

IN THE MATTER OF
WARREN PETROLEUM CORPORATION ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(a)
OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

Docket 6227. Complaint, June 30, 1954—Order, Sept. 17, 1956

Order dismissing as not sustained by the evidence, complaint charging one of the largest marketers of liquefied petroleum gas in the United States with discriminating between buyers in the price at which it sold "LP-Gas" in the Lake Village, Ark., area in violation of Sec. 2(a) of the Clayton Act, and with making sales to certain industrial and domestic consumers at unreasonably low prices in the area with the intent and effect of destroying competition.

Mr. William H. Smith and *Mr. Brockman Horne* for the Commission.

Mr. Warren M. Sparks and *Mr. M. D. Wallingford*, of Tulsa, Okla., and *Mr. William Simon* and *Mr. John E. McClure*, of Washington, D.C., for Warren Petroleum Corp.

Catlett & Henderson, of Little Rock, Ark., for Butane Wholesale Gas Co. and Zero LP-Gas Co.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

On June 30, 1954, the Federal Trade Commission issued its complaint in the above-entitled proceeding, alleging in Count I thereof that respondent Warren Petroleum Corporation had, for a number of years last past, discriminated between buyers in the price at which it had sold in interstate commerce liquefied petroleum gas, hereinafter referred to as "LP-Gas," thereby diverting business to itself from its competitors and creating a dangerous tendency toward monopoly in the sale thereof, in violation of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

The complaint describes LP-Gas as a product produced from crude oil mixtures as they come from producing oil and natural-gas wells, which, under relatively low pressure and at normal temperatures, can be transported and stored in liquid form and released as a gas at atmospheric pressure, for use domestically as a fuel for heating and refrigeration, and industrially as a fuel for internal combustion engines and for heating. Respondent Warren Petroleum Corporation is alleged to be one of the largest marketers of this product in the United States, its sales for 1952 amounting to \$103,352,915.00.

Count II of the complaint alleges that respondent Warren Petroleum Corporation is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 2100 National Bank of Tulsa Building, Tulsa, Oklahoma; that respondent Butane Wholesale Gas Company is a corporation organized and existing under and by virtue of the laws of the State of Arkansas, with its principal office and place of business at Little Rock, Arkansas, 51% of the capital stock thereof being owned, since July, 1950, by Warren Petroleum Corporation; and that respondent Zero LP-Gas Company, Lake Village, Arkansas, is a wholly-owned subsidiary of respondent Butane Wholesale Gas Company. It is further alleged that respondent Warren Petroleum Corporation, because of its ownership of 51% of the capital stock of respondent Butane Wholesale Gas Company, has the power to control the business policies and practices of that company, and, in turn, those of respondent Zero LP-Gas Company, and that, to all intents and purposes, respondent Zero LP-Gas Company, Lake Village, Arkansas, is part and parcel the same business as that conducted by respondent Butane Wholesale Gas Company, and, to a substantial extent, as that conducted by respondent Warren Petroleum Corporation.

It is further alleged that during the years 1952 and 1953, respondents, through the instrumentality of Zero LP-Gas Company, Lake Village, Arkansas, sold LP-Gas in the Lake Village area at 7¢ per gallon to industrial consumers and at 9¢ to 10¢ per gallon to domestic consumers, which prices were from 3¢ to 4¢ per gallon under the prevailing retail price in the Lake Village territory, and that such sales were made at unreasonably low prices, with the intent, purpose and effect of injuring, restraining, suppressing, and destroying competition in the retail sale of LP-Gas in the Lake Village area between respondents and competing sellers of LP-Gas. It is further alleged that the effect and result of such sales by respondents have been and now are unduly and substantially to injure, restrain and suppress competition between respondents and their competitors in the retail sale of LP-Gas in the Lake Village, Arkansas trading territory and tend to create in respondents, and especially in said wholly-owned subsidiary respondent Zero LP-Gas Company, a monopoly in the sale of LP-Gas in the Lake Village, Arkansas trading area.

The Answers

Respondents, in their answers, deny that they have violated the Clayton Act as alleged in Count I of the complaint, and that they

have violated the Federal Trade Commission Act as alleged in Count II thereof.

