IN THE MATTER OF

AMERICAN MOTORS CORPORATION ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(a) OF THE CLAYTON ACT

*Docket 7357. Complaint, Jan. 13, 1959—Decision, July 19, 1965**

Order requiring a major appliance manufacturer and distributor of electric appliances located in Detroit, Mich., to cease discriminating in price among competing customers in violation of Sec. 2(a) of the Clayton Act by granting preferential prices for its household appliances to its merchandising distributors, and from granting preferential prices in the future to any of its customers, unless it satisfies the Commission in advance that all price differentials are cost justified, and notifies all of its customers of such price differentials and its basis.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Motors Corporation and American Motors Sales Corporation have violated, and are now violating, the provisions of subsection (a) Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent American Motors Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its office and principal place of business located at 14250 Plymouth Road, Detroit 32, Michigan.

PAR. 2. Respondent American Motors Sales Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 14250 Plymouth Road, Detroit 32, Michigan.

PAR. 3. Respondent American Motor Sales Corporation is a wholly owned subsidiary of respondent American Motors Corporation.

PAR. 4. Respondent American Motors Corporation is a major manufacturer and distributor in the United States of electric appliances. Included among these electric appliances are refrigerators, ranges, home freezers, automatic washers, clothes dryers and room coolers, some of which this respondent manufactures at its factories located in Detroit, Michigan, and Grand Rapids, Michi-

*Reported as amended by Commission's order of October 7, 1965.

gan, and some of which this respondent has manufactured for it by other concerns. All these appliances are marketed by said respondent under the trade names "Kelvinator" and "Leonard."

PAR. 5. Respondent American Motors Sales Corporation is engaged in selling the products of respondent American Motors Corporation including those listed in Paragraph Four. In the furtherance of its sales activities respondent American Motors Sales Corporation maintains 16 zone offices located throughout the United States. Said respondent's sales of electric appliances which it acquires from respondent American Motors Corporation for the most part are made to retail dealers who sell to consumers.

The sales activities of respondent American Motors Sales Corporation including the acts and practices hereinafter alleged were and are under the direction, supervision and control of respondent American Motors Corporation. Both said corporations are jointly and severally named as respondents herein.

PAR. 6. In the course and conduct of their business, as aforesaid, respondents American Motors Corporation and American Motors Sales Corporation are now and for many years have been engaged in commerce, as "commerce" is defined in the Clayton Act. Respondents ship or cause to be shipped and transported their electric appliances in a constant current of commerce from the State or States where such products are manufactured, or are temporarily stored in anticipation of sale or shipment, to purchasers located in other States and the District of Columbia for use, consumption, or resale therein.

PAR. 7. In the course and conduct of their business in commerce, as aforesaid, respondents American Motors Corporation and American Motors Sales Corporation have discriminated in price in the sale of electric appliances by selling such products of like grade and quality at different prices to different and competing purchasers.

Included among such sales at discriminatory prices are sales which respondents made to retail dealer-purchasers in which respondents charged substantially lower prices for electric appliances than were charged by respondents to other competing retail dealer-purchasers of such products of like grade and quality.

PAR. 8. As illustrative of the discriminatory pricing practices alleged in Paragraph Seven, respondents during the past several years, including 1956 and 1957, sold electric appliances to certain retail-purchasers including the B. F. Goodrich Company, Akron, Ohio; the Consumers Power Company, Jackson, Michigan; and the Alabama Power Company, Birmingham, Alabama, at prices which

were approximately five percent lower than the prices charged to other retailer-purchasers competing with such favored purchasers in the resale at retail of the respondents' products to the consuming public.

PAR. 9. The effect of said discriminations in price by respondents American Motors Corporation and American Motors Sales Corporation in the sale of electric appliances has been or may be substantially to lessen, injure, destroy, or prevent competition between respondents' retailer-purchasers paying such higher prices and their favored retailer competitors paying such lower prices.

PAR. 10. The discriminations in price as herein alleged are in violation of the provisions of sub-section (a) of Section 2 of the Clayton Act, as amended.

Mr. Thomas A. Muntsinger and *Mr. Hans C. Nolde* for the Commission.

