

than the net prices charged any other purchaser who, in fact, competes in the resale and distribution of said products with the purchaser paying the higher price.

It is further ordered, That respondent, Westinghouse Electric Corporation, a corporation, shall, within sixty (60) days after service upon it of the instant 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.

IN THE MATTER OF
TUNG-SOL ELECTRIC INC., ET AL.

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

Docket 8514. Complaint, June 27, 1962—Decision, Sept. 12, 1963

Order requiring a major manufacturer of electronic products, including miniature bulbs, sealed-beam lamps and flashers for replacement in automotive vehicles, with main office in Newark, N. J., to cease violating Sec. 2(a) of the Clayton Act by such practices as granting on purchases of automotive flashers to buying group jobbers—whose organizations did not perform the functions of warehouse distributors but were actually devices for facilitating the receipt by the jobber purchasers of the discriminatory prices—the higher price discounts accorded warehouse distributors but not available to nongroup buying distributors in competition with the favored jobbers; and by granting “incentive rebates” based on net purchases to warehouse distributors and redistributors in addition to their functional discounts.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936, (U.S.C. Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Tung-Sol Electric Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with principal office and place of business located at One Summer Avenue, Newark, New Jersey. Tung-Sol Electric Inc., has divisions and corporate subsidiaries which are variously located and engaged in the manufacture, sale and distribution of electronic products, including miniature bulbs, sealed-beam

lamps and flashers for repair or replacement installation and use in automotive vehicles. Tung-Sol Electric Inc.'s overall product sales during 1959 totaled approximately \$72,000,000.

Respondent, Tung-Sol Sales Corporation, a wholly owned and controlled subsidiary of respondent Tung-Sol Electric Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with principal office and place of business located at One Summer Avenue, Newark, New Jersey. Tung-Sol Sales Corporation is engaged in the sale and distribution of the products, including automotive replacement parts, manufactured by its parent Tung-Sol Electric Inc. Tung-Sol Sales Corporation maintains a warehouse stock for such purposes in one warehouse which it operates, located in Atlanta, Georgia; other warehouse stock are maintained elsewhere in warehouses operated by respondent Tung-Sol Electric Inc. Tung-Sol Sales Corporation's sales of automotive replacement products during 1959 totaled approximately \$9,000,000.

Respondents Tung-Sol Electric Inc., and Tung-Sol Sales Corporation, in the course and conduct of their business, as aforesaid, have caused and now cause the said automotive miniature bulbs, sealed-beam lamps and flashers to be shipped and transported from the State or States of location of their various manufacturing plants, warehouses and places of business, to the purchasers thereof located in States other than the State or States wherein said shipment or transportation originated. Said products have been and are sold to different purchasers for use or resale within the United States and the District of Columbia, and respondents, in the sale of the said products, have at all times relevant herein been and now are engaged in commerce, as "commerce" is defined in the Clayton Act.

PAR. 2. Respondents classify said different purchasers of their automotive replacement products and extend and set terms and conditions of sale for each such classification as follows:

Jobbers — A purchaser classified as a jobber is normally engaged in reselling said automotive replacement products to automotive vehicle fleets, garages, gasoline service stations, and others in the automotive repair trade serving the general public. Jobbers purchase at a net price set out in respondents' "Jobber Net Price Lists". Respondents sell to approximately 500 such jobber purchasers throughout the United States.

Warehouse Distributors—A purchaser classified as a warehouse distributor normally resells only to jobbers. A warehouse distributor purchases from respondents' "Jobber Net Price Lists", less a 7½%

Complaint

63 F.T.C.

"warehousing allowance" on purchases of automotive miniature and sealed-beam lamps. The warehouse distributor receives a "Redistribution Allowance", or rebate, of 14% of the jobber net price of automotive miniature and sealed-beam lamps, and 20% of the jobber list price of flashers. To obtain the redistribution allowances the sales must be made by the warehouse distributor to bona fide jobbers approved by respondents' sales representatives. Claims for redistribution allowances must be submitted monthly to respondents. In certain instances upon "certification" that a warehouse distributor does 100% of his business with bona fide jobbers the redistribution allowance is granted as a discount off the warehouse distributors purchase invoice without the required submission of monthly claims.

Redistributor—A purchaser classified as a so-called "redistributor" is a jobber who resells both as a jobber and as a warehouse distributor. A redistributor purchases from respondents' "Jobber Net Price Lists" less the aforesaid warehousing allowance on automotive miniature bulbs and lamps. Each month such a purchaser submits a claim for those sales made as a warehouse distributor and accordingly is allowed thereon the aforesaid applicable redistribution allowances for approved sales.

Respondents grant warehouse distributors and redistributors an "Incentive Rebate" based on net purchases of automotive products according to the following schedule:

Net purchases:	<i>Incentive rebate, percent</i>
\$3,000 to \$9,999.....	1
\$10,000 to \$19,999.....	2
\$20,000 and over.....	3

Respondents sell to 581 such "warehouse distributors" and "redistributors".

PAR. 3. Respondents, in the course and conduct of their business as aforesaid, have been and now are discriminating in price between different purchasers of their automotive replacement products of like grade and quality, by selling said products at higher and less favorable prices to some purchasers than the same are sold to other purchasers, many of whom have been and now are in competition with the purchasers paying the higher prices.

