a market position comparable to that of Clorox Chemical in the sale of household liquid bleach.

B. *The Principal Competitors in each Section*

There is some conflicting testimony as to the actual number of household liquid bleach manufacturers in the United States. It was estimated by the president of respondent that there were between 100 and 200 such liquid bleach manufacturers. The president of Purex estimated there were approximately 40 to 50 such manufacturers who sell their products under their own label to grocery stores in competition with Clorox liquid bleach. The December 1955 edition of the Thomas Register of American Manufacturers contains the names of 20 companies known as liquid bleach manufacturers that were competitors of Clorox Chemical.

The following household liquid bleach manufacturers were the principal competitors of Clorox Chemical at the time of the acquisition:

1. *Purex Chemical Company*, hereinbefore mentioned, which had the largest distribution of household liquid bleach of any manufac-

turer except Clorox Chemical, sold its said product to customers in areas west of the Mississippi River and south of the Ohio River, plus portions of Wisconsin, Southern Illinois, and Southern Indiana. It did not sell in Pennsylvania, West Virginia, Virginia, the Carolinas, or Southern Florida. Since its acquisition in 1958 of the John Buhl Products Company, the manufacturer of "Fleecy-White" brand of household liquid bleach, it has added to its sales territory most of Virginia, West Virginia, Ohio, North Carolina, and parts of Michigan and Wisconsin.

2. *Roman Cleanser Company*, located in Detroit, Michigan, sold its household liquid bleach from its plants in Detroit; Griffin, Georgia; Tampa and Miami, Florida. Deliveries were made to customers located within a radius of about 150 miles of each plant. The territory generally covered by such sales are the States of Michigan, Ohio, part of Pennsylvania, parts of Indiana, Illinois, Georgia, Florida, and very little in Virginia and West Virginia.

3. *Linco Products Corporation*, sold its household liquid bleach principally to customers in and around the City of Chicago where its factory is located. Its sales territory also included the States of Illinois, Indiana, Michigan, Wisconsin, and parts of Iowa and Ohio.

4. *The Hood Chemical Company*, with its principal place of business in Ardmore, Pennsylvania, sold its household liquid bleach produced at its plants in South Plainfield, New Jersey; Charlotte, North Carolina; Jacksonville, Florida; and Lisbon, Ohio, to customers in the sales areas surrounding the Cities of Philadelphia and Pittsburgh, Pennsylvania, the States of Florida, North Carolina, and South Carolina.

5. *Rose-Lux Chemical Company*, sold its household liquid bleach under the trade name or brand "Rose-X", manufactured in its factory located in Brooklyn, New York, to customers in the metropolitan area of New York City, including two counties in New Jersey, and one county in Connecticut.

6. *The J. L. Prescott Company*, with its factory located in Passaic, New Jersey, sold its "Dazzle" brand of household liquid bleach to customers in the States of Massachusetts, Connecticut, Rhode Island, and portions of Maine, New Hampshire, New Jersey, New York, Pennsylvania, and Maryland.

7. *The Savol Bleach Company*, from its factory in East Hartford, Connecticut, sold its household liquid bleach to customers located within a radius of 35 miles around Hartford.

8. *The Gardiner Manufacturing Company* sold its household liquid bleach "101" brand from its plant located in Buffalo, New York, to customers in western New York and western Pennsylvania,

which included Erie and Bradford, Pennsylvania, Olean, Rochester, and Niagara Falls, New York, and points between those areas.

9. *The John Buhl Products Company*, hereinbefore mentioned, sold its "Fleecy-White" brand of household liquid bleach to customers in and around the City of Chicago, Illinois, where its factory was located, and in parts of Wisconsin, Michigan, Ohio, Iowa, Illinois, Indiana, West Virginia, Virginia, and North Carolina; and also in some portions of Kentucky, Tennessee, Alabama, Georgia, Texas and Louisiana.

10. *Jones Chemicals, Incorporated*, sold its household liquid bleach under the trade name "Sunny Sol" from its factory in Caledonia, New York, to chain stores and jobbers in Utica, Binghamton, Norwich, and Albany, New York, and under the same trademark, it sold in bulk to franchised distributors in Buffalo, Rochester, Syracuse, Elmira, New York, and in Erie, Pennsylvania, who in turn sold to retailers in those areas.

11. *Lady's Choice Foods*, a corporation with plants located in San Francisco and Los Angeles, California, manufactured and sold household liquid bleach under the trade names "Saniclor" and "Hypo" to customers throughout the State of California, and portions of Arizona and Nevada.