History of the Proceeding

Subsequent to the submission of answers, hearings were held in New Orleans, Louisiana, Memphis, Tennessee, and Jackson, Mississippi, at which evidence was submitted relevant to Count I of the complaint. Thereafter hearings were held in Little Rock, Arkansas, at which evidence was adduced with respect to Count II of the complaint. At the completion of his presentation of evidence, counsel in support of the complaint moved that Count I of the complaint be dismissed without prejudice. Thereupon counsel for the respondents moved that Count II of the complaint also be dismissed for failure of proof and other reasons, and requested that a hearing be granted for the purpose of presenting argument thereon. Such hearing was subsequently held in Washington, D. C., and thereat counsel for the respondents joined in the motion of counsel supporting the complaint to dismiss Count I thereof, but requested that, because the dismissal would be based upon a complete failure to prove any wrong conduct on the part of Warren Petroleum Corporation, Count I should, in fairness to that respondent and in order to alleviate the adverse publicity which normally attaches to the issuance of a complaint, be dismissed with prejudice.

Conclusions as to Count I

In view of the motion of counsel supporting the complaint that Count I thereof be dismissed, together with the fact that a review of the record reveals that the evidence, even when considered in the light most favorable to the allegations of Count I, completely fails to establish the price discrimination alleged therein, it must be concluded that Count I of the complaint should be dismissed. Furthermore, it appears that in fairness to respondent Warren Petroleum Corporation, such dismissal should be absolute rather than conditional.

Relationship Between Respondents Warren Petroleum Corporation and Zero LP-Gas Company

In support of his motion to dismiss Count II of the complaint herein, counsel for respondent Warren Petroleum Corporation contends that although that corporation acquired 51% of the stock of respondent Butane Wholesale Gas Company in 1950, it did not thereafter attempt to direct, control or manage the business activities of respondent Butane Wholesale Gas Company, and did not use that corporation or its wholly-owned subsidiary, respondent Zero

LP-Gas Company, Lake Village, Arkansas, as an instrumentality to effectuate any of the unfair acts or practices charged in Count II of the complaint, and that, accordingly, as a matter of law, Count II must fail as to respondent Warren Petroleum Corporation.

The evidence shows that for some fifteen years prior to the purchase by respondent Warren Petroleum Corporation of 51% of the capital stock of respondent Butane Wholesale Gas Company, Mr. B. T. Harris, president of the latter corporation, had been prominent in the business of selling LP-Gas in Arkansas. In fact, in 1935 he was the only dealer in that product in the State. In 1952 he was selling approximately 30% of the LP-Gas sold in Arkansas. Because of his financial success and consequent prominence in the industry, it appears that respondent Warren Petroleum Corporation bought the stock in question as an investment in a successful organization. In fact, in the instrument of purchase, a stipulation was inserted that Mr. Harris should remain as president of respondent Butane Wholesale Gas Company for five years, and continue, during that period, to direct the company's affairs. Mr. Harris testified that, as president of respondent Butane Wholesale Gas Company, he did so direct the affairs of that corporation according to his best judgment, and purchased gas wherever he could buy it cheapest. This statement is corroborated by the fact that during the two years with which we are here concerned, respondent Butane Wholesale Gas Company purchased 9,500,000 gallons of LP-Gas from competitors of respondent Warren Petroleum Corporation. The president of respondent Warren Petroleum Corporation testified that the reason for buying stock in respondent Butane Wholesale Gas Company was to make money for the Warren Petroleum Corporation, and that, although he consulted with Mr. Harris on major financial commitments affecting both corporations, the normal business operations of respondent Butane Wholesale Gas Company were left in the complete control of Mr. Harris. The president of respondent Warren Petroleum Corporation further testified that he had never heard of Lake Village, Arkansas, the trade area here involved, until the investigation by the Federal Trade Commission in this proceeding was brought to his attention.