For example, among respondents' customers are a number of jobbers engaged in so-called "group buying" which are classified by respondents as "warehouse distributors". Such "buying group" members who are the real purchasers, do not perform the normal functions of a

warehouse distributor, but are in fact jobbers buying and reselling as jobbers. Respondents' classification of such buying groups as warehouse distributors results in the granting of higher and more favorable purchase price discounts to these group buying jobbers than are granted to respondents' non-group buying jobber customers who purchase at respondents' regular jobber prices and do not receive the additional discounts available to respondents' warehouse distributor classification. Many of these group buying jobbers are in competition with respondents' nongroup buying jobber customers.

As sample illustrations respondents have appointed Cornbelt Automotive Warehouse, Inc., Omaha, Nebraska, Southern California Jobbers, Inc., Los Angeles, California, and Nor-Cal Distributors, Inc., San Francisco, California, as warehouse distributors of their automotive replacement products. These organizations are or have been buying groups through which their jobber members purchased respondents' automotive replacement products at the lower warehouse distributor price which would otherwise not have been available to such jobbers. Purchase transactions between respondents and the individual jobbers have been billed to and paid for through the aforesaid organizations. Said organizations thus have purported to be the purchasers of respondents' products, when in truth and in fact they served only as an agent for the several individual purchasers aforesaid, and were devices for facilitating the inducement or receipt by the said jobber purchasers from the respondents of discriminatory purchase prices.

PAR. 4. The effect of respondents' aforesaid discriminations in price between the said different purchasers of its said products of like grade and quality, sold in the maner and method and for purposes as aforesaid, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said favored purchasers.

PAR. 5. The aforesaid acts and practices of respondents constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936.

Mr. Richard B. Mathias and Mr. John Perry, counsel supporting the complaint.

Howrey, Simon, Baker & Murchison, by *Mr. Harold F. Baker* and *Mr. David C. Murchison*, Washington, D. C., attorneys for respondents.

Mr. Harry G. Mason and Mr. Charles Rupprecht, Newark, New Jersey, of counsel.

Initial Decisions

63 F.T.C.

INITIAL DECISION BY HARRY R. HINKES, HEARING EXAMINER

MAY 13, 1963

HISTORY OF CASE

Complaint was issued in this proceeding against the two corporate respondents named in the caption on June 27, 1962, charging them with a violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U.S.C. 13). After describing the activities of these respondents in the sale and distribution of automotive replacement parts, the complaint charges that the respondents have been engaged in commerce, as "commerce" is defined in the Clayton Act, in the sale of automotive miniature bulbs, sealed-beam lamps and flashers.

The complaint goes on to charge the respondents with discriminatory practices with respect to the sale of miniature and sealed-beam lamps and flashers.

By answer filed July 25, 1962, respondents, while making certain admissions, denied a number of material allegations of the complaint and by further answer raised certain affirmative defenses.

By order dated October 12, 1962, a prehearing conference was set by the hearing examiner to consider simplification and clarification of the issues, stipulations, admissions, and other matters to expedite the trial of the case. At the prehearing conference held on October 30, 1962, counsel for the respondents indicated that a drastic change in sales practices had taken place since the matter had been investigated by Commission personnel. On the strength of that change, he felt that a continuation of this proceeding would not be in the public interest. As a result, a second prehearing conference was scheduled to hear Commission counsel's attitude in the light of this change in sales practices.

At the second prehearing conference, held on November 23, 1962, counsel supporting the complaint advised that he wished to go to trial. Counsel for the respondents, however, argued that a dismissal of the complaint as to miniature bulbs and sealed-lamps was appropriate and if it were granted, the respondents would not contest a cease and desist order with respect to flashers. He proposed to file a formal motion for dismissal of the complaint as to the first two products coupled with a stipulation of facts sufficient to cover a cease and desist order with respect to flashers. In support of the motion to dismiss, counsel for respondents indicated that several affidavits would be filed

632

Initial Decision

setting forth the factual basis for the motion. Counsel supporting the complaint was asked:

HEARING EXAMINER HINKES: Do you disagree with them [the supporting affidavits] or are you going to contest their factual basis?

MR. MATHIAS: No.

HEARING EXAMINER HINKES: Well, it seems to me then that conceivably we do have a purely legal issue, whether the facts thus stated constitute a legal basis for dismissal for abandonment, and if I should so find then conceivably we would not have to make as many trips or perhaps any trips, I don't know, and to that end, of course, I think our effort should be directed at this moment.

MR. MATHIAS: Yes — excuse me.

HEARING EXAMINER HINKES: Yes, go right ahead.

MR. MATHIAS: I believe just as I have listened to the discussion so far, if you find that the abandonment does constitute a defense and a cause for dismissal of the two products involved therein, it is my understanding that the case would pretty much be over right about that point.

HEARING EXAMINER HINKES: Yes.

MR. MATHIAS: As to the third product involved in this, Mr. Baker either commented that there was not too much, too great a dispute involved in that particular item.

Accordingly, on November 26, 1962, counsel for the respondents filed a "Motion for Partial Dismissal of Complaint" with three affidavits attached thereto (Schulte, Kirchner and Bennett), together with a memorandum in support of the motion. In addition, a stipulation, signed only by respondents' counsel and not by Commission counsel, was submitted with respect to the respondents' practices in connection with the sale of flashers, and a proposed order to cease and desist discriminatory pricing practices with respect to the flashers.