Cross, Wrock, Miller, Vieson & Kelley, Detroit, Mich., by *Mr. Glen R. Miller* and *Mr. Forrest A. Hainline* for the respondents.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

SEPTEMBER 3, 1964

The Commission's complaint, issued January 13, 1959, charges the respondents, American Motors Corporation and American Motors Sales Corporation, with discriminating in price in the sale of certain of their products (electric appliances) in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13). Respondents' principal defense is cost justification. A substantial volume of evidence, both in support of and in opposition to the complaint, has been received. Proposed findings and conclusions have been submitted by the parties and argued orally before the hearing examiner. The case is now before the examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the evidence.

The case has been beset by delays and other difficulties almost from the beginning. The hearing examiner to whom the case was originally assigned, the late Frank Hier, died in June 1959 and the present examiner was appointed in his stead. There have been several changes in complaint counsel, some five different attorneys having at various times been in charge of the Commission's case. Each change in complaint counsel necessitated extended delay in

order that newly appointed counsel might familiarize himself with the record, particularly respondents' cost study. In addition, respondents' principal witness, the accountant who prepared the cost study, died after his direct examination and before the hearing at which he would have been cross-examined; and another important witness for respondents, the executive who was most familiar with the facts underlying the cost study, became incapacitated by reason of serious illness during the course of the hearings and was therefore unable to testify.

Respondent American Motors Corporation is a Maryland corporation. It is engaged in the manufacture of, among other products, electric appliances for use in the home, such as refrigerators, freezers, air-conditioners, ranges, washers, and dryers. Respondent American Motors Sales Corporation, which is a wholly owned subsidiary of American Motors Corporation, is a Delaware corporation. It is engaged in the sale of the appliances manufactured by its parent corporation, the sales being made to retail dealers, who in turn sell the appliances to the public. The appliances are marketed under the trade names "Kelvinator" and "Leonard." Both corporations have their principal office and place of business at 14250 Plymouth Road, Detroit, Michigan.

There is no issue over the element of interstate commerce. The appliances are sold by respondents throughout the United States.

The case arises out of the fact that in the sale of the appliances respondents sell to one group or class of dealers at uniformly lower prices than those at which they sell to dealers generally.

The dealers receiving the lower price are known as "Merchandising Distributors." Each is a multiple-outlet dealer, having numerous retail stores or outlets. So far as the present record discloses, there are four such purchasers: B. F. Goodrich Company, Akron, Ohio; Alabama Power Company, Birmingham, Alabama; Consumers Power Company, Jackson, Michigan; and Sterchi Brothers Stores, Inc., Knoxville, Tennessee.

All purchasers other than these four are classified by respondents as "Regular Dealers." These are usually single-outlet, independently-owned retail appliance stores.

The lower prices accorded merchandising distributors represent a differential of approximately 3.5 percent. Use of the term "approximately" is necessary because the discount is not absolutely uniform on all products. Rather, there is a specific dollar-and-cents price differential on each model of each product. For example, the refrigerator listed as the first item on Commission Exhibit 1F is sold

to merchandising distributors at $144.40 and to regular dealers at $149.45. The price differential of $5.05 is almost exactly 3.5 percent of the lower price and almost exactly 3.38 percent of the higher price. On other items the percentage differential may vary by a few one-hundredths of 1 percent, but for practical purposes it may be assumed that the percentage differential in favor of merchandising distributors is 3.5 percent.

A former exception as to laundry equipment, such as washers and dryers, should be noted. At the time the complaint was issued, in January 1959, the discount on such equipment was approximately 4.5 percent. However, in the summer of 1959 the discount on laundry equipment was reduced to 3.5 percent, making it uniform with that on other products. This change in policy appears to have been motivated by business reasons and to have had no relation to the pendency of the Commission's complaint. Laundry equipment has always represented only a relatively small portion of respondents' sales volume.

Actually, therefore, what we are now concerned with in this proceeding is a price differential of 3.5 percent.

At the first hearing, on May 3, 1960, a written stipulation of facts entered into between counsel was received in evidence (CX 1A-G). A second stipulation (CX 2) provided simply that any orders entered as to American Motors Sales Corporation might in the discretion of the hearing examiner be made to apply to American Motors Corporation as well. Upon reception in evidence of the two stipulations, the case-in-chief in support of the complaint was rested.

Until the filing by the parties of their proposed findings and conclusions, it was assumed by the hearing examiner that all parties regarded the stipulation of facts as having established a prima facie case in support of the complaint. It is now urged by respondents that on one point, that of competitive injury, the stipulation is deficient and fails to establish a prima facie case.

