IN THE MATTER OF

BOISE CASCADE CORPORATION

FINAL ORDER, OPINION, ETC. IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2 OF THE CLAYTON ACT

Docket 9133. Complaint, April 23, 1980—Final Order, Feb. 11, 1986

This final order requires a Boise, Idaho distributor of office products to cease accepting from any supplier a net price for office products that is lower than the price at which the supplier sells the products to other retailers with whom respondent competes. The Commission ruled that respondent violated the Robinson-Patman Act by knowingly receiving wholesaler discounts on goods it sold at retail in competition with other dealers.

Appearances

For the Commission: *Arnold C. Celnicker, Chris M. Couillou, Phyliss M. Richardson* and *Harold E. Kirtz.*

For the respondents: *John T. Loughlin, R. Clifford Potter, Scott M. Mendel* and *Dennis P.W. Johnson, Bell, Boyd & Lloyd,* Chicago, Ill.

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 Boise Cascade Corporation, hereinafter sometimes referred to as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act and Section 2(f) of the Clayton Act, as amended, 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 Boise Cascade is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal offices located at One Jefferson Square, Boise, Idaho.

PAR. 2. Respondent Boise Cascade is now, and for many years has been, engaged in the operation of an integrated forest products company. The respondent, among other activities, distributes office supplies, stationery, printing paper, coarse paper and office furniture through its distribution centers across the United States.

PAR. 3. In the course and conduct of its business, respondent Boise Cascade has been and is now engaged in commerce, as "commerce" is defined in the Clayton Act. In the course of that commerce, Boise Cascade has been and is now purchasing office product supplies for resale within the United States from suppliers also engaged in commerce, as "commerce" is defined in the Clayton Act.

In connection with such transactions, Boise Cascade is now, and has been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for resale and the resale of office product supplies of like grade and quality which are purchased from the same or competitive suppliers. [2]

The aforesaid suppliers are located in the various States of the United States, and respondent Boise Cascade and such suppliers cause the products when purchased by said respondent to be transported from the place of manufacture or purchase to Boise Cascade's retail stores or warehouses located in the same state and various other States of the United States.

PAR. 4. In the course and conduct of its business in commerce, respondent Boise Cascade has knowingly induced or received from some of the aforesaid suppliers discriminatory prices, discounts, allowances, or terms and conditions of sale favorable to respondent in the commodity purchase transactions described.

For example, respondent resells office product supplies at both the wholesale and retail levels but receives a wholesale discount on all office product supplies it purchases from certain suppliers. These wholesale discounts, however, are not available to all competitors of respondent who sell these products at the retail level.

PAR. 5. The favorable discriminatory prices, discounts, allowances, or terms and conditions of sale were not granted by said suppliers to all of respondent's competitors nor received by all of respondent's competitors in connection with the like or similar purchase transactions of commodities of like grade and quality so purchased for consumption, use or resale.

PAR. 6. When respondent induced or received the discriminatory net prices from its suppliers, as alleged, respondent knew or should have known that such discriminatory net prices constituted discriminations in price prohibited by Section 2(a) of the Clayton Act, as amended.

PAR. 7. The effect of the knowing inducement or receipt by respondent of the discrimination in price, as above alleged, has been or may be substantially to lessen, injure, destroy, or prevent competition between suppliers of office products granting such discriminations and other suppliers of such products who do not grant or allow such

discriminations, or between respondent and its competitors not receiving or securing such discriminations.

PAR. 8. The acts and practices of Boise Cascade herein alleged are in violation of Section 5 of the Federal Trade Commission Act and Section 2(f) of the Clayton Act, as amended. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

STATEMENT OF COMMISSIONER PAUL RAND DIXON*

In voting in favor of the order directing the ALJ to consider evidence as relevant because it bears upon the function and service defense set out in *Doubleday & Co.*, 52 F.T.C. 169 (1955), I want to make it clear that I believe a unanimous Commission was correct when it explicitly repudiated *Doubleday* in *FTC v. Mueller Co.*, 60 F.T.C. 120 (1962), aff'd, 323 F.2d 44 (7th Cir. 1963). *Doubleday,* unlike *Mueller,* does not comport with the language, history or precedent of the Robinson-Patman Act, and should not be revived. In addition, I do not believe that amendments or modifications to the Robinson-Patman Act should emanate from the Commission or commentators no matter how certain they are that the Act is inconsistent with current economic doctrine.