On November 30, 1962, Commission counsel filed their answer to the respondents' motion, asking that the motion be denied. Among other things the answer stated:

If the hearing examiner were to grant respondents' motion to dismiss, it would amount to allowing respondents to present part of their case without the necessity of formal hearings and without allowing counsel supporting the complaint to participate in the taking of testimony and presentation of evidence. Counsel supporting the complaint would have no opportunity to cross examine any persons who prepared and signed any of the affidavits submitted in support of the motion to dismiss.

A third prehearing conference was thereupon held January 15, 1963. At that prehearing conference the hearing examiner stated that he was "somewhat at a loss to understand the posture of this case * * * ." Here called the second prehearing conference at which the legal issue of abandonment was in dispute but not the factual issues

Initial Decision

63 F.T.C.

set forth in the affidavits accompanying the motion to dismiss. The hearing examiner stated:

On the record it does not appear to me quite clear as to whether or not the affidavits, that is, the facts in these affidavits, are now being contradicted or not by Commission counsel * * *.

By way of reply (Tr. 45) Commission counsel stated "* * * our concern is not that we have any controversy of facts in the course of the events that have occurred. There is perhaps an issue of fact or an issue of a conclusion to be drawn from the facts * * *."

The transcript goes on:

HEARING EXAMINER HINKES: Are you speaking of facts—let us put it that way—the chronology of the events as contained in the affidavits—is that the idea?

MR. MATHIAS: That is correct.

HEARING EXAMINER HINKES: Rather than any construction that can be put upon any intent?

MR. MATHIAS: Correct—that is much better stated than I could have stated it. It is not the facts contained therein, but the motive or the fact [t]hat will occur in the future.

HEARING EXAMINER HINKES: I understand. Now, let me put it this way, however, Mr. Mathias. Are you satisfied with the chronology of events contained in these affidavits so that we can proceed simply to a determination of the legal issue of abandonment or do you prefer to have hearings to develop any change—any shade of interpretation that we care to put upon the facts contained in these affidavits?

Counsel for the respondents then (Tr. 51) offered to produce the affiants in the event there were questioning required concerning the affidavits. Commission counsel replied that the facts set forth in these affidavits were not really going to be contested. Commission counsel hinted (Tr. 53) at "other facts" which would require hearings.

The hearing examiner then stated:

* * * apparently, there is no necessity for a hearing to prove the facts that are averred in these affidavits, since they are not really being disputed. However, you tell me that in addition there are some other facts not mentioned which you think you can prove, that is, Commission counsel can prove, which will militate against a dismissal for abandonment. I cannot tell you whether you should proceed to prove these facts. I can only say that if you think you would like to have that in the record before I make my ruling, then we have got to hold hearings for that purpose.

MR. CORKEY: Well, I do not know that it would be necessary to hold hearings. I suppose that we could counter his affidavits with affidavits of our own from witnesses that we would bring forward.

* * * I think that we would, probably, be inclined at this point to stand on the fact that these affidavits we do not believe give any basis for a plea of abandonment.

At the same prehearing conference, there was a discussion of the scope of the order in the event the complaint was dismissed as to miniature bulbs and sealed-lamps.

HEARING EXAMINER HINKES: * * * Let us assume, for the purpose of discussion, that I should agree that abandonment took place as to the miniature bulbs and lamps—I see those are the two products involved—sufficient to warrant a dismissal of the complaint as to those two products, we have from the respondents an offer to consent to an order which would prohibit the illegal practices with respect to flashers.

* * * would you want to have hearings of any kind to establish a record basis for an order which would encompass more than flashers, even though only flashers were involved in the illegal practices that have not been abandoned?

MR. MATHIAS: I do not believe that hearings relative to the scope of the order extending beyond flashers would, necessarily, be required at this juncture of the case.

But I do not think that I would make any strong argument immediately as to including miniature bulbs and lamps within an order on stipulation regarding flashers.

MR. BAKER: As I understand it, Commission counsel will appeal only on the assumed findings by your Honor of abandonment with respect to the two products and would not contest the scope of the order on flashers. As I understand it, that is his position.

HEARING EXAMINER HINKES: * * * is that correct?

MR. MATHIAS: Yes.

Thereafter, on January 28, 1963, complaint counsel filed a supplemental reply to the respondents' motion for dismissal. In it was stated:

Counsel supporting the complaint must admit that they are in no position to take issue with the affidavits filed by respondents outlining the so-called "one price" system. The investigation on which the complaint is based ended sometime before the changes now averred took place * * *. For the purpose of this part of our argument we accept the fact that there has been a change. But, even accepting the statements made regarding the change, we must reject the conclusion that these statements afford any proper basis for a claim of abandonment.

Two appendices were attached to the supplemental reply. Appendix A was part of the prehearing conference transcript. Appendix B was a notice issued by the respondents on April 12, 1962, concerning their discontinuance of service allowances.

On February 7, 1963, respondents filed a reply brief in support of their motion for dismissal. In it they stated they had no objection

Initial Decision

63 F.T.C.

to the hearing examiner's consideration of Appendix B of complaint counsel's supplemental reply, and admitted its authenticity.

Finally, on April 17, 1963, respondents filed a motion for leave to file certain admissions in connection with respondents' alleged violation of Section 2(a) of the Robinson-Patman Act with respect to flashers. Complaint counsel having no objection thereto, the motion was granted by order of the hearing examiner dated April 23, 1963, and the admissions incorporated in the record.

On the record thus constituted, including the complaint, the answer, the motion for partial dismissal and the uncontested affidavits attached thereto, the Appendix B attached to complaint counsel's supplemental reply, the admissions by respondents with respect to their sale of flashers, and the statements of record by counsel, the hearing examiner concludes that respondents' motion for partial dismissal should be granted, their conditional offer of an order covering flashers be accepted, and an initial decision rendered to such effect.