On this issue the stipulation reads:

> All parties to this stipulation further agree that competent and experienced witnesses actively engaged in retailing electric appliances sold to them by respondent corporations, and who are in competition with the retail outlets of the merchandising distributors referred to above, if called upon to testify in this matter would testify substantially as follows:
>
> (a) Twenty-four out of twenty-six of such witnesses would testify that the price differentials referred to in paragraph (12) of this stipulation in many instances exceeded the amount of net profit received by them on sales of such items during the years specified;

(b) That the witnesses have lost sales of electric appliances of like kind to competitors where the amounts of the differentials in the lower retail prices charged by such competitors were equal to the differentials referred to in paragraph (12) of this stipulation.

(CX 1D-E)

Subparagraph (b) above is without probative value on the issue of competitive injury. It says only that the potential witnesses have lost sales to competitors, presumably merchandising distributors. The statement is completely silent as to the number or frequency of such lost sales, whether they number one or two or many.

No case has come to the examiner's attention in which it has been held, either by the Commission or the courts, that mere loss of an occasional sale—diversion of isolated items of business to a competitor—is sufficient to meet the criterion of competitive injury prescribed by the statute. It is injury, and substantial injury, to competition, or the reasonable probability thereof, with which the statute is concerned, not the loss of a few sales.

On the other hand, subparagraph (a) does in the examiner's opinion establish a prima facie case of competitive injury. The stipulation here in substance is that twenty-four regular dealers would testify that the price differentials in question exceeded in many instances the net profit derived by the dealers from the sale of respondents' products. If this does not establish actual injury to competition, it at least warrants an inference that substantial injury is reasonably probable.

It is therefore concluded that a prima facie case in support of the complaint has been established.

This brings us to respondents' principal defense, cost justification. Respondents urge that the price differentials are warranted by differences in the cost of selling to the two classes of customers. Shortly after the complaint issued, respondents retained the services of the late William J. Warmack to prepare a cost study. Mr. Warmack was a certified public accountant with wide background and experience in Robinson-Patman Act cases. From 1929 to 1946 he was a member of the accounting staff of the Commission. In 1946 he resigned his position with the Commission, and from that time until his death was engaged in the private practice of accounting, specializing in problems in cost accounting arising under the Robinson-Patman Act. He testified as an expert witness in a number of Robinson-Patman Act cases, both before the Commission and in the courts.

The cost study prepared by Mr. Warmack in the present case appears in the record as Respondent Exhibit 1, and his testimony

in support of the study extends from pages 15 to 39 of the transcript. A concise yet comprehensive summary by Mr. Warmack of the purpose, scope, and results of the study follows:

The purpose of the study and analysis was to develop factual cost evidence in order to determine whether the company's price differentials on sales to merchandising distributors, Alabama Power Company, Consumers Power Company, B. F. Goodrich Company, and Sterchi Brothers Company, represent differentials which make only due allowance for differences in costs of sale or delivery resulting from the differing methods or quantities in which said products are sold or delivered to said customers. The price differentials (discounts) range up to about 3.4% on sales of refrigerators, electric ranges, home freezers, and air conditioners, and up to about 4.4% on sales of laundry equipment including automatic washers and dryers.

In this engagement our work has been directed principally to an analysis of those differential costs which offer the least resistance to reasonably accurate allocations necessary in establishing factual cost bases for pricing. Such costs usually involve direct selling and they invariably include compensations to indiivduals, expenses incurred in their duties, and other expenses properly assignable to their efforts—and that was found to be true in the instant studies.

Most of the other differential costs of sale and delivery are not included in the analysis for the reason that they are not needed to prove savings on which the company bases its price differentials. The differential costs which are not included, of course, have been reviewed and studied to the extent of determining with reasonable certainty that they would have no over-all adverse effect on the cost picture presented in this report. In fact, if included in the analysis, they would serve to increase the cost savings shown herein.

Merchandising activities for representative geographical trade areas over the country (7 out of the present 19 zones and 40.5% of zone sales) and a representative period of time (6 months) have been covered in the study and analysis for the fiscal year ending September 30, 1959. Three zones, Atlanta, Detroit, and New Orleans, representing about 28% of zone sales were covered for the full fiscal year ending September 30, 1958.