Nonetheless, I do not believe that it is appropriate in these circumstances for me to deny to other Commissioners the opportunity to review and analyze evidence that they may find relevant in their consideration of the case.

I note that from my review of the investigatory record I have reason to believe that there is sufficient evidence to find a violation as charged under the *Doubleday* standard as well as under *Mueller.*

DISSENTING STATEMENT OF COMMISSIONER DAVID A. CLANTON**

The majority of the Commission today issues a complaint proceeding on two mutually exclusive, inconsistent theories of violation of the Robinson-Patman Act. On the facts presented, I cannot support this approach.

The first theory, *viz.,* that Boise Cascade has violated the rule set forth in *FTC v. Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd,* 323 F.2d 44 (7th Cir. 1963), utilizes, in my view, an unsound, inequitable doctrine. It does not appropriately take account of the value of the services rendered by Boise as a dual distributor, and so leads to a result which is

* Commissioner 1961–1981.
** Commissioner 1976–1983.

at odds with the ideals underlying the Act. Accordingly, I could not support a complaint premised on this theory.

The second theory, based upon our decision in *Doubleday & Co.*, 52 F.T.C. 169 (1955), does examine whether the discounts received by Boise are reasonably related to the services provided by that firm in connection with its sales to end users. Regrettably, because of our preoccupation with *Mueller,* sufficient evidence has not been developed at this time to enable me to determine whether there is reason to believe that Boise is being overcompensated by its suppliers. Since the mere existence of price differentials does not make out a *prima facie* case of violation under the *Doubleday* theory, I am unable to support issuance of the complaint under this approach without further investigation.

DISSENTING STATEMENT OF COMMISSIONER ROBERT PITOFSKY*

The Commission today has issued an extremely unwise Robinson-Patman complaint. I would not ordinarily dissent from the issuance of a complaint (and certainly not at such length), but this one has such a profound anticompetitive potential that it ought not to go by without comment.

Let me emphasize that this is *not* the kind of quarrel over the advisability of Robinson-Patman enforcement that has split the Commission in the past. That statute should be enforced by this agency, and I am convinced that sensible cases can be initiated—addressing real issues of injury to competition. I can't believe, however, that a solution to the problem of non-enforcement is this misguided effort.

In the remarks that follow, I don't mean to downplay the difficult policy questions involved in Robinson-Patman enforcement. As is often the case, this division among Commissioners occurs because of the tension between the philosophies of the Sherman Act and the Robinson-Patman Act—a conflict created by Congress and left unresolved on the FTC's doorstep many years ago. That kind of issue generates honest differences that in turn reflect deeply held points of view.

This complaint involves the office supply industry and focuses on the legality of discounts to Boise Cascade, a [2] so-called dual distributor. Before examining the legality of that discount, a bird's eye view of the industry might help.[1]

All agree that the office supply industry is highly competitive. At

* Commissioner 1978–1981.

[1] To the extent this Dissenting Statement makes preliminary factual assertions regarding the office supply industry or Boise, it is based on my understanding of the facts developed by staff during the pre-complaint investigation. When the initial decision in this matter comes to the Commission I will, of course, base my decision solely on the record developed at trial.

the manufacturing level there is extreme deconcentration with some 2900 relatively small companies manufacturing a product line or two (for example, pencils, pens, manila folders, staplers, chairs, etc.). Some of these manufacturers sell directly to large corporate users but most sell through about 6000 intermediate distributors.

While there is a wide variety of intermediate distributors and channels of distribution, we can simplify this discussion by limiting consideration to three categories of distributors:

Contract Stationers. These are relatively large dealers who buy from manufacturers at between 50 and 65% off list and sell directly and only to large users.

Dealers. These are much smaller distributors who usually buy from manufacturers at no better than 40% off list, or from intermediate wholesalers (*see* immediately below) at a price that is roughly the equivalent of 30 or 40% off list. [3]

Wholesalers. This is the category that includes the respondent, Boise Cascade. Boise is a large national wholesaler and buys from manufacturers at 50–65% off list. Unlike contract stationers which frequently buy at the same price, Boise not only sells to large commercial users but also to dealers at roughly a 20 to 30% markup. It is because Boise, unlike contract stationers, is a "dual distributor" that Robinson-Patman questions arise.

