

IN THE MATTER OF
EXQUISITE FORM BRASSIERE, INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SECS. 2(d) AND 2(e) OF THE CLAYTON ACT

*Docket 6966. Complaint, Nov. 29, 1957 *—Decision, Oct. 31, 1960*

Order requiring an industry leader in the manufacture and sale of brassieres, with annual sales in excess of \$10 million, to cease discriminating in price between competing customers in violation of Secs. 2(d) and 2(e) of the Clayton Act by paying advertising allowances and furnishing "stylists" to certain large retailer customers while not making either available on proportionally equal terms to competing smaller customers.

Peter J. Dias, Esq., and Robert G. Cutler, Esq., for the Commission.

James W. Cassedy, Esq.; Robert B. Dawkins, Esq., and Peyton Ford, Esq., of Washington, D.C., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

STATEMENT OF THE CASE

On November 29, 1957, the Federal Trade Commission issued its complaint against Exquisite Form Brassiere, Inc., a corporation (hereinafter called respondent), alleging that respondent had violated Section 2(d) of the Clayton Act (hereinafter called the Act), 15 U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act. Copies of said complaint together with a notice of hearing were duly served on respondent.

Respondent appeared by counsel and filed an answer admitting the corporate, commerce, and most of the factual allegations of the complaint but denying any violation of the Act. Pursuant to notice, hearings were thereafter held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at various times and places from June 9, 1958, to December 29, 1958.

At the conclusion of the case-in-chief, counsel supporting the complaint moved the undersigned to certify to the Commission their motion to amend the complaint to also allege a violation of Section 2(e) of the Act, in view of the proof received. Counsel for both parties and the undersigned being of the opinion that such an amendment was not "reasonably within the scope" of the original complaint, as required by Section 3.9 of the Commission's Rules

* Amended and Supplemental Complaint, Aug. 1, 1958.

of Practice, said motion was certified to the Commission. On August 1, 1958, the Commission granted the motion and issued its amended and supplemental complaint, alleging violations of Sections 2 (d) and (e). The Commission's order further provided that the evidence theretofore introduced should have the same force and effect as though received under the complaint as amended, and that respondent be accorded such procedural rights as the undersigned deemed appropriate and necessary.

Respondent was accorded the right to, and did, recall witnesses for further cross-examination in the light of the amended complaint, and thereafter presented its defense, none of which had been proffered prior to the amendment of the complaint. Every procedural right which respondent could have been afforded had the complaint originally alleged violations of Sections 2 (d) and (e) was accorded.

The amended and supplemental complaint alleges, in substance, that respondent paid for services furnished by some customers and that such payments were not available on proportionally equal terms to competing customers, in violation of Section 2(d); and that respondent furnished services to some purchasers upon terms not accorded to competing purchasers on proportionally equal terms in violation of Section 2(e).

Both parties were represented by counsel, participated in the hearings, and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. Because of the untimely demise of both Messrs. Cassedy and Dawkins, several extensions of time for the filing of proposed findings were granted, finally terminating September 15, 1959, at which time both parties filed their proposed findings of fact and waived oral argument thereon. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith specifically rejected.¹

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondent

The complaint alleged, respondent admitted, and it is found that respondent is a New York corporation with its principal

¹ 5 U.S.C. § 1007(b).

office and place of business located at 159 Madison Avenue, New York City, New York.

II. *Interstate Commerce*

The complaint alleged, respondent admitted, and it is found that it is now, and for many years past has been, engaged in the manufacture, sale and distribution of brassieres. In the course and conduct of its business respondent is now, and has been, engaged in commerce, as "commerce" is defined in the Act, having shipped its products or caused them to be transported from its principal place of business in the State of New York to customers located in other states of the United States and the District of Columbia. Volume and dollar-wise, respondent is a leader in the industry, with sales in excess of \$10,000,000 annually. Respondent sells its products to various customers and purchasers, such as department stores, women's specialty stores, and dress shops, with places of business located in various cities throughout the United States, who were and are engaged in the resale of respondent's products at retail to the purchasing public.

III. *The Unlawful Practices*

A. Paying for services furnished by customers. (Section 2(d))

Section 2(d) makes it illegal for any person engaged in commerce to

* * * pay * * * to a customer * * * for any services * * * furnished by or through such customer in connection with the * * * sale * * * of any products * * * manufactured * * * by such person, unless such payment * * * is available on proportionally equal terms to all other customers competing in the distribution of such products. * * *

The facts with respect to this issue are substantially undisputed and for the most part admitted. Since 1954 respondent has had in effect a cooperative advertising plan, with various changes from time to time as hereinafter set forth, under which it pays, by means of credit memoranda applicable to current or future invoices, a portion of the cost of newspaper advertising placed by its larger customers and featuring respondent's products. From August 30, 1954, to January 25, 1956, if a customer would place such an advertisement of at least 400 lines in a recognized newspaper, respondent would pay 60 percent of the cost. If within six months the customer placed at least five such advertisements, respondent would pay 70 percent of the cost of all of them. If at least eight advertisements were placed within six months, respondent would pay 80

1036

Findings

percent of the cost of all of them. No payments were made for any smaller advertisements or in any other media.

From January 26, 1956, to July 1, 1957, the lineage requirement was changed to 200 lines and respondent would pay 50 percent of the cost of each advertisement; for successive advertisements within a three-months' period, 60 percent for two, 70 percent for three, and 80 percent for four. From July 1, 1957, to the date of the hearings, respondent's plan was changed so that it would pay 50 percent on all such advertisements regardless of the number placed, with the same 200-line and media requirements.

The record establishes that this plan was designed for, and offered only to, the larger accounts. The specific terms of the cooperative advertising plan, particularly the requisite size of the advertisement, made it inapplicable to smaller accounts which never did enough business in respondent's products to justify or even pay for advertising expenditures in such amounts. In fixing the terms of its advertising program, respondent of course knew that its smaller accounts could not afford an advertisement of the requisite size devoted to one product when the account's share of the cost would in all probability exceed its total gross profit on the sale of such product.