12. *The No-Worry Chemical Company* manufactured a household liquid bleach at its factory in Newark, New Jersey, and sold it to customers in Essex and Hudson Counties, New Jersey, under the trade name "No Worry Bleach".

13. *B. T. Babbit, Inc.*, whose principal household product is "Bab-O" also, since 1956 when it acquired Chemicals, Inc., manufactured household liquid bleach at its factory in Oakland, California, under the trade name "Vano", which it sold to customers in the immediate area around San Francisco and Oakland, California.

14. *The Hilex Liquid Bleach Company*, with its factory located in Minneapolis, Minnesota, sold household liquid bleach to customers in the States of Minnesota, North and South Dakota, and part of Colorado.

15. *The Texize Chemical Company* is listed in Dunn & Bradstreet as a manufacturer of household bleach having a financial strength of more than $1,000,000. It is located in Greenville, South Carolina, and apparently sold its products in that general area, although the record does not contain detailed information with respect to the business of this company. It is of sufficient importance, however, that the Nielsen Food Index includes it in household liquid bleach market studies that have been made.

In addition to the foregoing-named manufacturers, the record contains evidence of another local company in New England, the

Sunlight Chemical Corp., of East Providence, Rhode Island, engaged in the manufacture of a line of chemicals for household cleaning and laundry in the home, including a household liquid bleach.

From the foreoing facts, it is found that the sections of the country involved in this case are the United States as a whole, as well as those local and regional markets within the United States where Clorox is sold in substantial competition with one or more other household liquid bleach producers, and as recognized by the A. C. Nielsen Company Marketing Service to be as follows: New England, Metropolitan New York City, Middle Atlantic, East Central, Metropolitan Chicago, West Central, Southeast, Southwest, and Pacific.

VI. CLOROX'S SHARE OF THE HOUSEHOLD LIQUID BLEACH MARKET IN THE UNITED STATES AND IN CERTAIN SECTIONS OF THE COUNTRY AT THE TIME OF THE ACQUISITION AND AS OF JUNE-JULY 1961

The following Table I sets forth the market share of various brands of household liquid bleach, on a consumer dollar basis, for the United States as a whole, and for certain regions such as New England, Metropolitan New York, Middle Atlantic, etc., as reported by the A. C. Nielsen Company in its bi-monthly reports covering the two-month periods June–July 1957 and June–July 1961.

TABLE I.—*Market Shares, Bi-monthly Periods, June–July 1957 and June–July 1961 Percent of Total Sales, Liquid Bleach on Consumer Dollar Basis*

		Clorox	Purex	Fleecy White	Purex & Fleecy White[1]	Hilex	Linco	Roman Cleanser	Sani-Clor	Texize	All others[2]
Total, United States	1957	48.8	15.7	4.0	19.7	3.3	2.1	5.9	0.8	0.5	18.9
	1961	51.5	14.2	4.0	18.2	(2)	1.5	4.1	(2)	1.1	23.6
New England	1957	56.0	—	—	—	—	—	—	—	—	44.0
	1961	67.5	—	—	—	(2)	—	—	(2)	—	32.5
Metropolitan New York	1957	64.3	—	—	—	—	—	—	—	—	35.7
	1961	65.4	—	—	—	(2)	—	—	(2)	—	34.6
Middle Atlantic	1957	71.6	—	—	—	—	—	—	—	—	28.4
	1961	71.7	—	—	—	(2)	—	—	(2)	—	28.3
East Central	1957	42.4	5.0	5.2	10.2	0.9	0.7	27.2	—	—	18.6
	1961	46.5	4.8	7.0	11.8	(2)	0.8	21.4	(2)	0.5	19.0
Metropolitan Chicago	1957	28.6	0.1	18.9	19.0	0.1	50.3	—	—	—	2.0
	1961	32.4	—	20.5	20.5	(2)	35.9	—	(2)	—	11.2
West Central	1957	34.5	20.6	9.0	29.6	25.8	2.1	—	—	—	8.0
	1961	41.7	18.7	9.2	27.9	(2)	0.9	0.1	(2)	—	29.4
Southeast	1957	52.6	16.0	5.7	21.7	—	—	5.3	—	3.1	17.3
	1961	54.2	12.5	4.2	16.7	(2)	—	3.0	(2)	5.6	20.5
Southwest	1957	48.4	39.6	3.9	43.5	—	—	—	—	—	8.1
	1961	46.5	38.0	2.7	40.7	(2)	—	—	(2)	0.3	12.5
Pacific	1957	39.2	42.4	—	42.4	—	—	—	6.0	—	12.4
	1961	38.0	38.6	—	38.6	(2)	—	—	(2)	—	23.4

[1] Purex acquired Fleecy White in October 1958.
[2] Hilex and SaniClor included in "All Others" in 1961.
— Indicates no sales in the area.