The uncontradicted evidence indicates that after the purchase of the stock in question, respondent Butane Wholesale Gas Company continued to be controlled and directed by its own president, Mr. Harris, and did not become a mere agency or instrumentality of respondent Warren Petroleum Corporation. The law seems to be well settled that mere ownership by one corporation of stock in another corporation, even though such ownership extend to more

than 50% of the latter's stock, does not of itself make the owning corporation responsible for the activities of the subsidiary corporation unless the owning corporation shall have asserted control over its subsidiary to the extent of directing and determining its policies and practices, thus making the subsidiary corporation an instrumentality of the owning corporation. In the opinion of the United States Court of Appeals for the Seventh Circuit, October term, 1955, in the case of *National Lead Company, et al. v. Federal Trade Commission*, the Court states:

* * * To come within the applicable rule, there must be evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction.

Since respondent Warren Petroleum Corporation never exercised such control over respondent Butane Wholesale Gas Company, it follows that respondent Warren Petroleum Corporation never exercised such control over respondent Zero LP-Gas Company, the wholly-owned subsidiary of respondent Butane Wholesale Gas Company. In the light of this fact, and the legal principle above quoted, it must be concluded that respondent Zero LP-Gas Company was not an instrumentality of respondent Warren Petroleum Corporation, and that the latter corporation is consequently not responsible for any of the alleged unlawful acts or practices of respondent Zero LP-Gas Company during the years 1952 and 1953. Accordingly, Count II, insofar as it relates to respondent Warren Petroleum Corporation, should therefore be dismissed.

Interstate Commerce

Although counsel for respondents Warren Petroleum Corporation and Butane Wholesale Gas Company admit that those corporations are engaged in interstate commerce, they deny that the latter corporation's wholly-owned subsidiary, respondent Zero LP-Gas Company of Lake Village, Arkansas, is so engaged. In fact, they contend that the complaint is fatally defective in that it alleges only that respondent Zero LP-Gas Company, Lake Village, Arkansas, sold LP-Gas in the Lake Village marketing area at unreasonably low prices for the purpose of creating a monopoly in the sale of that product in that area. Since the undisputed evidence clearly shows that respondent Zero LP-Gas Company sold LP-Gas only in the Lake Village, Arkansas, area, they further contend that Count II of the complaint must fail because the acts and practices complained of were neither alleged to be in interstate commerce, nor are they so in fact.

In the immediately preceding section of this opinion we have concluded that respondent Warren Petroleum Corporation did not exercise control over either respondent Butane Wholesale Gas Company or its wholly-owned subsidiary, respondent Zero LP-Gas Company. Accordingly, for the reasons previously stated, we must now conclude that respondent Warren Petroleum Corporation did not engage in interstate commerce in the Lake Village, Arkansas marketing area, which is an additional reason why the complaint should be dismissed as to that corporation.

The evidence, however, compels a different conclusion as to respondent Butane Wholesale Gas Company. This respondent is clearly shown to be under the autonomous control of its own president, Mr. Harris. Mr. Harris, in turn, is shown to have selected and employed the manager of respondent Zero LP-Gas Company, and to have directed the latter's sales policies and practices. Respondent Zero LP-Gas Company was therefore merely an instrumentality of its parent corporation. Respondent Butane Wholesale Gas Company purchased LP-Gas beyond the borders of Arkansas, and sold it through its instrumentality, respondent Zero LP-Gas Company, in the Lake Village area of Arkansas. We must conclude, therefore, that the acts and practices of both respondent Butane Wholesale Gas Company and its subsidiary, respondent Zero LP-Gas Company, which were performed in the marketing area of Lake Village, Arkansas, were performed as part of interstate transactions, over which the Federal Trade Commission has jurisdiction.

The Acts and Practices of Respondent Zero LP-Gas Company and Public Interest Therein

Counsel for the respondent further contends that the acts and practices engaged in by the respondent in the sales territory of Lake Village, Arkansas, during 1952 and 1953 were not unfair and that no public interest inheres therein. The evidence relating to the first of the above contentions applies equally to the second. Accordingly, the two contentions will be considered together, for the purpose of determining whether respondent Zero LP-Gas Company, Lake Village, Arkansas, during the years 1952 and 1953, sold LP-Gas, as alleged in the complaint, in that trading area at "unreasonably low prices with the intent, purpose and effect of injuring, restraining, suppressing and destroying competition in the resale of LP-Gas in the Lake Village, Arkansas territory between themselves and competing retail sellers of LP-Gas," and whether there is any public interest in the further prosecution of this proceeding.