Section 2(f) of the Robinson-Patman Act says it's illegal for a company "knowingly to induce or receive a discrimination in price" which is prohibited in other parts of the statute. Where's the discrimination here? No one has suggested there is anything illegal about Boise getting 50 to 65% and the dealers only 40% on those transactions where Boise sells to the dealers. That's a legitimate "functional discount" which compensates Boise for services performed in the sale of manufacturers' products; for example, maintaining an inventory, carrying a full line, distributing catalogs, delivering to dealers on request, etc. Functional discounts are justified on the theory that there can be no injury to competition if they are available to all similar types of sellers in roughly equal amounts.

Problems arise, however, when a company like Boise not only sells to intermediate dealers but sells to large commercial users in competition with those dealers. On those sales, [4] Boise will have received 50 to 65% and the dealers only 40%. Arguably, that's a discrimination in price between competing sellers that leads to an injury to competition, and therefore Section 2(a) of the Robinson-Patman Act is violated; arguably, Boise *knowingly* received that illegal discount and hence violated 2(f). Boise's explanation is that it is not being favored over its dealer customers; rather, the extra 10 to 25% only compensates Boise

for special services it provides which are not furnished by the dealers. These are the same wholesale services for which it can legally be compensated when it sells to dealers. In statutory terms, Boise says there can't be any injury to competition even when it sells to users if the greater discount only pays for the better services it provides.

In the 1950's and 1960's, two contradictory rules of law were developed to deal with this kind of problem. One was the so-called *Mueller* rule (named after the Commission's 1962 decision in *FTC v. Mueller Co.*, 60 F.T.C. 120 (1962); *aff'd.* 323 F.2d 44 (7 Cir. 1963)). That rule essentially holds that it is never a defense for a dual distributor to justify a discount in excess of the discount available to dealers with whom it competes by pointing out that the discount is only compensation for valuable services it performs in selling the manufacturer's product. It is a rigid *per se* rule which prevents the issue of "just compensation" from being put to **[5]** proof.[2] If there is a justification for *Mueller,* it is that any services that the dual distributor performs are valuable not only to the manufacturer but to the dual distributor as well. Since it's difficult to apportion these values, the *Mueller* solution is to allow no compensation defense.

Before *Mueller* was decided, the *Doubleday* rule was the law (named after a 1955 Commission decision, *Doubleday & Co.*, 52 F.T.C. 169 (1955)) *Doubleday* accepted the principle that there could be no injury to competition and hence no violation of the Robinson-Patman Act if the additional discount paid to the dual distributor did no more than roughly compensate the dual distributor for the useful services it provided. In *Doubleday,* the Commission found that the extra discount was not justified and found a violation—showing the weakness of any argument that an absolute *per se* rule is necessary to have any effective enforcement. The heart of *Doubleday* is to recognize that money paid to a dual distributor could be a discriminatory allowance because the dual distributor is a power buyer or could be fair compensation for valuable services, and it puts that issue to proof. **[6]**

In my view, the *Mueller* rule is anticompetitive, anticonsumer and anti-efficient. In addition, in a fine display of what can be accomplished with a bad rule of law, it's probably anti-small business as well.

1. *Competitive Considerations.* If Boise sold only to wholesalers or sold only to users (as contract stationers do), it is clear that there could be no violation of the Robinson-Patman Act; it is the dual distribution

[2] Technically, Boise could justify receipt of favorable discounts if they were equal to or no more than cost savings enjoyed by its suppliers as a result of dealing with Boise. *See* 15 U.S.C. 13(a) (1970) and *United States v. Bordon Co.*, 370 U.S. 460, 468 (1962). But since Boise's suppliers don't engage in wholesaling, there is no "cost saving" to the supplier and hence no cost justification defense—even though the services Boise performs are highly desirable to both suppliers and customers from a business point of view.

function that creates the problem. But it is well established that dual distribution is pro-competitive. It introduces new competition at both levels at which the dual distributor operates, disrupts possible consensual patterns of price uniformity, and causes or encourages discounting. That sort of competition has always been regarded as desirable from the point of view of the Sherman Act.