In the terms of the statute, the payments must be available upon proportionally equal terms to all competing customers. It follows that if they are not available or offered to all such, no matter how equal the terms otherwise may be, the statute is violated. Both requisites are necessary—availability to all and proportionally equal terms to all. It is settled law, and indeed respondent's counsel concedes, that the term "available" as used in § 2(d) means that the payment must be offered, and the terms made known, to all competing customers.² That which is not made known or that which is not offered cannot be considered as available. The choice must be that of the customer, not the seller. Any other interpretation would make evasion of the statute simplicity itself.

The record here establishes that the respective plans were not offered and were not made known to many of respondent's customers competing with those to whom such payments were made. Counsel supporting the complaint called a number of respondent's customers located in Paterson, Plainfield, and Trenton, New Jersey, who testified that they were never offered cooperative advertising allowances by respondent and had never received any. Some of these customers testified that they had been informed of the existence of a

² *Kay Windsor Frocks, Inc.*, 51 FTC 89 (1954); *Henry Rosenfeld, Inc.*, 52 FTC 1535 (1956); *Chestnut Farms-Chevy Chase Dairy*, 53 FTC 1050, Docket No. 6465 (1957).

Findings

57 F.T.C.

plan at its inception, but had never been advised of its terms and specifically the changes occurring in 1956 and 1957. The record further establishes that respondent did pay such advertising allowances to various customers in each of the three cities who were in direct competition in the resale of respondent's products with the customers who were not offered the plan. Both the testimony of the customers who were not offered the plan and their geographic proximity to the location of the stores which were paid advertising allowances establish that they were in fact in direct competition with each other in the resale of respondent's products.³

As the Commission said in the *Rosenfeld* case, *supra*:

* * * Under the Act, an allowance cannot be deemed "available to a reseller, * * * when a seller fails to inform or otherwise offer promotional allowances to a customer * * *.

and also in the *Chestnut Farms Dairy* case, *supra*,

* * * Whether or not a customer participates therein is a decision for the customer. The customer obviously must know the specific terms of a plan before he can determine whether he is interested in participating. * * *

Respondent's cooperative advertising plan in fact was not designed or intended for the use of its smaller customers. As found above, many of them were never offered the plan, and, while many of them knew in general that cooperative advertising existed in the industry, they were never told of respondent's terms, which changed three times from 1954 to 1957. Respondent argues that its second plan, the one adopted in 1956, was given some publicity in trade journals and hence was known to its customers. Aside from the question of who did or did not read such articles, such general publicity cannot be equated with an offer and actual knowledge of the terms, so as to be "available" within the meaning of the statute.

Respondent also contends that it offered the plan to all of its customers orally through its salesmen, but the undisputed testimony of many customers was that they were never offered the plan, and of other customers, that while they were informed of the original plan, they were never advised of the terms of the second or third plans. Respondent called no salesmen to refute this testimony and hence it stands undisputed. While it is apparent that many of respondent's smaller customers economically could not have made use of the cooperative advertising because of the required size of the advertisement, it also seems obvious that at least some of them might have been able to make use of it when the requisite size was

³ *Elizabeth Arden v. F.T.C.*, 156 F. 2d 132 (C.A. 2, 1946); *F.T.C. v. Simplicity Pattern*, 360 U.S. 55 (1959); and *Liggett & Myers Tobacco Co., Inc.*, 56 FTC 221, Docket No. 6642 (1959).

reduced from 400 to 200 lines in 1956. Yet it is undisputed that they were never informed of this change.

While the Commission in the *Lever Brothers* and the so-called *Soap* cases,⁴ held that every feature of a plan need not be useful to all in order for it to be upon proportionally equal terms, this holding was limited to situations where reasonably equal alternatives are available. As the Court of Appeals pointed out in the recent *State Grocers* case,⁵ a plan (of exactly the same type as herein) whose terms by their nature cannot be used by all competing customers is not "available," and is tantamount to no offer at all. In the *Soap* cases, alternative advertising allowances were made known and available to all. The teaching there is that all parts of an offer do not have to be usable by all, but only when and if a reasonable alternative of proportionally equal terms is available. Unless such special circumstances exist, the more recent holding in the *State Grocers* case, *supra*, must prevail—namely, that a plan which is not usable by all, with no alternatives of proportional equality, is not available to all within the meaning of the statute.

In an attempt to establish a reasonable alternative, respondent argued that its premium plan, and/or the furnishing of counter display material and store dispensers for its products, were available alternatives upon proportionally equal terms. The argument is without merit. With regard to its premium plan, hereinafter described, in the first place, and most importantly, the record establishes that it was not in effect during most of the time encompassed by the cooperative advertising allowances. The premium plan was discontinued in January 1955, renewed in June of 1955, and then discontinued permanently in January 1956. Throughout nearly half of 1955, substantially all of 1956, and ever since it has not been in existence. That which does not exist cannot be an alternative. Secondly, even when it existed it was not proportionally equal—it did not constitute a form of advertising allowance such as the various alternatives in the *soap* case did. Thirdly, it was not an alternative since it was neither offered nor made available to all. It was neither offered, nor made available, to those accounts receiving advertising allowances.

The premium plan consisted of a system of points awarded to customers, one for each \$10 worth of goods purchased from respondent. It required the accumulation of 30 points, or a minimum of \$300 in purchases, before any premium or prize was earned. Conversely, no minimum purchases were necessary under the co-

⁴ *Lever Brothers Co.*, 50 FTC 494 (1953); and companion cases.

⁵ *State Wholesale Grocers v. A & P Company*, 258 F. 2d 831 (C.A. 7, 1958).

operative advertising plan. Additionally, no one could seriously argue that an ice bucket, a pressure cooker, an iron, a percolator, a carving set or a bridge set were reasonable alternatives of proportional equality with hundreds of dollars worth of promotional advertising. In short, the premiums were neither available nor proportionally equal within the meaning of the statute.

In addition to establishing that advertising allowances were not made available to all competing customers, the record also establishes that even among those to whom they were made available the plan was not adhered to and they were not upon proportionally equal terms. A number of instances were established where respondent deviated from its stated percentages in Paterson, Plainfield and Trenton. Some customers were paid 80 percent of the costs of ads when they were only entitled to 50 percent under the terms of the plan; some were paid percentages not even set forth in the plan, such as 75 and 77 percent; and some were paid only 50 percent when they were entitled to a larger amount because of placing the requisite number of ads during the specified periods of time. In each instance these variations occurred among customers competing in the resale of respondent's products. The record also establishes that in one instance respondent granted "push" or "prize" money to one customer's sales personnel in the amount of 11 cents per brassiere sold during a specified period of time, without according such allowance to any of respondent's competing customers.