To resolve these issues it is necessary to understand the geographi-

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cal area in which the alleged unlawful acts and practices occurred, the marketing methods employed therein, the number and relative financial strength of the wholesalers supplying that area with LP-Gas, and the number and relative financial strength of the retailers competing in the resale of such gas in that area.

The Southeast Arkansas area in which Lake Village is located is a fertile valley, inhabited by prosperous farmers who constitute an excellent potential market for LP-Gas. This area is served by respondent Butane Wholesale Gas Company and nine wholesaler-competitors: Phillips Petroleum Company, Gulf Petroleum Company, Gulf Refining Company, Magnolia Petroleum Company, Pan-Am Southern, Beacon Petroleum Company, Lion Oil Company, Taluma or Stanlund Oil, and Anchor Petroleum Company. Most of the companies named are financially stronger than respondents Butane Wholesale Gas Company and Warren Petroleum Corporation together.

At the retail level, there are in this area twelve competitors of respondent Zero LP-Gas Company, as follows: Lion Oil Company, and Tucker, at Hamburg; Grisham and Eudora, at Dermott; McCormick at Oak Grove; Oerbner, successor to Tims, at McGehee; Jones at McGehee; Ottis Cash at Warren; Magnolia Petroleum Company at Lake Village; Mathews and Leek, at Dumas; and Riley at Monticello. Five of these twelve retail dealers are shown to have had a much larger sales volume during the years in question than was enjoyed by respondent Zero LP-Gas Company.

Production of LP-Gas from oil and gas wells is relatively constant throughout the year. The consumption of that product, however, varies greatly between the summer and winter seasons. During the summer much less gas is used than is produced, whereas the winter consumption is relatively much greater. This fact necessitates storage of a considerable quantity of gas produced in the summer for winter consumption. Since storage facilities are limited, the wholesalers endeavor to devise means to increase the sale of LP-Gas in the summer. For that purpose, they have established a quota system by which they agree to sell to each of their retailer customers 11½ gallons of gas during the winter for every gallon bought by the retailer during the summer. This quota system causes the retailer, in turn, to endeavor to increase his sales of LP-Gas to his consumer-customers in the summer, even at prices only high enough to meet current expenses, in order that he may be entitled to purchase from the wholesaler as much gas as possible for resale at the high winter prices. The retailers assert that their

annual profits depend not so much on summer prices as on the average price throughout the entire year.

The evidence shows that Mr. Harris, President of respondent Butane Wholesale Gas Company, started selling LP-Gas in Southeast Arkansas in about 1935, at which time he was the only such dealer in that State. By 1952, although the volume of his business had increased yearly, competition had so grown that, instead of 100% as in 1935, he was selling during 1952 only approximately one-third of the LP-Gas sold in Arkansas.

These statistics do not, however, reflect the volume of this business in the Lake Village, Arkansas, area, with which we are presently concerned. This is true because in 1951 Mr. Harris lost his retail outlet there. His subsequent efforts to regain an outlet in that area, and the resulting opposition thereto, formed the basis for Count II of the complaint. In order, however, to view the events of 1952 and 1953 in their proper perspective, we must consider briefly certain other events precedent thereto.

In 1948, a Mr. Brazil, who was operating as a retail dealer in LP-Gas in Dermott, Southeast Arkansas, and serving as an outlet in that area for Mr. Harris, owed Mr. Harris \$27,000. Mr. Brazil, with the consent of Mr. Harris, sold his retail business to Mr. Lamar Grisham for the sum of \$37,500, of which Grisham paid \$10,000 in cash and gave notes for the balance of \$27,500. Because of Mr. Brazil's indebtedness to Mr. Harris, Grisham's notes in the amount of \$27,500 were assigned to him. Thereafter, in the winter of 1951, Mr. Harris' supply of LP-Gas was curtailed and he failed to deliver his various quotas of LP-Gas to his customers, including Mr. Grisham. Partly as a consequence of that failure, and partly because Mr. Grisham could get LP-Gas cheaper from the Phillips Petroleum Company, Mr. Grisham stopped buying LP-Gas from Mr. Harris and started buying it from Phillips Petroleum Company.