Most of the differential costs are of a joint nature both as to customers served and as to products sold. Hence, it was necessary to develop proper measuring factors on which to base sound separations and allocations of such costs. For this purpose, time studies were conducted over a period of 3 to 4 months of the actual time and effort expended by more than 75 individuals whose compensations and expense represent the principal items of costs covered in this report.

The results of our study and analysis show that, as compared with regular dealers, cost savings realized per dollar of sales in serving the aforementioned merchandising distributors in 1958 and 1959 were as follows:

	Cost Savings on Sales to	
	Merchandising Distributors	
	1958	*1959*
Alabama Power Company		
New Orleans Zone	6.44%	5.68%
Consumers Power Company		
Detroit Zone	7.99%	3.95%
B. F. Goodrich Company		
Three Zones (1958)	7.02%	
Seven Zones (1959)		5.94%
Sterchi Bros. Company		
Two Zones	7.05%	6.04%

The above cost savings may be compared with the company's price differentials (discounts) to merchandising distributors approximating 3.4% on refrigerators, electric ranges, home freezers, air conditioners, etc., and approximating 4.4% on laundry equipment including washers and dryers.

For the three zones covered in the studies for 1958, cost savings and the excess of cost savings over discounts allowed on sales to merchandising distributors, by product classifications, are shown in Schedule 3-58 herein. It will be noted in this connection that the cost savings exceed the discounts in every instance. It will be noted also that the excess of cost savings over discounts range from around 1.9% on sales of laundry equipment in the New Orleans Zone up to around 4.6% on sales of refrigerators, freezers, ranges, etc., in the Detroit Zone.

In this engagement we have endeavored to carry the costing to the refinements customarily required by the Federal Trade Commission in past Robinson-Patman cost cases. Methods and procedures thus employed are spelled out in tabular form herein along with explanatory comments.

(RX 1, pp. 1-3)

Essentially, the validity of respondents' cost study turns on the question whether in selling to regular dealers respondents' employees usually perform certain significant functions which ordinarily they are not called upon to perform for merchandising distributors. On this subject the cost study states:

While sales and deliveries are made directly to the individual outlets of the merchandising distributors the same as to the regular dealers, additional sundry functions performed by the District Managers (salesmen), and to some extent by Zone Managers and Branch Managers, in serving dealers are not required in serving merchandising distributors.

This may be best illustrated by a brief outline of the work program of the District Managers (salesmen) in contacting dealers at their establishments. The functions of the District Managers include the following:

(1) Determining the standing and general reputation of the dealer in the community and his demonstrated merchandising ability in the local trade.

(2) Presentation and demonstration of products, product features and advantages, available and applicable merchandising plans and programs, and the general operating policies and practices of the zone as the "distributor" and the American Motors Corporation as the "manufacturer."

(3) Assisting the dealer in developing sales and merchandising plans applicable to the relative size (sales volume) of the dealership and the economic scale of the area he serves.

(4) Assisting the dealer in the training of retail salesmen through organized training programs or meetings on specific subjects.

(5) Soliciting orders for products in quantities and model assortments consistent with dealer's ability to merchandise and within the extent of his financial responsibility and ability to pay.

(6) Assisting dealer in securing wholesale financing (floor plans) when necessary, and retail financing (time-payment sales); also periodic inventory checks on floor-planned products.

As already stated, many of these functions are not required in serving the merchandising distributors who perform the same or similar services for themselves through their own sales organization. This, of course, accounts largely for the cost savings disclosed by our study and anlysis as shown herein.

(RX 1, pp. 5–6)

In detailing the time periods and sales areas selected for the study, Mr. Warmack stated:

The data set forth in this report represents the results of studies of costs of merchandising in the company's Atlanta, Cleveland, Dallas, Detroit, New Orleans, Pittsburgh, and Seattle Zones for the six-months' period, March 1, 1959, through August 31, 1959; and for the Atlanta, Detroit, and New Orleans Zones for the full fiscal year ending September 30, 1958.

In selecting the zones (geographic areas) covered in these studies, particularly the current studies in 1959, it was a primary requisite that the Detroit Zone be included for the reason that it serves Consumers Power Company. The same was true as to the New Orleans Zone which serves Alabama Power Company. Since Sterchi Brothers Company operates in the New Orleans and Atlanta Zones, the Atlanta Zone was included. The Cleveland and Pittsburgh Zones were included for the reason that the preliminary investigation of the Federal Trade Commission was centered in those areas. For the purposes of rounding out a reasonable representative cost coverage of the company's merchandising activities, the Dallas and Seattle Zones were also included in the studies.