Respondent's contention that its furnishing of display material and store dispensers constitutes a proportionally equal alternative is entitled to even less consideration. Inasmuch as such materials were offered and furnished to all customers who desired them regardless of participation in the cooperative advertising or the premium plan, they were in no sense alternatives but were general promotional services available to all. Even if such facilities had been offered as alternatives, which they were not, quantitatively they could not be considered proportionally equal. In addition, it would appear to be an attempt to make Section 2(e) "services" a substitute or alternative for Section 2(d) "payments"; Section 2(d) encompasses paying for services furnished by a customer, whereas § 2(e) encompasses services furnished by the seller to the customer, which would include the furnishing of store dispensers and display material. Section 2(d) expressly provides that such payments for services furnished by a customer are illegal unless *such payment* is available on proportionally equal terms to all other customers competing. This means what it says: an alternative must be the

payment for services furnished and not the furnishing of services by the seller to the customer. Such payment, not something else, must be available on proportionally equal terms.

In addition to the foregoing defenses, respondent also argued that its cooperative advertising allowances were made in good faith to meet competition. It is now well settled that the good faith meeting of competition defense set forth in Section 2(b) is not applicable to Section 2(d).⁶

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent has paid and contracted to pay for advertising services furnished by or through some of its customers in connection with the sale or offering for sale of its products by such customers, without making such payments available on proportionally equal terms to all other customers competing in the distribution of its products, in violation of Section 2(d) of the Act.

B. Furnishing services to purchasers. (Section 2(e))

Section 2(e) makes it illegal to

* * * discriminate in favor of one purchaser against another * * * of a commodity bought for resale * * * by * * * furnishing * * * any services * * * connected with the * * * sale * * * of such commodity * * * upon terms not accorded to all purchasers on proportionally equal terms.

The terminology of the Section and the decisions of the Commission and the courts make it clear that the term "accorded" used in Section 2(e) has substantially the same meaning as the term "available" used in Section 2(d). For the same reasons as expressed hereinabove, the services supplied by respondent must be offered and made known to all purchasers, or they cannot be considered as having been accorded to all as required by the statute. Although Section 2(e) does not contain the limitation found in 2(d), that the purchasers or customers to whom the services must be accorded be competing in the resale of the products, the decisions of the Commission and the courts uniformly have so construed it.

As with respect to the 2(d) count, the facts are substantially undisputed. During the same period of time in the course and conduct of its business, respondent has furnished to some of its purchasers the services of special personnel known as "stylists." These "stylists," perhaps more commonly known as "demonstrators," are employed and paid by respondent and furnished to some of its customers at their stores to assist in the demonstration and sale of

⁶ *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *A & P Tea Co. v. F.T.C.*, 106 F. 2d 667 (C.A. 3, 1934); and *Henry Rosenfeld, Inc.*, 52 FTC 1535 (1956).

Findings

57 F.T.C.

respondent's products and the education of its customers' sales personnel. As in the case of cooperative advertising, the record establishes that respondent furnished stylists only to its larger accounts. They were not offered or made available to many of respondent's smaller accounts in direct competition with such favored accounts in the resale of respondent's products.

Much of the testimony concerning the furnishing of stylists came into the record prior to the amendment of the complaint, when Section 2(e) was not in issue and the issue at that point was 2(d). The testimony of respondent's officials reveals that the stylist program was never intended to be available or offered to all of its customers, but was a special program designed to promote sales in the largest stores of respondent's customers. Respondent sells nationally and has the country divided into from ten to fourteen districts. It employed only four to six stylists. They were assigned on an equal basis to each district, so that each individual district would have use of a stylist for approximately six months. Respondent's officials conceded that its district managers assigned stylists to purchasers in their territory as they saw fit, and that it would be completely impractical to furnish them to every customer who wanted them. They also conceded that it was not intended that the program would be available to all customers. Prior to the amendment of the complaint to include Section 2(e), it was frankly conceded that the stylist program was adopted as a promotional device to enhance respondent's sales.

The record establishes that respondent furnished stylists to customers in Plainfield and one customer in Trenton while not offering or furnishing such stylists to all other competing customers in those areas. While respondent's answer affirmatively alleged that it had made the services of stylists available on proportionally equal terms to all its competing customers, respondent's principal defense to the 2(e) charge appears to be that it furnished such services as a good faith meeting of competition. Actually its position in this respect is inconsistent inasmuch as if it furnished or offered the services of stylists to all of its customers, then it could not have been limiting the furnishing of such stylists to a good faith meeting of services furnished by competitors, since the record establishes and respondent concedes that such stylists were not furnished by competitors to the smaller stores and accounts among respondent's customers.

Inasmuch as the record establishes beyond dispute that such services were not offered or accorded to all competing purchasers, the only defense necessary to consider is that of the good faith meeting of competition. Counsel supporting the complaint suggest

1036

Findings

in their brief that the good faith meeting of competition defense in Section 2(b) is not applicable to Section 2(e) as a matter of law, suggesting that the holdings of the Commission and the Court of Appeals to the contrary in the *A & P Tea Co.* and *Rosenfeld* cases⁷ were *dicta*. Be that as it may, the issue has been definitively settled by the recent decision of the Supreme Court in the *Simplicity Pattern* case,⁸ where the Court specifically held that the good faith meeting of competition defense set forth in Section 2(b) does apply to Section 2(e), although it does not to Sections 2(c) and 2(d). Section 2(b) provides, *inter alia*:

* * * Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

With respect to this very point, the Supreme Court held:

Thus a discrimination in prices may be rebutted by a showing under any of the Section 2(a) provisos, or under the Section 2(b) proviso—all of which by their terms apply to price discriminations. On the other hand, the only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the Section 2(b) proviso.

There can no longer be any question but that the proviso in 2(b) is applicable to Section 2(e).