FINDINGS OF FACT

The Parties

1. Respondent, Tung-Sol Sales Corporation, is the wholly owned sales subsidiary of respondent, Tung-Sol Electric Inc. Tung-Sol Electric Inc., is a corporation organized and doing business under the laws of the State of Delaware with its principal office and place of business located at 1 Summer Avenue, Newark 4, New Jersey. Tung-Sol Sales Corporation is a corporation organized and doing business under the laws of the State of New York with its principal office and place of business located at 1 Summer Avenue, Newark 4, New Jersey.
2. Respondent, Tung-Sol Electric Inc., controls the sales policy of Tung-Sol Sales Corporation.

Automotive Flashers

3. Respondents have been engaged and are presently engaged in the manufacture, sale, and distribution of flashers for repair or replacement installation and use in automotive vehicles. Automotive flashers are the activating device in the directional signal used in automotive vehicles. Tung-Sol's gross sales of automotive flashers in the replacement market in the year 1961 were approximately \$3,320,000. Flashers are sold by respondents to jobbers and warehouse distributors located in various States of the United States for resale in the replacement market.

4. Respondents have sold and now sell their automotive flashers in commerce as "commerce" is defined in the Clayton Act, as amended, to customers located throughout the United States.

5. Respondents have sold and do sell their flashers to jobbers and to distributors. Respondents sell flashers to approximately 500 jobber customers throughout the United States and to approximately an equal number of warehouse distributors.

Purchasers classified as jobbers are normally engaged in reselling said flashers to automotive vehicle fleets, garages, gasoline service stations, and others in the automotive repair trade.

Purchasers classified as warehouse distributors normally resell only to jobbers.

Warehouse distributors receive a "redistribution allowance" from respondents in the amount of 20% off the jobber list price for flashers. Warehouse distributors submit monthly claims to respondents for such redistribution allowances based upon their resales to jobbers. In certain instances upon "certification" that a warehouse distributor does 100% of his business with bona fide jobbers the redistribution allowance is granted as a discount off the warehouse distributor's purchase invoice without the required submission of monthly claims.

Some of such warehouse distributor customers of respondents are composed of jobbers who either own and control, or are members of a group, which group collectively constitutes the warehouse distributor, sometimes referred to as a "buying group." The members or owners of said "buying groups" compete with jobber customers of respondents, which jobber customers pay jobber list price for flashers as compared to respondents' selling price to said buying groups of jobber list price less 20%. Some of such jobber owned and controlled entities, sometimes known as "buying groups," do not operate as warehouse distributors or perform functions in the redistribution of flashers.

The result of the foregoing is the granting by respondents of higher and more favorable purchase price discounts to jobber members of said groups than are granted by respondents to competing jobber customers not affiliated with a "buying group."

Respondents grant and have granted to competing customers incentive rebates on net purchases of flashers according to the following schedule:

Net purchases:	Incentive rebate, percent
\$10,000 to \$24,999-----	2
\$25,000 to \$49,999-----	3
\$50,000 and over-----	4

6. Respondents, in the course and conduct of their business as aforesaid, have been and now are discriminating in price between different purchasers of their automotive flashers of like grade and quality, by selling said products at higher and less favorable prices to some pur-

Initial Decision

63 F.T.C.

chasers than the same are sold to other purchasers, many of whom have been and now are in competition with the purchasers paying the higher prices.

7. The effect of respondents' aforesaid discriminations in price between the said different purchasers of its said flashers of like grade and quality sold in the manner and method and for purposes as aforesaid, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the aforesaid favored purchasers are engaged, or to injure, destroy or prevent competition with said favored purchasers.

Sealed-Beam and Miniature Lamps

8. Prior to January 1, 1962, Tung-Sol Electric Inc., and Tung-Sol Sales Corporation and all of their major competitors, including particularly General Electric Company and Westinghouse, sold sealed-beam and miniature lamps to the automotive replacement market on the basis of a dual price structure. Historically, the industry has sold miniature bulbs and sealed-beam lamps on such a dual price structure for approximately 40 years. Basically, this price structure consists of two levels, namely, warehouse distributors and jobbers. Warehouse distributors receive from manufacturers redistribution allowances based upon services rendered to the manufacturers in connection with their resale of the merchandise to jobbers. The effect of this pricing structure is to accord to warehouse distributors lower net prices than to jobbers (Schulte p. 1).

9. The General Electric Company is by far the leading and dominant manufacturer and seller of sealed-beam lamps and miniature bulbs. It is estimated that General Electric and their agents have about 800 salesmen calling upon the warehouse distributor and jobber trade. Tung-Sol has approximately 40 salesmen calling upon this class of trade (Schulte p. 2; Kirchner p. 4).

10. On January 1, 1962, the General Electric Company put into effect a revolutionary change in distributional patterns and pricing structure in the miniature bulb and sealed-beam lamp replacement market. Thereafter, and continuing to date, General Electric sold sealed-beam lamps and miniature bulbs to all customers, irrespective of classification or function, at a single, uniform price. As a result of this drastic change by General Electric, Tung-Sol undertook a reevaluation of its pricing practices and reached a firm decision on or about March 15, 1962, to adopt, effective April 2, 1962, a one price policy to all of its sealed-beam lamp and miniature bulb replacement customers irrespective of classification or function (Schulte p. 2).