This series of events left Mr. Harris and his Butane Wholesale Gas Company without a retail outlet for LP-Gas in a territory in which Mr. Harris had been a pioneer, and, at one time, the only distributor. He tried without success to buy an interest in several outlets. Failing in this, he then organized Zero LP-Gas Company, employed a manager therefor, and, in April of 1952, established that company as a retail distributor of LP-Gas in Lake Village, Arkansas, where until then there had been no LP-Gas dealer. Mr. Harris testified that he told his manager that he wanted to be competitive in the retail sale of LP-Gas, but he also wanted to make money. He instructed his manager to find out what the "going price" was in the area, and to sell at that price. Thereafter respondent Zero LP-Gas

Company published a price of 8¢ per gallon for LP-Gas to commercial buyers, and 11¢ per gallon to domestic buyers. Although the testimony is somewhat confused as to the prevailing price for commercial buyers, there seems to be no doubt that all the dealers in the area were charging domestic buyers 12¢ a gallon for LP-Gas, with 1¢ discount for payment within ten days. Respondent Zero LP-Gas Company sold no gas to commercial buyers during the first two weeks of its existence, and at the end of the first month its total sales to this class of customer equaled only \$440.00, while its sales to domestic buyers were \$285.00, not enough to pay operating expenses, even if the gas had cost Zero nothing. Thereafter, on May 15th, respondent Zero LP-Gas Company lowered its price to commercial buyers to 7¢ per gallon, and made its first sale at that price to Powell Brothers. The evidence indicates that this lowering of the price by respondent Zero LP-Gas Company followed a price-cut by dealer Tims, who had already lowered his price to 6½¢ a gallon, in a sale made to Powell Brothers. Mr. Harris testified on this point that he called upon Powell Brothers and was told by them that he might have their entire business if he would lower his price from 7¢ to 6½¢ per gallon, but that he declined to do so.

The testimony shows that because of the proximity of large refiners to this area, the price of gas there always tended to be lower than in other areas in Arkansas; in fact, the Lake Village, Arkansas area was described as the "dumping ground" for cheap gas. It is not surprising, therefore, that price competition in this area was keen, and that numerous price wars had been waged. In fact, the record shows that such a price war was begun by dealer Tims in 1949, and finally ended in some form of collusive agreement as to price among the dealers. Furthermore, the record shows that the farmers of this area, who purchased gas at wholesale, were sharp bargainers, and that they sought, at times with considerable success, to play one dealer against another for the purpose of buying gas at the lowest possible price.

In 1952, following the entry of respondent Zero LP-Gas Company into the market in the Lake Village, Arkansas Area, competition was intensified. In the spring of 1953, the retail distributors of LP-Gas in this area, most of whom appeared as witnesses in this proceeding, held a meeting in the law office of one Leffel Gentrys. Mr. Harris testified concerning this meeting that the group there attending asked him to join with them in agreeing to fix prices, and refused to do so. He testified further, however, that he told them, "If you fellows are going to raise the price, I want to get all I can for gas, and I'll go along with you." Although the record herein is not clear

as to just what occurred at this meeting, immediately thereafter the dealers all raised the price of LP-Gas to their commercial customers to 8½¢ per gallon, and Mr. Harris then followed suit.