As counsel supporting the complaint points out, this necessitates applying the tests which have been applied to Section 2(b) in order to determine whether or not respondent's furnishing of stylists was in fact a good faith meeting of the furnishing of such services to a purchaser by a competitor. It is settled law that the good faith meeting of competition defense is restricted to individual competitive situations and does not apply to a plan or system.⁹ In other words, in the language of the statute, the meeting of competition must be defensive in order to meet an offer made to one's customer and thus prevent the loss of such a customer, rather than be aggressive, or a system designed to meet competition generally as distinguished from individual offers to customers.

The situation here was exactly the opposite. Before the complaint was amended, respondent's testimony frankly revealed that the plan was designed as an aggressive tool to promote the sales of its products. The very method by which it was set up, limiting the stylists to an equal amount of time in each district and permitting their use by each district manager as he saw fit would prevent its

⁷ See footnote 6, *supra*.

⁸ See footnote 6, *supra*.

⁹ *F.T.C. v. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Standard Oil Co. v. F.T.C.*, 340 U.S. 231 (1951); 355 U.S. 396 (1958); and *C. E. Niehoff & Co.*, 51 F.T.C. 1114 (1955).

being used only for the purpose of meeting specific competition. If it were designed to meet competition as it arose, stylists would have to be assigned in those areas where the need occurred, and not divided equally throughout the entire nation and used at the discretion of district managers. The odds would be astronomical against an even distribution of offers by competitors to respondent's customers at all times throughout the country. Furthermore, as was pointed out by the Supreme Court in the *Staley* and *Standard Oil* cases, *supra*, Section 2(b) does not permit the adoption of a system to meet the competition of an illegal discriminatory system engaged in by competitors. Two wrongs do not make a right. The "good faith" requirement is not met unless the discrimination is limited to individual situations in order to meet competitive offers and prevent the loss of customers. Although respondent proved that some of its competitors had supplied stylists, no attempt was made to demonstrate the terms and conditions of such programs, the products involved, or the length of time such services were furnished. Lacking this information, respondent's furnishing of stylists hardly could be said to have been made in good faith to meet the services furnished by competitors.

Additionally, the proviso is designed to prevent the loss of customers by permitting such discrimination in limited situations. The record here establishes that the furnishing of stylists was not a prerequisite to preventing the loss of any customers, since they all testified that the failure or refusal of a manufacturer to furnish stylists would not result in their discontinuance of business with that manufacturer. After the complaint was amended to include Section 2(e), the same witness for respondent then testified that the furnishing of stylists was limited to the meeting of competition, although he had previously testified to the contrary, namely, that stylists were used at the discretion of the district managers for whatever promotional benefit possible. In the light of well-established principles of evidence, his testimony prior to the existence of a self-serving motivation militating against a full and frank disclosure of all the facts is entitled to more weight than that after the amendment. This principle is similar to the familiar one applied by the courts in connection with numerous exceptions to the hearsay rule, such as past recollection recorded, admissions, statements against interest, *res gestae*, declarations of state of mind, etc.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, and accordingly it is found, that respondent has discriminated in favor of some purchasers against other purchasers by furnishing the services of stylists upon terms not accorded to all competing purchasers on

1036

Order

proportionally equal terms, in violation of Section 2(e) of the Act. It is further concluded and found that such discrimination in the furnishing of services was not made in good faith to meet services furnished by a competitor.

C. Respondent's contentions applicable to both counts

Respondent's answer (although not its present counsel) advanced the threadbare contention that Sections 2 (d) and (e) are unconstitutional. In addition to the well-settled rule that administrative agencies have no power to pass upon the constitutionality of laws enacted by Congress, the numerous decisions of the Courts of Appeal and the Supreme Court enforcing Commission orders issued under Sections 2 (d) and (e) demonstrate the contrary.¹⁰

Respondent also argues that under Sections 2 (d) and (e) it is essential to both plead and prove that the practices may have had a substantially injurious effect upon competition, as is necessary in connection with alleged violations of Section 2(a), price discrimination. The contrary is so well settled as to not warrant extended discussion, and the Commission and the courts have so held frequently.¹¹ In the recent *Simplicity Pattern* decision, the Supreme Court specifically passed upon this very contention, and stated:

In terms, the proscriptions of these three subsections [(c), (d), and (e)] are absolute. Unlike Section 2(a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce and engaged in the above-found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act.

2. The acts and practices of respondents as above found violate Sections 2 (d) and (e) of the Act.

ORDER

It is ordered, That respondent Exquisite Form Brassiere, Inc., a corporation, its officers, directors, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale of brassieres in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

¹⁰ *Elizabeth Arden v. F.T.C.*, *supra*; *F.T.C. v. Simplicity Pattern*, *supra*; *Great A & P v. F.T.C.*, *supra*, and *State Wholesale Grocers v. A & P Co.*, *supra*.

¹¹ *Henry Broch & Company*, 54 FTC 673, Docket No. 6484 (1957); *Elizabeth Arden v. F.T.C.*, *supra*; and *F.T.C. v. Simplicity Pattern Co.*, *supra*.

1. Paying, or contracting to pay to or for the benefit of any customer, an advertising allowance, push money or anything of value as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of respondent's products, unless such payment or consideration is offered and otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products;

2. Discriminating, directly or indirectly, among competing purchasers of its products, by contracting to furnish, furnishing, or contributing to the furnishing of the services of stylists or any other services or facilities connected with the processing, handling, sale or offering for sale of respondent's products, to any purchaser from respondent of such products bought for resale, unless such services or facilities are offered and otherwise made available on proportionally equal terms to all purchasers competing in the distribution or resale of such products.

OPINION OF THE COMMISSION

By SECREST, *Commissioner*:

The complaint herein charges the respondent with violating subsections (d) and (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The hearing examiner in his initial decision held that the allegations of the complaint were sustained by the evidence and ordered respondent to cease and desist the practices found to be unlawful. Respondent has appealed from this decision.

The complaint, as originally issued, charged only a violation of Section 2(d). At the conclusion of the case in chief, the complaint was amended on the motion of counsel supporting the complaint to include allegations charging also a violation of Section 2(e) of the Act. Respondent contends that the Commission exceeded its authority under § 3.9 of its Rules of Practice by amending the complaint to include a new and separate charge. It also contends that by so amending the complaint the Commission deprived respondent of its constitutional right to a fair hearing.