Source: CX 325, p. 77; CX 721 Z-38-Z-44.

It will be noted from the foregoing table that the sales of Clorox, during the period June–July 1957 represented 48.8% of the total sales of household liquid bleach in the United States, and that such sales had increased to 51.5% during the period of June–July 1961. It will also be noted that Clorox's nearest competitor, Purex, which ranked second in sales nationally with a market share of approximately 15.7% in the June–July 1957 period, decreased to approximately 14.2% in the June–July 1961 period, and that although Purex acquired the fourth ranking competitor, "Fleecy-White" in October 1958, the combined sales of Purex and "Fleecy-White" in 1961, which amounted to approximately 18.2% of the national market, represented barely one-third of the amount of household liquid bleach sold by Clorox during that period. The third largest seller of household liquid bleach, Roman Cleanser, whose sales of this product in the 1957 period represented approximately 5.9% of the national market, had decreased to approximately 4.1% in the 1961 period; such sales amounting to less than one-tenth of Clorox's sales during this latter period. The fifth ranking brand in 1957, Hilex, with approximately 3.3% of the national market was not shown separately in the June–July 1961 Nielsen report, but was included in the "All Others" category, as was the Sani-Clor brand whose sales represented less than 1% of the national sales in 1957. Two other companies whose brands of liquid bleach are not named in the report but are included in the "All Others" category are the Hood Chemical Company and the J. L. Prescott Co. each of whose sales of household liquid bleach for the year 1957 exceeded the sales of the Linco brand but were less than those of Roman Cleanser.

It is noted that Clorox not only increased its market share of the total sales of household liquid bleach in the United States as a whole between the June–July 1957 and the June–July 1961 periods from 48.8% to 51.5% as indicated above, it also increased its market share even more substantially, at the expense of its competitors, in at least four of the nine sections of the country covered in the accompanying table; namely, New England, East Central, Metropolitan Chicago and West Central. In the New England region, Clorox's increase in its market share was particularly significant, having risen from 56% in the 1957 period to 67.5% in the 1961 period, an increase of 11.5 percentage points in the four year period since the acquisition of Clorox by P & G, while the market share of all other household liquid bleach producers in that area decreased from 44% to 32.5%. During this same period, Clorox's market share increased in the East Central region from 42.4% to 46.5%; in the Metropolitan Chicago area from 28.6% to 32.4%; and in the West Central region from 34.5% to 41.7%. Also during this same period, the market share of Purex and "Fleecy-White" combined was decreasing in four of the six regions in which they operated, namely: West Central, from 29.6% to 27.9%; Southeast, from 21.7% to 16.7%; Southwest, from 43.5% to 40.7%; and Pacific, 42.4% to 38.6%. The increase in market share of the combined Purex, "Fleecy-White" sales during this period in the other two regions was insignificant, amounting to only 1.6 percentage points in one region and 1.5 percentage points in the other, namely, East Central and Metropolitan Chicago, respectively. The market share of Roman Cleanser, the next largest competitor of Clorox was also decreasing during this same period from 5.9% to 4.1% in the United States as a whole, and from 27.2% to 21.4% in the East Central region, and from 5.3% to 3% in the Southeast. In the only other area in which Roman Cleanser was sold, the West Central region, it showed a market share of only 0.1% in the 1961 period where it apparently had no sales in the 1957 period.

The market share of Clorox in the United States as a whole and in the nine sections of the country reflected in Table I above is shown for the bi-monthly periods June–July 1957 and June–July 1961 on a Consumer Dollar Basis, and, as indicated in the preceding discussion, shows an increase of 2.7 percentage points. Respondent's Exhibit 135 shows that Clorox's average annual market share, on the same Consumer Dollar Basis increased 3.5 percentage points from August 1, 1957 to August 1, 1961 and Respondent's Exhibit 134 shows that Clorox's average annual market share, on a 32 oz. Equivalent Unit Basis, increased 3.3 percentage points during the same period of time. It will also be noted that, while Table I shows an increase in Clorox's market share in the New England region from the June–July 1957 period to the comparable 1961 period of 11.5 percentage points, Respondent's Exhibit 136 shows that Clorox's average annual market share in this region increased 15.5 percentage points from August 1, 1957 to August 1, 1961. Respondent's Exhibit 136 also shows somewhat greater increases in three of the other regional markets than the increases shown in those markets in Table I, and lesser increases in three of the remaining regional markets.