The period from 1949 through 1953, in the Lake Village, Arkansas trading area, is marked by increasing competition, personal hostilities, and private law-suits. Dealers Tims and Mathews are described as price-cutters. In 1949, Mr. Grisham quarrelled with dealer Tims and lodged two complaints against him for infringement of law. During this period Mr. Grisham also quarrelled with his partner, Mr. Mathews. Hostility developed between Mr. Grisham and Mr. Harris, and some of the witnesses testified that Mr. Harris had asserted that he was "out to get Grisham." The evidence shows, however, that Mr. Harris did no overt act designed to destroy Mr. Grisham's business. In fact, in 1952, when respondent Zero LP-Gas Company sold 276,000 gallons of LP-Gas in the area, Mr. Grisham sold 1,750,000 gallons, making a \$41,000 profit for his organization and earning \$22,000 for himself, after taking a depreciation of \$12,000 on his investment of \$37,500. Such profits are hardly consistent with a claim of substantial injury resulting from the competition of respondent Zero LP-Gas Company.

The evidence also shows that respondent Zero LP-Gas Company was not operated by Mr. Harris as a subsidized loss operation for the purpose of driving other dealers out of business. During 1952, respondent Zero LP-Gas Company made a profit of \$2,000, and during 1953, one of \$18,000. Furthermore, it is apparent that the establishment of a monopoly by Mr. Harris in the area in question was practically impossible, since to do so he would not only have had to drive out of business 11 or 12 retail dealers, five of whom were shown to be larger than respondent Zero LP-Gas Company, but he would also have had to drive from the area eight wholesalers, including such economic giants as Gulf Oil Company, Phillips Petroleum Company, and Lion Oil Company. The evidence shows that no one was in fact driven out of business, nor did respondent Zero LP-Gas Company ever post a serious threat to anyone's economic existence in that area.

The evidence shows, furthermore, that the lowest price at which respondent LP-Gas Company sold gas in this area during the time in question was 7¢ per gallon, which was not, as alleged, 3¢ to 4¢ under the prevailing retail price in that area, but in fact was ½¢ higher than the price at which at least one competing dealer was selling LP-Gas, namely, 6½¢ per gallon. Therefore the evidence, even when viewed in the light most favorable to the allegations contained in Count II of the complaint, indicates only that respondent

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Zero LP-Gas Company lowered its price to meet competition, in order to survive in a very competitive trading area.

CONCLUSIONS

It must be concluded that the allegations of the complaint have not been sustained by the evidence; that there is no public interest in the further prosecution of this proceeding; and that, therefore, the complaint herein should be dismissed. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

This is an appeal by counsel supporting the complaint from a decision and order of the hearing examiner, entered at the conclusion of the testimony in support of the complaint, dismissing Count II.

Count II, Paragraph 18, is as follows:

During the years 1952 and 1953, respondents Warren Petroleum Corporation, Butane Wholesale Gas Company and Zero LP-Gas Company, Lake Village, Arkansas, collectively and severally, through the instrumentality of respondent Zero LP-Gas Company, Lake Village, Arkansas, sold LP-Gas in the Lake Village area at 7 cents per gallon to industrial consumers, and at 9 cents to 10 cents per gallon to domestic consumers, which prices were from 3 to 4 cents per gallon under the prevailing retail market in the Lake Village territory, and lower by the same amounts than the prices charged in other areas in Arkansas by other retail subsidiaries and affiliates of respondents Butane Wholesale Gas Company and Warren Petroleum Corporation.

It is alleged that the aforementioned sales by respondents in the Lake Village, Arkansas territory were made at unreasonably low prices with the intent, purpose and effect of injuring, restraining, suppressing, and destroying competition in the retail sale of LP-Gas in the Lake Village, Arkansas territory, between themselves and competing retail sellers of LP-Gas. The effect and result of said sales by respondents have been, and are now, unduly and substantially to injure, restrain and suppress competition between respondents and their competitors in the retail sale of LP-Gas in the Lake Village, Arkansas trading territory and tend to create in respondents, and especially in said wholly owned subsidiary Zero LP-Gas Company, a monopoly in the sale of LP-Gas in the Lake Village, Arkansas trading area.

Complaint further alleges that the pricing practices of respondents as alleged in Paragraph 18 cause injury to the public and to respondents' competitors and constitute an unfair method of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

Warren Petroleum Corporation, at the time in question, owned 51% of the stock of Butane Wholesale Gas Company, which in turn owned all the stock of Zero LP-Gas Company. Basis of the alleged

liability of the first two named corporations is their claimed control over Zero through this parent-subsiary relationship.