The answer to the first argument is that the new allegations were not added to the complaint pursuant to § 3.9 of the Rules of Practice which relates solely to the hearing examiner's authority to amend complaints, but in an exercise of the administrative responsibility of the Commission itself to issue its complaint and to supplement a complaint previously issued whenever it has "reason to believe"

that a provision of the Clayton Act within its jurisdiction to enforce is, or has been, violated.

With respect to the second contention, respondent has failed to indicate in what manner it was deprived of a fair hearing. The record reveals that insofar as the new allegations were concerned respondent was accorded the same procedural rights and safeguards it would have received had a new complaint been issued. Its appeal on these points is, therefore, denied.

Respondent has also appealed from the hearing examiner's holding that it violated Section 2(d) by making payments to certain customers for newspaper advertising furnished by or through them in connection with the sale of its products without making such payments available on proportionally equal terms to other customers competing in the distribution of such products. The hearing examiner found in this connection that respondent's cooperative newspaper advertising plan was not offered or made known to certain customers of respondent who were competing with others to whom respondent had granted advertising allowances.

Respondent contends that the hearing examiner's findings are not supported by the evidence, and further that it had proportionalized the payments made under the cooperative advertising plan by providing alternative plans on proportionally equal terms to customers who could not use newspaper advertising. On the latter point, the examiner ruled that other plans offered by respondent, namely, its premium plan and/or the furnishing of counter display material and store dispensers for its products, were not suitable alternatives to respondent's cooperative advertising plan.

We are convinced from an examination of the record that respondent's cooperative newspaper advertising plan was not offered or made known to some customers competing with others who received payments under the plan. The record reveals that respondent's salesmen offered the plan to certain of respondent's larger customers but did not make the offer to smaller competing customers nor inform them of the existence of the plan. Respondent's contention that advertising and other publicity in trade journals with respect to the plan constituted notice to all customers of the "availability" of the plan is refuted by the testimony of several of its customers. This argument also ignores the fact that publicity with respect to the plan, given in January and February, 1956, did not occur until about sixteen months after the plan was put into effect in 1954.

The record also discloses that respondent's premium plan was not offered to customers who received payments under the cooperative

advertising plan. Since the two plans were not offered to all competing customers, they cannot be considered as alternative features or elements of a comprehensive plan. In *Lever Brothers Company*, 50 F.T.C. 494 (1953), we held that a seller may pay for promotional services of various types and that in some instances it might be his duty to do so in order to meet the test of availability. We also held that such a comprehensive plan does not have to be so tailored that every feature of it will be usable or suitable for all customers. However, the customer and not the seller should decide what is or is not usable and suitable for him and should have the opportunity to select that feature of a plan which suits him best. *Liggett & Myers Tobacco Company, Inc.*, Docket 6642 (1959); *Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050 (1957).

Since respondent's customers were denied this choice, the aforementioned plans cannot be considered as alternatives but were in fact separate and distinct from one another. Respondent's other two plans, namely, the furnishing of display material and store dispensers, were not offered in lieu of the advertising allowance but were available to customers receiving such allowance. It is our conclusion, therefore, that the various plans offered by respondent were not alternatively available to all competing customers. Consequently, we do not reach the question of whether the various plans could be legitimate components of a comprehensive plan or whether the terms of one plan were or could be proportionally equal to those of another. The allegation that respondent violated Section 2(d) is sustained by the showing that the cooperative advertising allowance was granted to some customers but was not offered to other customers competing in the distribution of respondent's products. Respondent's appeal on this point is also denied.

Another point raised by respondent in this phase of its appeal concerns the hearing examiner's rejection of its argument that its cooperative advertising allowances were granted in good faith to meet competition. The hearing examiner rejected this argument citing *Federal Trade Commission v. Simplicity Pattern Company*, 360 U.S. 55, 1959; *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F.2d 667 (3d Cir. 1939) and *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535 (1956).¹²

¹² Specifically the hearing examiner held that "it is now well settled that the defense set forth in Section 2(b) is not applicable to Section 2(d)" and that "this issue has been definitely settled by the recent decision of the Supreme Court in the *Simplicity Pattern* case." *supra*. He observed that the Court in the *Simplicity Pattern* case had held the good faith meeting of competition defense available in Section 2(e) situations but that it could not be offered defensively in cases brought under Sections 2(c) and 2(d).

The "services and facilities" amendment to the good faith meeting of competition defense originally took form during the Senate debates and culminated in Senate passage of a bill containing only present Section 2(d) but not Section 2(e). (80 Cong. Rec. 8418-8419). As initially proposed the meeting of competition defense appeared at the end of the bill and was numbered 2(d) following Section 2(c)(1) which is now Section 2(d). After the "services and facilities" language was added to the bill, however, the position of the subsection was changed and renumbered 2(b) and placed in the bill immediately following Section 2(a) which, then as now, relates only to price. Senator Moore of New Jersey in introducing the "services and facilities" amendment to Section 2(b) made no clear explanation as to why he added this language¹³ to the bill,¹⁴ but both the Senate and later the House amendments referred only to a *seller* furnishing the service or facility, as distinguished from payments by the seller to his customers which is, and was, the practice encompassed by what is presently Section 2(d).

In the House the "services and facilities" amendment was initially proposed on May 27, 1936 by Representative Miller on behalf of the Committee on the Judiciary during the debates on H.R. 8442 (80 Cong. Rec. 8139-8140). Representative Miller made no explanation as to why this amendment was offered but on May 28, 1936 Representative McLaughlin offered an amendment which was identical to the one offered by Representative Miller and stated: "Mr. Chairman. This is a committee amendment agreed to unanimously by the Committee and was explained yesterday. It simply allows a *seller* to meet not only competition in price of other competitors but also competition in services and facilities furnished." (80 Cong. Rec. 8224-8225). The Conference Committee Report (No. 2951, 74th Cong., 2nd Sess., June 8, 1936) explained the 2(b) proviso as: "A provision relating to the question of meeting competition, intended to operate only as a rule of evidence in a proceeding before the Federal Trade Commission, * * *"

In our *Rosenfeld* opinion, *supra*, we concluded that the 2(b) defense is not available in a proceeding involving an alleged viola-

¹³ In pertinent part the added language provided that: "nothing herein contained shall prevent a *seller* rebutting the prima facie case thus made by showing that his * * * *furnishing of services or facilities* * * * was made in good faith to meet * * * the *services or facilities* furnished by a competitor." [Emphasis provided.]