(RX 1, pp. 6–7)

It will be observed that in the foregoing no reference is made to B. F. Goodrich Company. This doubtless is because this company operates in all of respondents' 19 sales zones.

The actual geographic areas embraced within the 7 zones selected include—

* * * all or most of the states of Alabama, Florida, Georgia, Louisiana, Michigan, Mississippi, Ohio, Oregon, Tennessee, Texas, Virginia, and Washington. In addition it includes 22 counties in western Pennsylvania, 16 in West Virginia, 10 in northern Indiana, 10 in western Idaho, 2 in northern California, and 1 county in western Montana.

(RX 1, p. 7)

As already indicated, actual time records were kept covering time expended by certain of respondents' executives and employees in contacting customers. In this connection the cost study states:

Differential costs on which price differences are based by the company, as previously indicated, largely represent compensations to individuals, expenses incurred in their duties, and other expenses properly assignable to their efforts. It was therefore necessary to establish information as to the time and effort expended by personnel engaged primarily in direct selling and related activities in the geographic zones.

In this connection, actual time records were kept and reported daily by Zone Managers, Branch Managers, and District Managers (salesmen) of time expended by them in making customer contacts over a period of 3 to 4 months, viz., the months of June, August, September, and a part of the month of July, 1959, for the 7 zones covered in the study. The time reporting was suspended briefly in the month of July for the reason that zone personnel were primarily engaged during the last half of the month in a program of introducing new 1960 Models. Hence, time records then would not have properly reflected general activities as a whole.

The same time-and-effort information was also obtained on the activities of Servicemen and their assistants. Likewise, information as to time and effort expended in connection with credits and collections was compiled. These statistical data were then assembled and used to separate and allocate the cost and expense of the respective individuals for the six-months' period, March 1 to August 31, 1959. They were also used as a basis for separating and allocating the same classes of costs and expenses for the full fiscal year ending September 30, 1958.

(RX 1, pp. 7–8)

The various items or factors accounting for the cost differentials are summarized in the cost study as follows:

Cost Included in Analysis

Differential cost information developed and presented in this report principally represents the cost and expense of direct selling in the field, viz., salaries, bonuses, added compensation (commissions) earned under the company's incentive compensation plan, and related expenses. In addition it includes compensation and expense of servicemen, as well as credits and collection expense, bad debt expense, and a part of the office expense (mostly stenographic) in the 7 zones covered in the studies.

Except for the bad debt expense, differential costs have been separated and allocated between groups of customers on the basis of time and effort expended by individuals in accordance with the statistical time study information previously described herein.

Bad Debt Expense (Losses) sustained over the 3-year period ending September 30, 1959, has been tabulated for the 7 geographical zones covered in the study and analysis. In applying this class of expense, an average amount of loss actually sustained per dollar of sales in the past 3 years is assigned separately to each zone.

(RX 1, pp. 8–9)

Mr. Warmack's testimony in support of the cost study was given at a hearing held on May 3, 1960 (Tr. 15-39). Cross-examination was deferred in order that complaint counsel might have an opportunity to examine the cost study and the underlying data in connection with it. Unfortunately, Mr. Warmack died before the next hearing, which was held on November 29, 1960. Complaint counsel, however, made no point of their inability to cross-examine Mr. Warmack, but proceeded with their case in rebuttal (Tr. 43–45).

Complaint counsel's principal witness in opposition to the cost study was Mr. William S. Opdyke of the Commission's accounting staff. Mr. Opdyke's testimony was devoted almost entirely to pointing out instances of "miscoding" in respondents' time study; that is, instances where on a salesman's report a dealer would be listed as a regular dealer, when in fact he was a merchandising distributor outlet, and vice versa.

Actually, there were relatively few instances of such miscodings. The retail dealer contact reports sent in by respondents' salesmen and executives numbered some 4,700, and as there usually were three or four retailers listed in each report this means that during the fourteen weeks of the time study there were at least 14,000 contacts with retailers (Tr. 806–812; RX 7). Respondents place the number of miscodings at 27. This figure is challenged by complaint counsel, but in any event the number is negligible when compared with the number of contacts.