Considerable testimony was introduced concerning the allegations of Count II. This included evidence of (1) the general nature of the liquid petroleum gas business, (2) the competitive situation in the area in question and in other areas, (3) the prices of the various competitors, (4) relationship of the parties to each other, and other matters.

Liquid petroleum is a liquid product transported by rail or truck to local areas, where it is stored in special tanks and released as a gas for use domestically as a fuel for heating and refrigeration and industrially as a fuel for heating and power purposes. The locality involved is the Lake Village area, consisting of the town of Lake Village and surrounding community, all in the southeastern part of Arkansas. Included in this area are many farmers who buy much of the product for use in farming operations. Most of this industrial use is in the summer.

Refineries and other sources of supply are nearby. The supply is constant during the year. However, because of the heating requirements, the demand is greater in the winter. Because of storage difficulties, great effort is made to build up consumption in the summer. As part of that endeavor, a quota system has been established under which a retailer is furnished one and one-half gallons of gas during the winter for every gallon bought during the summer. The industrial users buy in larger quantities and, because of the competitive situation, are in a good bargaining position on price. The whole situation thus makes for active competition for the industrial business and gas for such purpose is sold cheaper than is gas for domestic use.

The period of time involved in the complaint includes parts of 1952 and 1953. During that period, the area in question was served by respondent Butane Wholesale Gas Company and nine wholesale competitors. In the retail field, and in addition to respondent Zero LP-Gas Company, there were twelve others, all to some extent in competition with each other.

The general nature of the competitive situation is well illustrated by a brief resume of happenings prior to 1952 which was the year in which respondent Zero LP-Gas Company began operations. In 1935 Mr. B. T. Harris was the only dealer in LP-gas in Arkansas. The coming of other competitors reduced his percentage of business until in 1952 he was selling about one-third of the product in Arkansas. Nevertheless, Mr. Harris was at all times prominent in

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the business and, on May 25, 1950, he and his wife owned substantially all the capital stock in three corporations, to wit, Butane Wholesale Gas Company, Harris Distributors, Inc. and Butane Gas Company. The last two corporations owned respectively two and three subsidiary corporations operating in Arkansas. In 1950 respondent Warren Petroleum Corporation bought a majority of the stock in the three Harris corporations. Mr. Harris, however, remained active in the operation of the corporations.

About 1948, Grisham bought from Brazil (Harris' retailer) the retail business located at Dermott and several other points. The deal involved Harris because he was a creditor of Brazil. Thereafter, Grisham and Harris had considerable disagreement in a business way. There was also sharp competition between other dealers which sometimes lead to price wars, law suits and personal feuds. For example, in 1949 Tims, a dealer in Mississippi, entered the retail business in Arkansas and for a time retailed industrial gas for 6½¢ per gallon. He claimed at the trial that his audit showed he was selling at a profit although that matter is in dispute. In any event, Grisham set in motion the machinery of local law enforcement which resulted in Tims being fined \$75 and in other troubles. Thereafter, Tims, Grisham and other dealers met in the office of Grisham's attorney. After that meeting, the prices went back to 8½¢ and the troubles seemed to be over.

In 1951 Grisham stopped buying gas from respondent Butane Wholesale Gas Company and began buying from Phillips Petroleum Company. Having thus lost his only retail outlet in southeast Arkansas, Harris then incorporated Zero LP-Gas Company which, on April 18, 1952, began the sale of gas from its retail store in Lake Village.

At the time of the entry of Zero into the market, the prevailing price of gas in the Lake Village area was 9¢ for industrial use and 12¢ for domestic purposes. A discount of 1% from the latter price was usually given. It also appears there were other variations from prices depending upon the particular competitive situation. Mr. Harris claims that he instructed his manager at Lake Village to sell at the "going price", as he wanted to be competitive, but he also wanted to make money. Zero's first announced prices were 8¢ industrial and 11¢ for domestic gas. During the first months, Zero did not sell enough gas to make expenses. On May 15, it lowered its prices on industrial gas to 7¢ making the first sale to Powell Brothers. In this sale, it was in competition with Tims and there is a controversy as to who first made the price cut. In any event, it appears

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that each endeavored to meet the competition of the other. There is also evidence that other retailers were importuned to reduce their prices to meet claimed lower offers of Zero. It also appears that some Arkansas companies in nearby localities were selling at higher prices than prevailed in Lake Village.