¹⁴ Senator Moore: " * * * The milk producers in New Jersey feel that unless this amendment is adopted all of their work for all these years will mean nothing; that they will go back again to where they were. The amendment merely provides that if they charge more to one person than to another, or are accused of discrimination, they shall have a right to prove justification. I think the amendment goes a little farther than the Borah-Van Nuys amendment or the amendment of the Senator from Oregon (Mr. McNary)." (80 Cong. Rec. 6435.)

tion of Section 2(d) because the statutory language does not so provide.¹⁵ This holding was affirmed on May 29, 1959 *In the Matter of Admiral Corporation* (Docket 7094, CCH Trade Reg. Rep. Par. 28,083) where, in denying the respondent's interlocutory appeal, we cited *Rosenfeld* and again declared that "the defense afforded in subsection (b) of Section 2 does not extend to other proceedings involving proved charges of violation of Section 2(d)." Our July 15, 1959 opinion in the same case alluded to our prior holding and stated that we would not there "reconsider or revise that ruling in any respect * * *" (CCH Trade Reg. Rep. Par. 28,175).

In our previous treatment of this issue we pointed to the hearings, debates, and Committee Reports and observed that there was little in the legislative history to explicate the meaning of the "services and facilities" amendment to Section 2(b). On the contrary we found that the discussion of the proviso in both the House and Senate appeared to be limited to situations involving price discrimination and that this was to be expected since neither the Robinson nor Patman bills, as originally introduced, provided for the defense of good faith meeting of competition and the proponents of the defense, in offering their amendments, initially limited its application to price. The addition of the language relating the defense to "services and facilities" apparently was not considered a significant change nor, for that fact, was the defense itself so considered, as it was interpreted as providing only a procedural as distinguished from a substantive defense.

Respondent contends that subsections (d) and (e) are interchangeable, relate to similar practices and that therefore the same standards, including this defensive proviso, should apply to each. We believe, however, that "the provisions of all paragraphs of Section 2 are consistent and deal logically with their respective subjects."¹⁶ That there are obvious differences between a seller furnishing a service or facility and his providing only the remuneration for the many distinctive promotional activities of his customers can readily be seen by reference to this Commission's

¹⁵ We observed that "judicial interpretation of Sections (c) and (d) had failed to integrate violations thereof with the standards applicable to the price discrimination provisions of the Act" and citing *The Great Atlantic & Pacific Tea Company v. Federal Trade Commission*, *supra*, we noted that the Court had stated that "The language of paragraph (b) related to proceedings brought pursuant to the provisions of paragraphs (a) and (e) but are not applicable to proceedings instituted under paragraphs (c) or (d)."

¹⁶ *The Great Atlantic & Pacific Tea Company v. Federal Trade Commission*, 106 F. 2d 667, 677.

decisions.¹⁷ Each subsection has its own office and relates to specific and legally determinable and distinguishable practices. Since the specific language of Section 2(b) refers only to practices covered by Sections (a) and (e) we must therefore reject the argument that the subsection must also logically apply to Section 2(d).

In confining our interpretation of this subsection to its precise language we are following previous interpretations of this same subsection, i.e., *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 241. In that case, despite a legislative history clearly indicating that Congress felt that the defense was to be construed as strictly procedural, the Supreme Court held that the language of Section 2(b) was clear and provided a complete defense to a charge of price discrimination. The dissent in the *Standard* case referred to the obviously different Congressional intent,¹⁸ but the majority held to a literal interpretation of the language of the statute.

"We cannot supply what Congress has studiously omitted."¹⁹ Since subsection 2(b) refers only to a *seller's* furnishing a service or facility and since there is nothing in the history of the bill or in the language of the statute to support respondent's contentions that this provision may be applied defensively to a charge of violation of Section 2(d) we must to this extent deny respondent's appeal.

Respondent has also taken exception to the hearing examiner's ruling that it violated Section 2(d) through the payment of "push" or "prize" money, contending that the findings on this point are not supported by the record and that, in any event, the payment of push money does not come within the purview of Section 2(d).

The record discloses in this connection that respondent transmitted a check to Rosenbaum's, of Plainfield, New Jersey, by letter dated July 19, 1957, advising that "This check represents the prize monies due your Sales Personnel for the Exquisite Form P.M. Contest that was run in your store for the period of 4/15 thru 6/8/7." Since this payment was granted by respondent to or, at least, "for the benefit of" a customer for promotional services

¹⁷ e.g., see *P. Lorillard Co. v. Federal Trade Commission*, 267 F. 2d 439 (3d Cir. 1959), cert. den. 80 S. Ct. 293 (1960); *Swanee Paper Corp.*, CCH Trade Reg. Rep. Par. 28, 212 (Dkt. 6927, 1959); *Liggett & Myers Tobacco Co., Inc.*, CCH Trade Reg. Rep. Par. 28, 256 (Dkt. 6642, 1959).

¹⁸ Justice Reed in his dissent referred to the statement by Mr. Utterback, Chairman of the House managers, before the Conference Report was agreed to by the House wherein he received permission to print an explanation of his understanding of the proviso. He explained that the proviso "does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. * * * It leaves it a question of fact to be determined in each case, whether the competition to be met was such as to justify the discrimination given. * * *" 340 U.S. 260, 261.

¹⁹ *Federal Trade Commission v. Simplicity Pattern Company*, 360 U.S. 55, 67.

furnished respondent, it clearly comes within the scope of Section 2(d). The record also reveals that this payment was not made available on proportionally equal terms to other customers of respondent in the Plainfield, New Jersey, area. This showing is sufficient to sustain the charge in the complaint that respondent violated Section 2(d) of the amended Clayton Act.

The hearing examiner also held that respondent violated Section 2(e) by furnishing the services of "stylists" to certain purchasers without making such services available to competing purchasers on proportionally equal terms. He ruled further that respondent had not justified this discrimination by showing that the services had been furnished in good faith to meet similar services provided by a competitor. Respondent has taken exception to both rulings.