More importantly, however, calculations as to the effect of the miscodings upon the results of the cost study were made by Mr. Joseph Warmack, son of Mr. William J. Warmack. Mr. Joseph Warmack is also an accountant and assisted his father in the preparation of the cost study. Giving full effect to the miscodings, they reduce the cost differentials by only negligible amounts, a few one-hundredths of 1 percent (Tr. 774-805; 871-889; RXs 4A-C, 5A-B, 6A-B, 11A-C, 12A-C, 13A-B).

An objection to the cost study particularly urged by complaint counsel is that the entire study and Mr. William J. Warmack's testimony in support of it represent nothing more than hearsay. It is argued that Mr. Warmack had no personal knowledge of the facts underlying the study and particularly the classification of customers, and that respondents failed to produce any witness who did have such knowledge.

This contention must be rejected for two reasons. In the first place, the cost study was prepared largely from respondents' books and records kept in the regular course of business.

Aside from this, however, there is substantial testimony from one of respondents' executives in support of the study. The executive in charge of the preparation of the study was Mr. James W. Keuping, who was respondents' manager of sales operations. He was present during the earlier hearings, but in 1961 became seriously ill and at the later hearings could not be used as a witness. Because of his ill health he resigned his position in 1961 and was succeeded by Mr. M. P. Wilson.

Mr. Wilson did testify during the later hearings, being called by both sides. He has long been connected with respondents in various capacities and is familiar with respondents' operations, particularly the sales operations. His testimony supports that of Mr. William J. Warmack, especially on the vital point of classification of customers and the factors accounting for the classification (Tr. 523–597; 706–716).

There is, in fact, no substantial evidence in opposition to the cost study. True, Mr. Opdyke did express the opinion that the validity of the study was "very questionable" (Tr. 267–277). But this opinion was based primarily upon a large number of documents which had previously been rejected as evidence (Tr. 190–210). There is no question as to Mr. Opdyke's competency as an accountant, but the documents which largely formed the basis for the opinion having been excluded, it necessarily follows that the opinion itself must be disregarded as being without probative value.

In this connection, it should be noted that subsequently objections to almost identical opinions by Mr. Opdyke were sustained by the hearing examiner upon the ground stated, that the documents forming the basis for the opinions had been excluded (Tr. 267–277).

Commission counsel also point out that the cost study is "post complaint"; that is, that the study was prepared after the issuance of the complaint and for use in this proceeding. But that is no valid reason for rejecting or seriously discounting the study. If it were, defense of a Robinson-Patman Act case on the ground of cost justification would, as a practical matter, almost always be impossible because usually it is not until the complaint issues that a respondent knows that his pricing practices are being challenged.

It is further urged by complaint counsel that the cost study is invalid because the compensation of respondents' district managers (salesmen), which is the principal factor in the cost differentials, is, in counsel's view, solely on a commission basis, the commission

being based upon the amount of the district manager's sales. Counsel's position is that since the salesmen work on commission based upon the amount of their sales, there is no proper basis for a cost differential premised upon the difference in the amount of time devoted by the salesmen to regular dealers as contrasted to that which they devote to merchandising distributors.

Actually, the plan of compensation appears to be a base salary plus commission plan (CXs 522A–C; 524A–B). If, however, the entire compensation were based upon commission, this, in the examiner's opinion, would offer no reason for excluding allocation of the salesmen's compensation from the cost study. This is because, first, the district managers (salesmen) are employed by respondents for their full time, and, second, their compensation covers not only their work in actually making sales but in performing the other functions detailed above, all of which contribute to sales, either directly or indirectly.

In summary, we have here a case in which the price differential is relatively small—3.5 percent—which is much smaller than the differentials which have usually been involved in other cases before the Commission. We have a cost study prepared by a very competent accountant with broad background and experience in Robinson-Patman Act cases. The classification of customers appears logical and reasonable and is supported by substantial evidence. Unquestionably there are substantial differences in the cost to respondents of serving the two groups. While there are discrepancies in the cost study, they are of a minor nature and do not materially affect the results reached by the study. The hearing examiner sees no reason to question the integrity of the cost study or its essential accuracy.

Cost justification, of course, is an affirmative defense and the burden of establishing the defense rests upon the party who offers it. But this burden should not be made excessive or unreasonable. Otherwise, the practical effect is to nullify the defense.

It is concluded that here the burden has been sustained.

ORDER

It is therefore ordered, That the complaint be, and it hereby is, dismissed.