11. The price change which was effective April 2, 1962, was publicized by a company release dated April 12, 1962 (Appendix B of complaint counsel's supplemental reply), in which it was stated:

The action of competition as of April 2, 1962, makes it necessary for us to hold in abeyance our service allowance program. As of April 2, 1962, consider article 1 of the warehouse distributor contract to be temporarily void.

12. As a result of adoption of a strict one-price policy effective April 2, 1962, Tung-Sol has experienced a revolution in its distributional patterns in that it has lost some of its larger warehouse distributor customers. This has occurred because jobbers who historically and usually purchased from warehouse distributors now purchase directly from Tung-Sol or any other manufacturer of miniature or sealed-beam lamps at precisely the same price as warehouse distributors (Schulte p. 2).

13. For some years prior to April 2, 1962, when Tung-Sol sold to jobbers and warehouse distributors at different prices, it did not sell to any warehouse distributors characterized as "paper wholesalers," i.e., those who did not perform a bona fide redistributive function. Prior to April 2, 1962, all Automotive Parts cases with one exception were cases involving so-called "warehouse distributors" who did not perform any bona fide redistributive functions and whose ownership, in one form or another was held by jobbers. The one exception was the case of *Alhambra Motor Parts, et al v. FTC*, which was on appeal to the Ninth Circuit Court of Appeals on April 2, 1962. An opinion in this case was rendered by the Court of Appeals on October 9, 1962, remanding the proceedings, CCH Trade Reg. Rep. ¶ 70,496 [7 S.&D. 550]. Therefore, at the time of Tung-Sol's decision to go to a one-price policy, and to date, there had been no final adjudication as to the legality of a two-price structure in connection with warehouse distributors performing bona fide redistribution functions in those situations where a warehouse distributor was owned in whole or in part by jobbers, and Tung-Sol did not have reason to believe that its dual pricing policy was certainly illegal (Schulte p. 3).

14. Prior to January 1, 1962, Tung-Sol granted to jobbers and warehouse distributors incentive rebates of from 1% to 3% discount from net purchase prices based on the volume of purchases. Effective January 1, 1962, long prior to the issuance of the Complaint herein, such incentive rebates were discontinued and Tung-Sol has no intent to reinstate such "incentive rebates" or any other "incentive rebates" or volume discounts, according to its executives (Schulte p. 4).

15. Top management officials state that Tung-Sol has no intention of reinstituting a dual price system or selling to jobbers and warehouse distributors at differing prices, or selling to any competing

customers in the replacement market at different prices. The adoption by Tung-Sol of a one-price system and the discontinuance of the 1% to 3% incentive rebate is considered by the management of Tung-Sol as a permanent change in pricing policy in the replacement market. Additionally, it is the considered and firm opinion of the respondents that the revolutionary change that has taken place in Tung-Sol marketing policies, along with the marketing policies of the rest of the sealed-beam lamp and miniature bulb industry, is a permanent change and precludes a return to a dual-price structure in the replacement market. This is so for several reasons. First, the change that has taken place has already resulted in a drastic realignment of customers with many of the larger warehouse distributors giving up entirely the business of selling sealed-beam lamps and miniature bulbs. Additional customers have been obtained at the jobber level and it would be extremely difficult to withdraw from these jobbers the privilege of buying at the distributors' prices. Any such attempt would injure the respondents seriously. Second, the dominance of General Electric and its actions in revolutionizing its distributional and pricing policies in the replacement market render it impossible for Tung-Sol, from a practical standpoint, to return to a dual-price system based on classification of customers even if Tung-Sol desired to do so. (Schulte p. 4.)

16. The decision of Tung-Sol to abandon its dual-pricing structure based on classification of customers was not influenced by the investigation of the Federal Trade Commission. The possibility of a Federal Trade Commission proceeding against Tung-Sol "was never discussed" in connection with any of the deliberations preceding Tung-Sol's abandonment (Kirchner p. 5-6). This is conclusively shown by Tung-Sol's continuation of a modified dual-pricing structure in connection with one of its other automotive products, namely flashers (Schulte p. 5).

17. Tung-Sol and its predecessor have been engaged in the sale of automotive lamps for over 50 years and until the instant complaint Tung-Sol has never been proceeded against in any Federal Trade Commission action (Schulte p. 6).

DISCUSSION

Abandonment

The law with respect to the defense of abandonment is relatively well settled.

It is, of course, axiomatic that mere discontinuance of a challenged practice does not render the controversy moot or estop the Commission

from entering an order to cease and desist.¹ Basically, determination as to whether the public interest requires the issuance of an order in cases where challenged practices have been abandoned lies in the exercise of a sound discretion by the Examiner and the Commission,² subject only to the caveat that "[t]his discretion must be confined, however, within the bounds of reasonableness."³

As stated in *National Lead Co. v. Federal Trade Commission*, 227 F. 2d 825, 839-40 (7th Cir. 1955):

While the Commission is vested with a broad discretion to determine whether an order is needed to prevent the resumption of unlawful acts which have been discontinued, this "discretion must be confined * * * within the bounds of reasonableness." (Quoting from *Marlene's, Inc. v. Federal Trade Commission*, 216 F. 2d at p. 559).