There is some evidence as to the cost of gas to the retailers. This feature is somewhat complicated by the apparent lack of adequate figures as to transportation costs and also by the fact that industrial sales were at a substantially lower margin of profit, for the purpose of building up a quota for the more profitable and stable winter business. There is also evidence that Harris entertained ill-will toward Grisham and the record contains statements by Harris and his associates that they intended to ruin Grisham. However, in 1952, Grisham sold in the area at least four times as much gas as Zero and his sales showed a steady increase from 955,000 gallons in 1948 to 1,750,000 in 1952, and 1,800,000 in 1953. During 1952 Grisham's organization made a profit of \$41,000 while Zero made a profit of \$2,000. In 1953 the latter organization made a profit of \$18,000.

While there is evidence of individual switching of customers, it does not appear that any competitor was substantially injured or that competition on the whole was injured.

Early in 1953, many of the retail distributors in the area involved met in the office of an attorney, apparently for the purpose of discussing the situation. What happened there was not accurately preserved for history; however, it does appear that shortly after the meeting, the price of industrial gas was raised by all retailers to 8½¢.

Counsel supporting the complaint very properly points out that in passing on the motion to dismiss, the evidence must be viewed in the light most favorable to the complaint. We have endeavored to do that and our conclusion is that the hearing examiner correctly dismissed the complaint as to Count II.

Other matters affecting the liability of respondents Warren Petroleum Corporation and Butane Wholesale Gas Company are discussed in the initial decision. In view of our conclusion as to respondent Zero LP-Gas Company, we find it unnecessary to pass upon these matters.

It is therefore ordered that the appeal of counsel supporting the complaint be dismissed and that an order issue accordingly.

FINAL ORDER

Counsel supporting the complaint having filed an appeal from the initial decision of the hearing examiner insofar as said decision

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dismisses Count II of the complaint; and the matter having been heard on briefs and oral argument; and the Commission having rendered its decision dismissing the appeal:

It is ordered, That the initial decision of the hearing examiner dismissing the complaint in its entirety be, and it hereby is, adopted as the decision of the Commission.

Decision

IN THE MATTER OF
I. J. FOX, INC., ET AL.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATIONS OF THE FEDERAL
TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS*Docket 6558. Complaint, May 25, 1956—Decision, Sept. 19, 1956*

Consent order requiring a Cleveland furrier of fur products to comply with the advertising, labeling, and invoicing requirements of the Fur Products Labeling Act.

Mr. Terral A. Jordan for the Commission.

Mendelsohn, Krottinger & Lane, by *Mr. Leonard Lane*, of Cleveland, Ohio, for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint herein was issued on May 25, 1956, alleging that the Respondents are, and subsequent to August 9, 1952, the effective date of the Fur Products Labeling Act, have been using unfair and deceptive acts and practices in commerce by misrepresenting certain of their fur products in newspaper, radio and television advertisements; by misbranding and falsely and deceptively invoicing such products; and by failing to maintain full and adequate records disclosing the facts upon which such representations were based, in violation of the Fur Products Labeling Act, the Rules and Regulations promulgated thereunder, and the Federal Trade Commission Act.

On August 7, 1956, no answer to the complaint herein having been filed, Respondents, their counsel, and counsel supporting the complaint entered into an Agreement Containing Consent Order To Cease And Desist, which was approved by the Director of the Commission's Bureau of Litigation, and thereafter submitted to the Hearing Examiner for consideration.

Respondent I. J. Fox, Inc. is identified in the agreement as an Ohio corporation, with its office and principal place of business located at 328 Euclid Avenue, Cleveland, Ohio, and Respondents Charles K. Fox and Max Weisman, respectively, are identified as president and secretary, and vice president and treasurer, thereof, having their office at the same address as the corporate Respondent.

Respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.