VII. Some Household Liquid Bleach Manufacturers Sold a Portion of Their Output to Grocery Chains for Resale Under Private Brand Labels

Respondent introduced into evidence a list of more than 200 private brand labels of household liquid bleaches being manufactured and sold.* It appears, however, that the household liquid bleach represented by these 200 odd private brand labels, was manufactured by only 54 manufacturers or suppliers. One label, that of Safeway Stores, represented a private brand manufactured by Safeway, and not by any other manufacturer. Of the 54 manufacturers, six have been mentioned hereinbefore as competitors of Clorox Chemical at the time of the acquisition.

The record indicates that certain of the testifying liquid bleach competitors of the respondent manufactured household liquid bleach for sale by others under private brand labels, in addition to manufacturing and selling bleach under their own brand names. Some of such competitors, and the number of private brand labels of household liquid bleach manufactured by them, for sale by others, were as follows: Purex—34; J. L. Prescott Company—41; and Hood—7. Other competitors, hereinbefore mentioned, which also manufacture private brand labels for sale by others are Lady's Choice Foods, Linco Products Corporation, and Roselux Chemical Company. The following named household liquid bleach producers apparently do not manufacture private brand labels: No-Worry Chemical Company; Sunlight Chemical Company; Savol Bleach Company; and Gardiner Manufacturing Company. The Jones Chemical Company began to sell household liquid bleach under a private brand label to a chain store in 1958.

The record does not contain any figures with respect to volume, but from the testimony of officials of these companies it appears that the Hood Chemical Company and the J. L. Prescott Company sold a substantial portion of their household liquid bleach to chain stores under private brand labels. The Linco Products Corporation sold about 12% of its volume to chain stores under private brand labels during the past few years, while the sales of household liquid bleach of other producers to the chain stores under private labels were *de minimis*. There is not sufficient evidence in the record to determine or find that the sale of private brand labels of household liquid bleach to grocery chain stores has increased since the year 1955.

Except for the Purex Company, the known manufacturers of private brand label liquid bleach for chain stores are not themselves important factors in the household liquid bleach industry, from the standpoint of their volume of sales. For instance, the combined total sales of such product by Hood Chemical and J. L. Prescott do not represent more than 5% of the industry. It also appears from the record that most of Hood Chemical Company sales of private

* Respondent's Exhibit 69 A–Z.

brand label liquid bleach to chain stores was in the metropolitan New York area; the Linco Product Corporation in the Chicago metropolitan area; and most of J. L. Prescott Company's sales under private brand labels were in and around Boston, Massachusetts, and in the New York City metropolitan area.

Furthermore, it will be noted that in the table appearing on page 1494 hereof, containing Neilsen data for the two-month period, June–July 1957, the respective percentages of sales by the different manufacturers do not include their sales of private label brands. However, such sales are included under the heading "All Others" which for those two months were less than 19% throughout the United States which, of course, would include, in addition to private label brands, all household liquid bleach sold throughout the country by all other manufacturers not listed in the table, including the J. L. Prescott Company and the Hood Chemical Company.

In view of the foregoing, it is found that the volume of sales of liquid bleach under private brand labels to grocery chains is not a substantial competitive factor in the household liquid bleach industry.

VIII. RESPONDENT'S MARKET POSITION IN THE SOAP, DETERGENT, AND ABRASIVE CLEANSER MARKETS

According to Nielsen Food Index reports, P & G is the leading producer in the United States of soap and synthetic detergents, and is one of the two leading producers of abrasive cleanser products. In 1957, P & G sales of packaged detergents in grocery stores was approximately 54.3% of total value on a consumer dollar basis, and 55% on a consumer unit basis, of the total national sales of such products. P & G consumer sales of toilet soaps in grocery stores in 1957 accounted for approximately 31.2% of total sales on a dollar basis and 37.3% on a unit basis of total national sales.