This rule of reasonableness requires something more than a mere guess or suspicion contrary to the evidence and to the finding of the trial examiner that a resumption of discontinued practices may not reasonably be anticipated. * * *

The principal elements which must be established to sustain the defense of abandonment are:

- (1) That there has been a voluntary and good faith abandonment by respondents;
- (2) That the challenged practices have been surely stopped under circumstances which assure that there is no reasonable likelihood of resumption of said practices by respondents, thus rendering the issuance of an order unnecessary.

The timing of abandonment has not necessarily been a determinative factor as to a respondent's voluntary and good faith conduct or a finding as to the likelihood of resumption. In *Firestone Tire & Rubber Co.*, Docket No. 7020, 55 F.T.C. 1909 (1959), the respondent did not abandon the practice in question until *after* the issuance of the

¹ *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938); *Standard Distributors v. Federal Trade Commission*, 211 F.2d 7, 13 (2d Cir. 1954); *Educators Ass'n v. Federal Trade Commission*, 108 F.2d 470, 473 (2d Cir. 1939); *Armand Co. v. Federal Trade Commission*, 78 F.2d 707, 708 (2d Cir. 1935); *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F.2d 273, 281 (3d Cir. 1952); *Hershey Chocolate Corp. v. Federal Trade Commission*, 121 F.2d 968, 971 (3d Cir. 1941); *Federal Trade Commission v. Good Grape Co.*, 45 F.2d 70, 72 (6th Cir. 1930); *Clinton Watch Co. v. Federal Trade Commission*, 291 F.2d 838, 841 (7th Cir. 1961); *Marlene's, Inc. v. Federal Trade Commission*, 216 F.2d 556, 559-60 (7th Cir. 1954); *Federal Trade Commission v. Wallace*, 75 F.2d 733, 738 (8th Cir. 1935); *Arkansas Wholesale Grocers' Ass'n v. Federal Trade Commission*, 18 F.2d 866, 871 (8th Cir. 1927); *Philip R. Park, Inc. v. Federal Trade Commission*, 136 F.2d 428, 430 (9th Cir. 1943); *Juvenile Shoe Co. v. Federal Trade Commission*, 289 Fed. 57, 59-60 (9th Cir. 1923); *Dolcin Corp. v. Federal Trade Commission*, 219 F.2d 742, 745 (D.C. Cir. 1954).

² *Marlene's, Inc. v. Federal Trade Commission*, 216 F.2d 556, 559-60 (7th Cir. 1954); *Keasbey and Mattison Co. v. Federal Trade Commission*, 159 F.2d 940, 951 (6th Cir. 1947); *Deer v. Federal Trade Commission*, 152 F.2d 65, 66 (2d Cir. 1945). This discretion is to be exercised in view of all the facts and circumstances surrounding the alleged discontinuance. *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F.2d 321, 330-31 (7th Cir. 1944); *Guarantee Veterinary Co. v. Federal Trade Commission*, 285 Fed. 835, 860 (2d Cir. 1922).

³ *Marlene's, Inc. v. Federal Trade Commission*, *supra*, cited and followed in *Stokely Van Camp, Inc. v. Federal Trade Commission*, 246 F.2d 458, 464-65 (7th Cir. 1957).

Initial Decision

63 F.T.C.

complaint, and yet the Commission upheld the hearing examiner's dismissal of the complaint on the ground of abandonment in view of other factors which precluded "cognizable danger of recurrent violations" (55 F.T.C. at 1920). The Commission stated:

As we stated in the matter of *Ward Baking Company*, Docket No. 6833 (decided June 23, 1958), dismissal is rarely warranted in cases where a party waits until the Commission has acted and only then discontinues his illegal practice. We also pointed out in that case and in the matter of *Argus Cameras, Inc.*, Docket No. 6199 (decided October 20, 1954), that the Commission, in the exercise of its proper discretion, may dismiss a complaint even though the discontinuance takes place after proceedings have been initiated, where there is a clear showing of unusual circumstances which in the interest of justice do not require entry of an order (55 F.T.C. at 1918).

Conversely, it is to be noted that "[t]he fact that a respondent has discontinued an illegal practice even prior to the issuance of a complaint does not prevent the Commission from issuing a cease and desist order." *Argus Cameras, Inc.*, Docket No. 6199, 51 F.T.C. 405, 406 (1954). Thus in final analysis, the key determinative question is not the timing but rather the likelihood of the resumption of the questioned practice, as the main goal of the Commission is to protect the public against continued or future violations of the statutes it administers.

1. Respondents Voluntarily and in Good Faith Abandoned the Challenged Practices

The Commission's complaint, dated June 27, 1962, was served on respondents on or about July 3, 1962 (Schulte p. 1). Respondents abandoned some of the challenged practices on January 1, 1962, and abandoned the practices which constitute the major part of the Commission's complaint effective April 2, 1962, as a result of a decision reached on or about March 15, 1962. Tung-Sol's abandonment decision on or about March 15, 1962, "* * *" was in no way, shape or manner influenced by the investigation of the Federal Trade Commission."

The abandonment of the challenged practices by respondents was with respect to two of its three automotive items, namely bulbs and lamps. The third automotive product manufactured and sold by respondents is flashers. There was no abandonment as to this product and respondents have continued to date the practices challenged in the complaint with respect to flashers (Schulte, p. 5). If, as stated in *Ward Baking Co.*, Docket No. 6833, 54 F.T.C. 1919 (1958), the

motivating force behind respondents' decision was to "avoid the issuance of an order" (54 F.T.C. at 1921), then logic dictates that respondents' abandonment as to bulbs and lamps would have been extended likewise to flashers.