The record clearly establishes that the stylist services furnished by respondent to some of its larger customers were not offered or otherwise made available to other purchasers competing with such favored customers. Respondent's contention that the services were an alternative feature of a comprehensive promotional plan which included the cooperative advertising allowance, the premium plan, and the furnishing of the display material and store dispensers is rejected since the stylist services were not offered to all competing customers. Moreover, the evidence shows that some of the favored customers received both the stylist services and the cooperative advertising allowance.

In his consideration of the respondent's defense that it was meeting competition in the furnishing of the services of the stylists, the hearing examiner applied substantially the same tests which have been applied by the Commission and the courts in cases where the meeting competition defense has been raised to justify a price discrimination under Section 2(a) of the Act. The record discloses that before the complaint was amended to include the Section 2(e) count, an employee of respondent testified that stylists were used at the discretion of respondent's district managers for whatever promotional benefits were possible. After the amendment, however, he testified that a policy committee of respondent decided where to send the stylists and that the decision was governed by information as to the stores to which a competitor had supplied a stylist. The hearing examiner held that the earlier testimony of this witness was entitled to more weight than that given after the amendment and, on the basis thereof and upon a consideration of the other evidence of record, he concluded that the stylist plan was designed and used by respondent as a general method of sales promotion and not for the purpose of meeting similar services furnished by other brassiere

1036

Opinion

manufacturers in individual competitive situations. We are convinced that the hearing examiner's appraisal and evaluation of the evidence was correct and that his holding that respondent had not furnished the services of stylists in good faith to meet competition is fully supported by the record.

One of the arguments raised by the respondent in its appeal attacks the constitutionality of subsections (d) and (e) of Section 2 of the Clayton Act. This argument has not been considered, however, since we have no authority, as an administrative agency, to rule on questions involving the constitutionality of the statutes we are charged with administering.²⁰ All other arguments made by respondent which have not been discussed herein are rejected.

The appeal of respondent is denied. An appropriate order will be entered.

Commissioner Tait dissented in part to the decision herein.

OPINION OF COMMISSIONER TAIT DISSENTING IN PART

I disagree with the majority's ruling that the defense set forth in the Section 2(b) proviso should not be recognized in a proceeding under Section 2(d).

The meeting competition defense was first raised in a Section 2(d) proceeding before the Commission in the matter of *Carpel Frosted Foods, Inc.*, 48 F.T.C. 581 (1951). The Commission did not hold in that case that the defense was not available to the respondent, but ruled only that respondent had failed to show that it had granted disproportionate allowances in a good faith effort to meet competition. The meeting competition defense was also rejected for the same reason in the matter of *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535 (1956), in which case the Commission stated, however, that the defense was not applicable to a respondent in a Section 2(d) case. This statement was made after some inconclusive consideration of the legislative history of the section, and was clearly based, in the words of the Commission, on the "bare-bones" language of the statute itself.

The holding in this case is essentially a reaffirmation of the ruling made in *Rosenfeld*, although the majority endeavors to supplement and bolster that decision by further consideration of the legislative history of Section 2(b) which, in *Rosenfeld*, was found to be noninformative. It arrives at the same conclusion that was reached in *Rosenfeld*, however, and again the ruling is based on what the Supreme Court has referred to as "the infelicitous lan-

²⁰ *Engineers Public Service Co. v. Securities & Exchange Commission*, 138 F. 2d 936 (D.C. Cir. 1943).

guage of § 2(b).” *Automatic Canteen Co. v. Federal Trade Commission*, 346 U.S. 61 (1953).

It is the majority’s position that the phrases “the furnishing of services or facilities” and “the services or facilities furnished” in Section 2(b) relate only to Section 2(e) which deals with the furnishing of services or facilities by a seller and not to Section 2(d) which deals with payments by the seller to or for the benefit of the customer for services or facilities furnished by or through the customer. This attempt to give a strict, literal interpretation to the language overlooks the decisions which have held that a seller who makes payments to a customer for demonstrator services is in reality furnishing such services to the customer. *Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F.2d 132 (2d Cir. 1946), and *Elizabeth Arden Sales Corporation v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945). Both of these cases were brought under Section 2(e). The court in the latter case remarked that the situation might alternatively “have been regarded as a discriminatory payment of compensation” by the seller for services or facilities furnished by the customer and “so to constitute a violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act * * *”. The court also observed that “whether the situation were construed as a discrimination under subsection (e) or as one under subsection (d) of Section 2 would not seem to be of any importance here” and that “even if subsection (e) had been invalid, we would not for that reason have reversed the judgment, because, as we have previously indicated, the situation could just as properly on the evidence have been treated as a violation of subsection (d) * * *”.

These two cases raise a question to which I find no answer in the majority opinion. If the payment by a seller to a customer for services furnished by or through that customer can constitute the furnishing of a service by the seller under Section 2(e), why can not the payment by the seller for a service be considered the furnishing of a service under Section 2(b)?

The majority relies on *Federal Trade Commission v. Simplicity Pattern Company*, 360 U.S. 55 (1959), as authority for its position that the defense of meeting competition is not applicable to a proceeding under Section 2(d). They cite this case and quote the hearing examiner’s observation that “this issue has been definitely settled by the recent decision of the Supreme Court in the Simplicity Pattern case.” The following statement from that decision is quoted in the initial decision:

Thus, a discrimination in prices may be rebutted by a showing under any of the § 2(a) provisos, or under the § 2(b) proviso—all of which by their

terms apply to price discriminations. On the other hand, the only escape Congress has provided for *discriminations in services or facilities is the permission to meet competition* as found in the § 2(b) proviso. [Emphasis supplied.]

In making this statement, the court had before it the question of whether the respondent should have been permitted under the justification provisions of Section 2(b) to rebut a Section 2(e) violation by showing an absence of competitive injury or by showing that its discrimination in services and facilities could be accounted for by cost differentials. The court held, in effect, that a Section 2(e) violation cannot be justified by a showing under any of the Section 2(a) provisos and that the only defense to such a violation is found in the Section 2(b) proviso. Since neither the meeting competition defense nor Section 2(d) was involved in this proceeding, the court's holding cannot be construed as having any bearing whatsoever on the applicability of the defense of meeting competition to a Section 2(d) case.