In the abrasive cleanser grocery store consumer sales market, sales of P & G's "Comet", on a dollar basis, represented approximately 36.5% of the national market in February and March 1958.

IX. P & G'S SELLING AND MERCHANDISING METHODS

A. *Method of Distribution*

P & G sells all its products, except Clorox, through a subsidiary, Procter and Gamble Distributing Company, which has its own salesmen who call on wholesale jobber and retail outlets in the grocery, drug, department, and variety store fields.

The P & G sales force is divided into sales departments or divisions, each division selling a line of closely related products. For instance, the Case Soaps Sales Department sells all P & G packaged household soaps, cleansers, and synthetic detergents. The Case Food Sales Department sells P & G household edible products, including the acquired Duncan Hines and Big Top products. The Toilet Goods Sales Department sells the toiletries products manufactured by the Company, which includes shampoos, home permanents, and dentifrices. There is also a division which handles paper products.

P & G has approximately 1800 salesmen selling its products, and all of P & G sales personnel, practices and policies are under one man, the P & G Vice President of Sales.

B. *Shelf Space in Grocery Stores*

The obtaining and retention of adequate shelf space in retail outlets, particularly in self-service grocery stores, is a fundamental objective of P & G salesmen. In January 1957 P & G inaugurated a "Chain Supermarket Retail Operation" devoted exclusively to shelf space. This program basically sought to realign soap, detergent and cleanser shelf space by grouping products into departments, and dividing said departments into proper classifications, alloting shelf space in ratio to sales movement.

There is an acute shortage of shelf space for all products, including respondent's, in the nation's grocery stores because of the greatly increased number and types of items carried by grocers in recent years. Adequate shelf space today is one of the things manufacturers compete for in grocery stores, especially in the larger supermarkets.

Each P & G salesmen, in addition to selling his line of P & G products, is responsible for obtaining advertising and other merchandising support from his customers, and for obtaining retail store shelf and display space for P & G products.

According to the President of respondent: "It's one of the salesman's normal duties to make sure to try to secure adequate shelf space for our brands."

Shelf space is generally allocated by grocers on the basis of the sales movement of a product, and the reputation and merchandising ability of the manufacturer of the product. As one liquid bleach manufacturer witness testified:

Well, the allocation of shelf space in the grocery stores is controlled by competitive factors that were previously recited; the amount of advertising, the amount of promotion, whether or not the product is being couponed or sampled; what sort of consumer promotion might be offered, how much sales help is offered the store manager in re-allocating or re-arranging shelf space, all these things have a factor in determining which product gets the maximum shelf space.

Another chain store grocer witness testified that in allocating shelf space the store owner takes into consideration such factors as advertising, promotion, and the character of the firm that is promoting the product so as to know whether or not it can carry out its promises.

C. *Advertising Programs*

Sales movement of products, including respondents, in grocery stores is based primarily on the ability of the producer to advertise and promote its products. Grocers desire "pre-sold" products which they do not have to advertise or promote themselves. "P & G brands are pre-sold through extensive advertising."

A chain store grocer witness testified that consumer acceptance is obtained, "by consistent advertising, radio, television. You name it. They could have many other gimmicks that are paramount to the supermarket industry, not particularly as to bleach or soaps. There are just any number of items that would cause a product to move."

As hereinbefore indicated, P & G is one of the nation's largest advertisers, having spent at least $79,000,000 to advertise its products in the fiscal year ended June 30, 1957, and approximately $82,500,000 for that purpose during the calendar year 1957.

Its principal soap and detergent competitors, Colgate-Palmolive, and Lever Brothers, spent approximately $37,000,000, and $24,000,000, respectively, during 1957 on national advertising. Purex, the principal competitor of respondent in the household liquid bleach business, spent approximately $3,000,000 in national advertising during the same year.

P & G uses television spot announcements extensively in advertising its products. In 1957 it ranked first in the nation as to amounts expended in this manner, having spent approximately $25,000,000 compared to approximately $8,000,000 expended by each of its principal competitors, Colgate-Palmolive and Lever Brothers for this type of advertising.

P & G also uses television programs extensively in advertising its products. It also ranked first in the nation in 1957 on amounts expended in this medium, having expended approximately $47,000,000. Colgate-Palmolive, its nearest competitor, spent approximately $19,000,000, and Lever Brothers spent approximately $16,000,000 for this type of advertising during this period.

The above amounts expended by P & G on television advertising alone indicate the advertising strength of the respondent.