Respondents' good faith is further shown by their offer to admit a prima facie case against them and the entry of a cease and desist order with respect to the flashers.

The nature of the change in respondents' business resulting from abandonment of the challenged practices was far-reaching and constituted a drastic upheaval of the historic patterns of distribution. Old and valued customers were lost and a new pattern of distribution has been set up with the acquisition of many new jobber customers. Thus discontinuance in this case does not involve the abandonment of a practice that was outmoded and was to be discarded in any event. Unlike an advertising theme that has run its course and is to be replaced in the normal course of business, the change of respondents was one which literally "shook" the very foundations upon which distributional patterns had rested for 40 years.

Respondents' abandonment was not, and could not reasonably be suspected to be, based upon a clear understanding by respondents that the practices challenged were illegal. The thrust of the complaint is that the respondents sold bulbs and lamps to certain customers classified as warehouse distributors and that such warehouse distributors in fact constituted "buying groups" of jobbers and hence the sale to such "warehouse distributors" was in actuality a sale to a jobber. Illustrative of such customers, it is alleged, is Southern California Jobbers, Inc., Los Angeles, California (Complaint, Par. Three).

The *Alhambra* case was pending in the courts at the time of abandonment by respondents, and if respondents had any intention of continuing their dual-price structure in the future and selling, for example, to Southern California Jobbers as a warehouse distributor and at lower prices than it sold to non-member jobbers, then prudence would have dictated awaiting the outcome of that case prior to any abandonment.

Absence of knowledge that a questioned practice was clearly unlawful plus abandonment notwithstanding this fact constitutes a powerful showing of good faith. Thus, in the *Argus* case, *supra*, the Commission held that abandonment by Argus subsequent to complaint was in good faith because, *inter alia*, Argus did not have reason to

know that the practices challenged were clearly illegal (51 F.T.C. at 408-9).⁴

2. The Challenged Practices Have Been Surely Stopped under Circumstances which Assure There Is No Reasonable Likelihood of Resumption

A. Assurances by Respondents

While assurances *alone* as to future intentions, either in the form of affidavits or otherwise, are not necessarily a sufficient basis to support an abandonment dismissal,⁵ it is equally true that bona fide assurances as to future intent are a persuasive factor, especially when coupled with other facts and circumstances which indicate a non-likelihood of resumption. Thus, for example, in a number of cases the Commission has specifically pointed out in the course of denying motions to dismiss on the ground of abandonment that respondents have failed to give assurances as to the future. See, for example, *Colgate-Palmolive Co.*, Docket No. 7660, Opinion of Commission, March 9, 1961 [58 F.T.C. 422, 432], where the Commission stated:

In the *Argus* case [dismissed on the basis of abandonment], the respondent filed affidavits stating that it had no intention of resuming the practices with which it was charged. Nowhere in this record has the Colgate-Palmolive Company given any such express assurance.

Likewise, in *Browning King & Co., Inc., et al.*, Docket No. 7060 [59 F.T.C. 155, 164], the Commission, in denying dismissal on the basis of abandonment, stated: "We have no express assurance from respondents that they will not resume such practices and there is no indication of any unusual circumstances which would support that conclusion".

In *Marlene's, Inc. v. Federal Trade Commission*, *supra*, respondents filed an equivocal affidavit stating it had no intention of resuming the complained of practices "on a major scale." Referring to this lack of categorical assurances by respondents, the court held: "Thus, not only is the record devoid of evidence as to petitioners' future intent, but also of any statement as to such intent. On this state of the record, we believe the Commission properly placed the

⁴ The fact that respondents, as a precautionary measure, have filed an answer denying illegality and setting up affirmative defenses, including the defense of abandonment, cannot be cited against acceptance of the abandonment defense. In *Stokely-Van Camp, Inc. v. Federal Trade Commission*, *supra*, the court held:

"Fact (2) is irrelevant. Its irrelevancy is emphasized by the Commission's apologetic statement that no criticism is to be made against respondents (petitioners here) for vigorously defending the position they had taken, which, of course, they had a right to do. It does not follow, however, that one who defends charges before the Commission is, on that account, to be subjected in the future to a cease and desist order because his defense there proves unsuccessful. That would be a policy abhorrent to our sense of justice" (246 F.2d at 465).

⁵ *Ward Baking Company*, Docket No. 6833, 54 F.T.C. 1919, 1922 (1958).

burden on petitioners to reveal affirmatively their intentions" (216 F. 2d at 560).

Again, referring to the equivocal affidavit, the court stated:

We can only speculate as to why these are so phrased, but certainly the Commission on this record, so wanting in candor on this crucial issue, could well be apprehensive that the public interest required an order (216 F.2d at 560).

On the other hand, where surrounding circumstances demonstrate rather clearly the absence of likelihood of resumption, affidavits of intent have been held to be unnecessary. Thus, in *Stokely-Van Camp, Inc. v. Federal Trade Commission, supra*, the Commission in denying an abandonment dismissal of the complaint noted that there were no affidavits indicating future intentions. The Court of Appeals, reversing the Commission, held the complaint should be dismissed on the ground of abandonment notwithstanding the absence of affidavits of future intent because of a change in industry competitive conditions which rendered a resumption of the questioned practices improbable (246 F. 2d at 463).

That the Commission places substantial weight on sworn assurances of future intent where other circumstances and facts tend to corroborate such assurances is shown by its decision in *Bell & Howell Co.*, Docket No. 6729, 54 F.T.C. 108 (1957), as follows: "The sworn assurances of respondent's responsible officers that the practices will not be revived are * * * persuasive that the 'practices alleged have been surely stopped and there is no likelihood that they will be resumed in the future'" (54 F.T.C. at 109).