If Boise cannot be compensated by its suppliers for expenses incurred in selling the suppliers' products, one possibility is that it will retreat into the wholesale line and like contract stationers, sell only to direct users. Another possibility is that it will discontinue sales to users and sell only to dealers. Either way, competition is diminished. In the past, *Mueller* supporters have occasionally granted that such anticompetitive consequences would occur, but have claimed that a *per se* rule is desirable because losses in competition that may result from that policy [7] were anticipated and recognized by Congress when it enacted the Robinson-Patman Act.

In recent years, there has been increasing recognition of the necessity to reconcile the Sherman Act's demand for competition with the Robinson-Patman Act's legitimate concern that small business not be done in by powerful rivals who are in a position to coerce lower prices from manufacturers. If there were any doubt whether the philosophy of reconciling Robinson-Patman and Sherman Act principles should prevail, a clear answer should have been provided by the Supreme Court in its *A&P* decision last year (where, incidentally, it threw out an earlier 2(f) case brought by this agency). The Court said:

> In the *Automated Canteen* case, the Court warned against interpretations of the Robinson-Patman Act, which "extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." 343 U.S. 63. Imposition of 2(f) liability on the petitioner in this case would lead to just such price uniformity and rigidity.

The *Doubleday* approach which allows distributors to be compensated, but not over-compensated, for services allows that reconciliation; the *Mueller* rule seems to me a classic example of an R–P approach in "open conflict with the purposes of other antitrust legislation."[3] [8]

2. *Anti-consumer Aspects.* One thing is fairly sure if a Commission majority prevails in its effort to resuscitate *Mueller*—that is, users will pay more for pencils, pens, staples, and so forth. This could be true because, as indicated above, competition will be reduced when dual distributors are forced to choose among different lines of distri-

[3] The Department of Justice apparently felt the same way in 1968 when it filed an *amicus* brief in the Supreme Court opposing the Commission's *Mueller* approach, *see Purolator Products, Inc. v. FTC*, 389 U.S. 1045 (1968).

bution. Another possibility is that dual distributors will continue to operate on both levels, but when denied a discount from manufacturers on sales to users, will find it necessary to raise price to users. The money charged to users will then go into the pockets of manufacturers who are prevented by law from paying a functional discount.

Alfred Kahn discussed this very issue in 1954:

> The denial to combined wholesaler-retailers of the buying prices to which their performances of wholesaling functions entitles them remains an unquestionably rigid, anti-competitive—indeed discriminatory—solution.

See Dirlam and Kahn, *Fair Competition: The Law and Economics of Antitrust Policy:* (1954) at 251.

3. *Anti-efficiency Concerns.* The *Mueller* rule is also undesirable because of the powerful way it undermines the ability of businessmen (including small businessmen) to do business in an efficient way.

The present complaint is as clear an example of this as one could find. Remember that this is an industry in which thousands of small manufacturers tend to make a single line or two of products. As a result, there are no [9] manufacturers who have the economic incentive to go into the business of wholesaling their own products since the central feature of wholesaling is the availability of a wide line of supplies.

Boise and other dual distributors have introduced into the industry the idea of building large computerized wholesale establishments which simultaneously can serve the needs of small dealers and commercial users. But under *Mueller* once a dealer becomes a dual distributor, any preferential discount on sales made in competition with its own customer-dealers will be illegal. Obviously, dual distribution will be discouraged. This is true no matter how valuable to the manufacturer the service performed by the dual distributor, no matter how efficient it is to have an integration of functions within a single distributor (or to have the distributor rather than the manufacturer do it), and no matter how valuable and desirable the arrangement is to the consumer.

4. *Small Business Impact.* The idea of a *Mueller* rule is to protect small businesses against dual distributor competition—an approach which Commissioner Dixon rightly points out has been viewed in the past as consistent with the purpose of the Robinson-Patman Act. The irony is that its application may end up hurting small businesses more than a less rigid approach. [10]

This effect occurs because many small dealers enter cooperative ventures which jointly purchase inventory and provide some of the

same wholesale functions offered by firms like Boise. But if an inflexible *Mueller* rule is applied, those small businessmen, who already know enough to protect their own competitive interests, will be denied a discount compensating them for the costs of their wholesaling if they both sell to and compete with other dealers. *See* Calvani, *Functional Discounts Under the Robinson-Patman Act,* 17 Boston Coll. Ind. and Comm. L. Rev. 543, 555 (1976).