P & G also utilizes radio, newspapers, and magazines extensively in advertising its products, and ranks high in the nation in the last two of these advertising media. It spent substantially more money in advertising in magazines in 1957 than any other detergent producer, and ranked fourth in the nation in magazine advertising.

Discount rates are available to large advertisers which can reduce their advertising cost by as much as 30% (or permit them to purchase substantially more advertising for the same amount of money expended). To earn these discounts, large advertisers may, as P & G does, combine their advertising on a given medium of all their products. This makes the pro-rata cost per product far less than the amount required to be paid by the one-product company. Even a company with many products cannot earn discounts comparable to those of P & G if their combined amount of advertising is insufficient to qualify for a maximum discount.

D. *Sales Promotion Methods*

In fiscal 1957 respondent P & G charged to profit and loss for sales promotion more than $47,000,000, which was approximately 5% of the amount of its net domestic sales. In conjunction with its advertising, P & G has promoted its household products by offering to the consumer such promotions as:

1. "Two-for-one" price sales.
2. Special packs wherein a small size is given free or at a reduced price with the purchase of the attached larger size or the entire pack price is reduced.
3. Free samples mailed or delivered to the consumer's residence.
4. Price-reducing coupons mailed to or delivered to the consumer's home, alone or packaged with free samples.
5. Reduced consumer prices on quantity purchases.
6. Free or reduced price merchandise premiums attached to the P & G product or to be sent for by the consumer.
7. Contests with cash and merchandise prizes for the consumer.

8. Cross-couponing of P & G products and of P & G and other nationally known related products in that a price-reducing coupon for one product will be packaged in another P & G product.

9. Combining several of its products in a joint promotion, utilizing combinations of promotions hereinbefore mentioned.

10. Combinations of promotions hereinbefore mentioned for a single product.

E. *P & G's "Comet" Advertising and Sales Promotion Campaign*

An example of the effectiveness of P & G's advertising and sales promotion compaigns is found in the "very successful" introduction and customer acceptance of its household cleanser "Comet". In the spring of 1957 respondent P & G introduced nationally its "Comet" brand of abrasive cleanser containing a bleach, with a national advertising campaign, after test marketing in selected areas, utilizing radio, television, newspaper, and magazine advertising, coordinated with extensive consumer promotions. From sometime in 1956 through October 1957, over a period of not more than 22 months, P & G spent for the direct advertising and promotion of "Comet" approximately $7,200,000. Of this amount, approximately $4,400,000 was spent in the first ten months of 1957 alone on "Comet" advertising.

As a result of the foregoing campaign, "Comet", according to Neilsen Food Index, steadily and consistently increased its market share, until by the last bi-monthly period of record herein (February-March, 1958) it had attained 36.5% of the national market of all scouring cleansers sold in grocery stores, and was within .4% of tying "Ajax", the leader in this field, for the number one rank. This position was gained by P & G within a period of approximately 20 months, from August 1956 to March 1958.

X. CHANGES MADE BY P & G SUBSEQUENT TO THE ACQUISITION OF CLOROX CHEMICAL

A. *As to Management Personnel of Clorox*

At the time of the acquisition, respondent P & G took over active control of the Clorox Chemical Company and installed its own personnel in key and controlling policy making positions. For example, Mr. Fred Brown, a veteran of 45 years with P & G, formerly in charge of all P & G domestic manufacturing, became Executive

Vice President and General Manager of Clorox, reporting directly to Mr. Borgens, the President of both P & G and Clorox. Mr. Brown replaced the former President of Clorox Chemical, Mr. W. J. Roth, who was retained in a consulting capacity only.

P & G also transferred three other men of staff level at the time of acquisition to key positions with the Clorox Company. One, a marketing specialist with P & G who had been responsible for the promotion of several P & G brands, including "Tide", was made a marketing staff associate; another, a manufacturing specialist, became a manufacturing staff associate, reporting directly to Mr. Brown; and a third was placed in charge of Clorox's laboratory controls and the technical phases of its business. Also, in January 1958, a former P & G district manager of case soap sales was made Pacific Coast Division Sales Manager of the Clorox Company.

In view of P & G's wide and successful experience in marketing its products, its technical know-how, together with its financial resources, these changes in the management of Clorox will result in substantial advantages to P & G in the marketing of Clorox liquid bleach.