The briefs for the Commission filed with the Supreme Court in *Simplicity Pattern Company* also show that the applicability of the 2(b) proviso to a 2(d) proceeding was not in issue in that case. As a matter of fact, it was argued in our first brief that "The proviso to § 2(b) clearly creates a meeting competition defense to §§ 2(d) and 2(e) as well as to § 2(a)." While not departing from this position, a later brief for the Commission contained the following statement:

It is not clear whether § 2(b) and its proviso apply also to charges under § 2(d). We assumed that they did in our brief in No. 406 (e.g., p. 17)—where the question was not in issue—but the Commission, in dealing specifically with the question, has held that they do not. *In the matter of Henry Rosenfeld, Inc.*, decided June 29, 1956, 1956-57 CCH Trade Reg. Rep. Par. 26,068. That question is, of course, immaterial to any issue in this case.

In its search for some indication of Congressional intent as to the scope of the Section 2(b) proviso, the majority glosses over that part of the legislative history of the Robinson-Patman Act which is most informative on this subject. House Bill, H.R. 8442, and Senate Bill, S. 3154, as originally introduced were identical in all respects. Both contained, as Section 2(d)(1), a provision which was the prototype of the present Section 2(d). Neither bill, however, provided for the defense of good faith meeting of competition and neither contained a provision similar to the present Section 2(e). Section 2(b) of the Clayton Act, as amended, first appeared in its present form as Section 2(b) in Senate Bill, S. 3154, when the bill was passed by the Senate. Although that bill contained the provision which ultimately became Section 2(d) of the amended Clayton Act, it *did not* contain any provision similar to Section

2(e) of the amended Act, nor did it otherwise prohibit the disproportionate furnishing of services and facilities as distinguished from payments to customers who furnished such services or facilities. It thus appears that at that stage of the history, at least, the defense set forth in the proviso must have applied to payments for services and facilities furnished by a customer. Any other construction would mean that the reference to "services and facilities" contained in the proviso was meaningless.

H.R. 8442 was later amended by the House to extend the scope of the meeting competition defense by the use of language identical to that contained in Section 2(b) of the Senate Bill. There is nothing in the discussion of this amendment or elsewhere in the debates or Committee reports to indicate that the meeting competition defense should not apply to a Section 2(d) proceeding.

In the Robinson-Patman Act, "Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent." *Staley Mfg. Co. v. Federal Trade Commission*, 135 F. 2d 453, 455 (7th Cir. 1943); *Standard Oil Company v. Federal Trade Commission*, 340 U.S. 231 (1951). It is completely incongruous to say that Congress intended to protect competition by providing a seller with the right of self-defense against a competitor's lower prices or its furnishing of services or facilities and at the same time intended to eliminate competition in another area so closely related to the furnishing of services or facilities as to be almost indistinguishable from it.

As one commentator has stated, "each of these sections [2(d) and 2(e)] is directed at discriminatory treatment of customers competing in the resale of the seller's goods, not at the purchase or furnishing of merchandising services as such."²¹ The evil at which both sections are aimed is the granting of discriminatory concessions by sellers to favored customers through the medium of cooperative merchandising arrangements. It may be said that both sections prohibit discriminations in services and facilities which are furnished directly by the seller or indirectly through payments made to the customer or to a third person. They differ only in that they apply to different methods by which services and facilities may be furnished and this distinction has not always been maintained. *Elizabeth Arden, Inc. v. Federal Trade Commission*, *supra*, and *Elizabeth Arden Sales Corporation v. Gus Blass Co.*, *supra*. Consequently, there is no sound or logical reason why a showing that competition was met in good faith should justify a *prima facie* violation of one section and not the other.

²¹ Austin, "Price Discrimination and Related Problems under the Robinson-Patman Act," Second Revised Edition (1959).

1036

Opinion

To the fullest extent Sections 2(d) and 2(e) should be interpreted to reconcile their basic purposes. I see no reason why a distinction should be made between these twins of the Robinson-Patman Act.

I also disagree with the majority's failure to overrule the hearing examiner's holding that the furnishing of services or facilities to customers cannot in any case constitute a suitable alternative to payments for services or facilities to be provided by competing customers. In rejecting the respondent's argument that its furnishing of display material and store dispensers constitutes a proportionally equal alternative to an advertising allowance, the hearing examiner made the following ruling:

* * * it would appear to be an attempt to make Section 2(e) "services" a substitute or alternative for Section 2(d) "payments"; Section 2(d) encompasses paying for services furnished by a customer, whereas § 2(e) encompasses services furnished by the seller to the customer, which would include the furnishing of store dispensers and display material. Section 2(d) expressly provides that such payments for services furnished by a customer are illegal unless *such payment* is available on proportionally equal terms to all other customers competing. This means what it says: an alternative must be the payment for services furnished and not the furnishing of services by the seller to the customer. Such payment, not something else, must be available on proportionally equal terms.

The hearing examiner's reliance on the precise wording of the statute and his attempt to distinguish the practices covered by Sections 2(d) and 2(e) was logical in the light of the *Rosenfeld* decision, *supra*. The ruling, however, is clearly in conflict with the view expressed by the Commission on this point in its "Guides"²² for compliance with Sections 2(d) and 2(e) and certain compliance reports accepted by the Commission in litigated cases.

For the majority to take a position contrary to that of the hearing examiner would point up a lack of consistency in its construction of the statute. It would then be forced to hold that the phrase "such payment" in Section 2(d) includes the "furnishing of services or facilities" as a proper alternative, but that the phrase "the furnishing of services or facilities" in Section 2(b) does not permit "such payment" as an alternative. The majority temporarily solves its dilemma by holding that it is unnecessary to consider the question. This may be so; but the inconsistency is implicit and remains unanswered.

I would reverse the initial decision on both of these issues.

²² *Guides for Advertising Allowances and Other Merchandising Payments and Services: Compliance with Sections 2(d) and 2(e) of the Clayton Act, as Amended by the Robinson-Patman Act, Adopted May 19, 1960.*

Complaint

57 F.T.C.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs in support thereof and in opposition thereto, and the Commission having rendered its decision denying the appeal:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

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

Commissioner Tait dissenting in part