The Commission here is proceeding, at least at this point, on a *Mueller* theory. To cushion the shock of resort to this approach, an order has simultaneously been issued which will permit Boise to introduce the kind of evidence, described above, that would be relevant only under a *Doubleday* standard.[4]

To say the least, that unusual approach—indicating that the case may be tried under two thoroughly inconsistent theories—will introduce great uncertainty into the law. Businessmen, for a considerable period of time, will not know whether to run their businesses (and keep records) as if [11] *Mueller* or *Doubleday* were the law. The approach is particularly unfair to Boise, the respondent in this case. It knows that it can't win this case under *Mueller* (no favored dual distributor could); it asserts it can win the case under *Doubleday.* It therefore must take the risk of an expensive defense, knowing that it may find after several years that a majority of the Commission still thinks that all the evidence it introduces is irrelevant under the *Mueller* standard. This confusing approach might be justified if there were any reason to believe that the Commission would be in a better position after a trial to choose between the *Mueller* and *Doubleday* standards. But that just isn't so. The whole point of a *Mueller* rule is to make discounts to dual distributors absolutely illegal, regardless of services performed to earn them, and the pros and cons of that approach are as apparent now as they will ever be. Thus, in an area where the Commission would serve all its constituencies by clarifying the law, it manages here to do the opposite.

It's fashionable these days to be in favor of deregulation—that is, to oppose excessive and unjustified government regulation of price and entry as a substitute for the operation of competitive forces. But over-regulation comes in many guises. It's one thing to try to protect, under the Robinson-Patman Act, small businessmen from power sellers and power buyers; it's another thing to resuscitate [12] a rule that discourages dual distribution—thereby raising entry barriers at the

[4] Because of the way this case has been investigated and presented to the Commission, I can't tell whether a complaint based on *Doubleday* would be proper. Accordingly, lacking reason to believe a violation has occurred on a valid *Doubleday* approach, I must vote against the complaint.

wholesale or dealer level—by denying to those affected by the rule the opportunity to argue that there has been no injury to competition.

The Commission's separate order, directing the Administrative Law Judge to admit evidence on the question of injury to competition, does imply that at least some Commissioners may eventually move away from the *Mueller per se* approach. However, for the reasons I've indicated, I believe it is preferable to accomplish that result now in a clear and direct fashion. In my view, this complaint should never have been issued and an advisory opinion clarifying the Commission's views on the *Mueller* and *Doubleday* rules should have been promptly published.

STATEMENT OF COMMISSIONER DIXON IN RESPONSE TO MOTION FOR RECUSAL

I cannot agree with respondent Boise Cascade Corporation, Inc. ("Boise") that my statement issued concurrently with the issuance of the complaint demonstrates prejudgment by me of the merits of this case.

The statement challenged by Boise was issued to make clear the basis on which I voted to issue the complaint. While a majority of the Commission agreed to issue a complaint against Boise, Commissioners disagreed on the appropriate legal standard to be applied to the investigatory record in order to determine whether there was "reason to believe" that a violation of law had occurred. One possible legal standard would make available the "function and service" defense as set out in *Doubleday & Co.*, 52 F.T.C. 169 (1955). An alternative standard was the one set forth in *Mueller Co.*, 60 F.T.C. 120 (1962), aff'd., 323 F.2d 44 (7th Cir. 1963). This conflict was made clear to respondent by my statement, by statements of Commissioners Pitofsky and Clanton, and by an order of the Commission requiring the ALJ "to enter [2] findings sufficient for disposition of the proceeding under both the *Mueller* and *Doubleday* rubrics."

As respondent Boise recognizes, a Commissioner must have "reason to believe" that the facts disclosed in the investigatory record indicate a violation of law before he or she may vote for the issuance of a complaint. My review of the record persuaded me that there was "reason to believe" that a violation of law had occurred whether judged by the *Doubleday* or the *Mueller* standard, and my statement says no more than this:

> from my review of the investigatory record I have reason to believe that there is sufficient evidence to find a violation as charged under the *Doubleday* standard as well as under *Mueller*.