B. *As to Plant Operations*

P & G closed down the Kansas City, Missouri, Clorox Chemical Company plant shortly after the acquisition, and is producing Clorox in a building on its own Kansas City, Kansas, property, with P & G personnel. This action was taken in the interest of economy. Rather than to have two plants manufacturing in the same area, it was decided to combine that production in one plant.

The Boston plant of Clorox Chemical was also closed down because it was thought that the Eastern territory could be supplied more economically from the Jersey City, New Jersey, Clorox plant.

C. *As to Sales Promotion Campaigns*

Respondent P & G has added promotions to Clorox merchandising programs using price-off labels, free premiums, price-reducing coupons, and reduced-price premiums, coordinated with advertising in selling Clorox in selected areas and nationally.

Examples of such promotions include merchandise premiums and special Clorox labels, usually during spring and fall housecleaning drives. One such brochure urges merchant support and stresses the coordinated advertising support in the same manner as is done for other P & G products.

A premium offer of an ironing board cover was made in the southeastern United States in November 1957, in Erie, Pennsylvania, in January and February 1958, and in June 1958, in the southwestern Sales Division of P & G. A premium pack of a dishcloth attached to a bottle of Clorox was also used in Los Angeles in June 1958.

This change to consumer promotion was decided upon by The Clorox Company as early as October 7, 1957.

In the spring of 1958, in the so-called "Clorox Spring Housecleaning Bee", consumer promotions were featured, such as an ironing board cover for 50 cents and a Clorox label.

Also in June 1958, a 5-cent price-off labels on gallons were used in metropolitan Chicago, which includes northern Illinois and a part of Wisconsin. Other price-off labels were used in Detroit, Nashville, Chattanooga, and San Francisco between February and July 1958.

The evidence introduced at the hearings held on December 1st and 12th, 1961, pursuant to the order of the Commission entered on June 15, 1961, remanding this proceeding to the Hearing Examiner for the reception of further evidence, clearly shows that respondent substantially increased the promotional activity with respect to Clorox, its acquired liquid bleach product, during the period July 1958 through July 1961. Such evidence shows that respondent used a total of about seventy promotions during that 3-year period at a total cost of approximately $1,550,000 for the promotion of Clorox. This amount is in addition to the $400,000 which respondent had budgeted immediately after the acquisition for the fiscal year ended June 30, 1958, for promotional expenditures of this product.

Prior to the acquisition of Clorox Chemical by P & G, the former company had not used consumer promotions for a number of years.

The evidence further shows dramatically that the market impact of the P & G-Clorox promotions was immediate and indicates that they were responsible, at least in part, for reversing the trend of Clorox's diminishing market share growth under the ownership of Clorox Chemical Co.

The following table shows the market share of Clorox and the annual changes therein, of the total sales of household liquid bleach in the United States, moving through grocery stores, for each of the four years preceeding the acquisition and each of the four years following the acquisition on both a 32-ounce Equivalent Unit Basis and on a Consumer Dollar Basis, together with the total annual expenditures by P & G for the promotion of Clorox.

TABLE II.—*Clorox Market Share and Annual Changes, Household Liquid Bleach and Promotional Expenditures*

Year ended July 31	32 oz. equivalent unit basis		Consumer dollar basis		Promotional expenditures
	Clorox share	Change	Clorox share	Change	
PRIOR TO ACQUISITION					
1953	41.4		45.3		(1)
1954	43.0	+1.6	46.4	+1.1	(1)
1955	44.0	+1.0	47.1	+0.7	(1)
1956	44.8	+0.8	47.8	+0.7	(1)
1957	45.3	+0.5	48.4	+0.6	(1)
SUBSEQUENT TO ACQUISITION					
1958	45.8	+0.5	48.7	+0.3	[2] $400,000
1959	46.8	+1.0	50.1	+1.4	520,300
1960	48.8	+2.0	51.8	+1.7	648,800
1961	48.6	−0.2	51.9	+0.1	379,800

[1] No Consumer promotions by Clorox Chemical Co.
[2] Budgeted by P&G for Clorox promotions for fiscal year ended June 30, 1958.

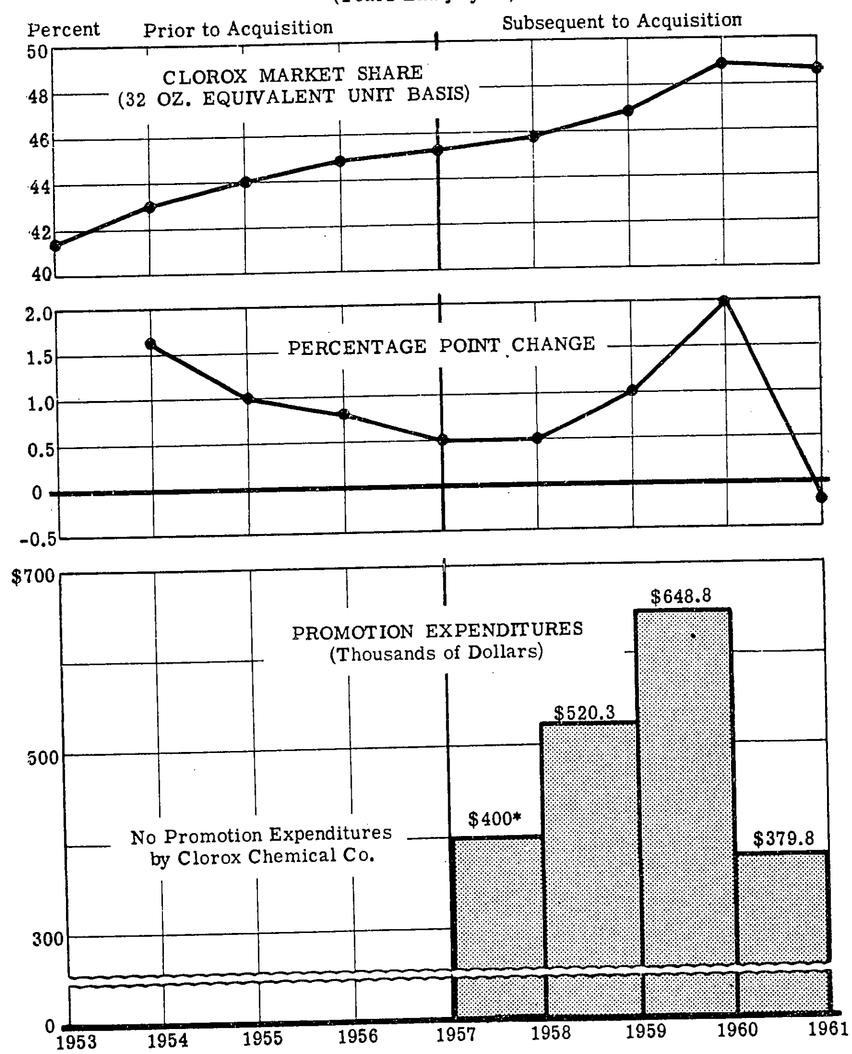
Source: RXs 134A, 135A and CX 718A-F.

It will be noted from the foregoing table that on both the 32 oz. Equivalent Unit Basis and the Consumer Dollar Basis, while Clorox's market share shows an increase every year from fiscal 1953 through fiscal 1961, the *trend* of the change in Clorox's market share shows a definite *declining trend* each year from fiscal 1953 to the date of acquisition, namely from +1.6 to +0.5 on the Unit Basis and from +1.1 to +0.6 on the Consumer Dollar Basis, during which time Clorox Chemical used no customer promotions and had no promotional expenditures. On the other hand, in fiscal 1958, the first year after the acquisition, when P & G budgeted $400,000 for promotional expenditures, the trend of the change in Clorox's market share leveled off and then in the following two years, fiscal 1959 and 1960, when Clorox's promotional expenditures increased to $520,300 and $648,800, respectively, the change in Clorox's market share shows a decided upward trend from +0.5 to +2.0 on the Unit Basis and from +0.3 to +1.7 on the Consumer Dollar Basis. In fiscal 1961, the change in Clorox's market share shows a definite reversal, although its actual market share shows only a slight decline of two-tenths of one percent on the Unit Basis and a slight increase of one-tenth of one percent on the Consumer Dollar Basis. In this connection, it is noted that P & G decreased its promotional expenditures materially in that fiscal year to $379,800 from $648,800 in fiscal 1960.

The following graph shows visually the correlation between Clorox's market share and the trend of the change therein from fiscal 1953 through fiscal 1961 on the one hand, and the amount allocated to promotional expenditures during that period of time.

A CORRELATION OF CLOROX MARKET SHARE AND ITS PERCENTAGE POINT CHANGE WITH EXPENDITURES FOR PROMOTIONS

(Years End July 31)



*Budgeted for fiscal year ended June 30, 1958.

SOURCE: CX 134A, 718A-F.