Respondent argues that my statement goes "much further" than an expression of the statutory standard to be met in issuing a complaint, and characterizes it as showing "that he [Dixon] has weighed the evidence and concluded even before any trial that Boise is guilty regardless of whether the evidence is examined under either the *Mueller* or the *Doubleday* standard."

This recasting of my words quoted above is entirely gratuitous. If I did not have "reason to believe" that a violation of law could be found from the evidence presented to the Commission prior to issuance of its complaint, I would have had no legal basis to vote for a complaint. Since the law requires me to have "reason to believe" that a violation of law may be found before I can vote to challenge it, I cannot see how the recitation of that fact can amount to prejudgment, and, indeed, I have not prejudged this case. If I am called upon to adjudicate the merits of this matter, [3] my judgment will be based solely upon the trial record compiled by the litigants. The Commission has frequently dismissed cases for failure of proof after originally finding "reason to believe" that a violation has occurred. Since I fail to discern how a reasonable person reading my statement could conclude that I have prejudged the merits of this case, I will not recuse myself from this matter.

Finally, I note that complaint counsel argue that this matter is not properly before the Commission in the absence of a certification by the ALJ. However, since disqualification is a question uniquely within the province of the Commissioner at whom the motion to disqualify is directed, I have addressed the merits of respondent's motion, and believe it is appropriate for it to be raised before the Commission.

January 30, 1981

INITIAL DECISION BY

LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

FEBRUARY 14, 1984

I. HISTORY OF THE PROCEEDING

On April 23, 1980, the Commission, with Commissioner Pitofsky dissenting, issued a complaint charging that Boise Cascade Corporation ("Boise") had violated Section 2(f) of the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act. The complaint alleges that Boise distributes office supplies, stationery, printing paper, coarse paper, and office furniture through distribution centers

located throughout the United States. The complaint further alleges that Boise has been and is engaged in commerce, as "commerce" is defined in the Clayton Act and that in the course of that commerce, it purchases office product supplies for resale within the United States from suppliers who are also engaged in commerce. [2]

The complaint claims that Boise competes with other businesses which are engaged in the purchase and resale of office products of like grade and quality which are bought from the same or competitive suppliers, and it charges that Boise, in the course of its business, has knowingly induced or received from some of its office product suppliers discriminatory prices, discounts, allowances, or terms and conditions of sale which were not granted by its suppliers on sales of goods of like grade and quality to all of its competitors; it further states that Boise should have known that the prices it induced or received constituted price discriminations prohibited by Section 2(a) of the Clayton Act, as amended.

Finally, the complaint alleges that Boise's knowing inducement or receipt of the price discriminations has been or may be substantially to lessen, injure, destroy, or prevent competition between suppliers of office products or between Boise and its competitors.

As an example of the violation alleged, the complaint states that Boise resells office product supplies at both the wholesale and retail level, but receives a wholesale discount on all products purchased from certain suppliers. These discounts are allegedly not available to all of Boise's competitors who sell the products at the retail level.

Boise's alleged dual function—*i.e.*, sales at the wholesale and retail levels of goods it purchases at wholesale discounts—prompted the Commission to direct me, in an order accompanying the complaint, to admit evidence of the services and functions performed by Boise on goods it purchases for resale at the retail level, and after considering *Mueller Co.*, 60 F.T.C. 120 (1962), *affd*, 323 F.2d 44 (7th Cir. 1963), *cert denied*, 377 U.S. 923 (1964) and *Doubleday & Co.*, 52 F.T.C. 169 (1955), to decide the materiality of such evidence. The Commission also ordered me to "enter findings sufficient for disposition of the proceeding under both the *Mueller* and *Doubleday* rubrics."

Because it received a stay in this proceeding from a federal district court, Boise, was not required to file its answer until November 3, 1980, an answer which essentially denied all of the charges in the complaint and interposed fourteen separate defenses.

After extensive and time-consuming discovery, evidentiary hearings began on April 13, 1982. The hearings concluded on April 27, 1983. Because of a complicated dispute over the application of the attorney-client and work product privileges to a Boise document and the testimony of one of its former employees, the record was not closed