In the instant case, respondents' responsible officials have given sworn assurances that respondents have no intention whatsoever of a resumption of the questioned practices. For all of the reasons stated under Point 1 above, these assurances must be found to be in good faith.

B. Changed Business Conditions

In *Sheffield Merchandise, Inc.*, Docket No. 6627, 55 F.T.C. 2027 (1958), the Commission reversed the hearing examiner's dismissal based on abandonment, pointing out that the Commission had no reasonable assurances of non-resumption "by reason of existing industry-wide business conditions" and remanded the case (55 F.T.C. at 2028). On the remand, it was shown that there had been an industry-wide change concerning the use of the term "jeweled" on watches. The hearing examiner again dismissed the complaint on the ground of abandonment, *Sheffield Merchandise Inc.*, Docket No. 6627, 56 F.T.C. 991 (1960), and the Commission affirmed, pointing out:

One of the points mentioned in our decision to remand was the absence of a showing that industry-wide business conditions had so changed as to warrant a

Initial Decision

63 F.T.C.

conclusion that respondents for competitive reasons would not engage again in the alleged practices. We think the record now fully supports such a conclusion. Of particular significance is the evidence before us that members of a Swiss association of watch manufacturers make the only one jewel watch movement sold in this country and that in July, 1956 all members of this organization discontinued their practice of marking the word "jeweled" on such watches (56 F.T.C. at 999).

Conversely, absence of a change in industry-wide conditions has been a factor influencing the Commission's decision not to accept the defense of abandonment. Thus in *Ward Baking Co., supra*, the Commission pointed out that "* * * the same competitive conditions which allegedly induced respondent to initiate the challenged advertising program apparently still exist" (54 F.T.C. at 1922). Likewise, in the first *Sheffield* opinion, and prior to any evidence as to industry-wide changes, the Commission stated the proposition thus:

There is no assurance other than respondents' promise, even though made in good faith, that they will not resume the practices complained about in the future for competitive reasons, because of the "*continued existence in the industry of the practices that led respondents initially to employ the questioned representations. In such setting, respondents for compelling competitive reasons would be free again to adopt the same or similar practices, absent some effective legal restraint.*" (55 F.T.C. at 2028, emphasis added.)

The contrast to the instant case is striking. By April 2, 1962, the miniature bulb and sealed-beam lamp industry had completely abandoned a dual-price structure. Respondents, of course, prior to the industry-wide change followed industry-wide practice. However, with the revolutionary change that has taken place industry-wide, there exists no overall competitive condition which might prompt or even make feasible a return by respondents to the former practices.

Unusual circumstances exist in the present case. The "* * * competitive conditions that influenced respondent[s] to adopt the practice in the first place have been changed * * *" completely.⁶ Respondents were among the first licensees of the General Electric Company more than 40 years ago and at a time when General Electric held all patents on incandescent miniature bulbs, sealed-beam lamps and the machinery and equipment necessary to their manufacture. GE thereby had a 100% monopoly.⁷ During that period, General Electric alone set the distributional patterns, including the dual-price structure, which it maintained until January 1, 1962. Perforce, therefore, respondents in their initial entry to the market as an independent manufacturer after the GE patents became available, were required from a practical competitive standpoint to follow the competitive pattern set by GE. Obviously, the unusual and drastic change in

⁶ *Firestone Tire & Rubber Co., supra*.

⁷ *Cf. United States v. General Electric Co.*, 272 U.S. 476, 480-81 (1926).

industry-wide practices wrought by GE's adoption of a one-price policy on January 1, 1962, removed, and removed surely, the "competitive conditions that influenced respondent[s] to adopt the practice in the first place" (*Firestone Tire & Rubber Co., supra*).

Indeed, the change wrought by GE effectively precludes a return by respondents to a two-price basis as effectively as the "industry-wide adoption of the [FTC] guides" in the *Firestone* case. In the *Firestone* case the Commission held that an agreement by respondent and other members in the industry, subsequent to complaint, to observe industry FTC Guides constituted an industry-wide change in competitive conditions justifying a conclusion that "* * * it is to be expected that the continuing guidance to be afforded by this program will prevent a recurrence" and that there was no "cognizable danger of recurrent violation" (55 F.T.C. at 1920). The Commission also pointed out that the respondent had "* * * taken costly steps to bring itself into line with the new standards" contained in the FTC Guides (*Ibid.*). The names of the tires are embedded in the sidewalls, and thus in changing the names of its tires in compliance with the Guides, Firestone had taken the "costly step" of making new tire molds. Respondents here have likewise made changes which, from a practical standpoint, are more costly than a physical tire mold change. As is shown by the Schulte affidavit, page 5, the changes which respondents made in turning to a one-price distribution system "resulted in a drastic realignment of customers" with many of respondents' customers giving up entirely the business of selling the products in question. While, of course, it might be physically possible to attempt to realign the customers once again in accordance with the old pricing system and to attempt to regain the lost customers, just as it would have been *possible* for Firestone to make once again tire molds bearing the deceptive designations, both situations are drastic enough to warrant the assumption that they will not be reversed. Indeed, the realignment of one's customers is an even more drastic change of commercial behavior than is the mere casting of new molds for one's products changing nomenclature.

A case which contains many significant parallels with the present proceeding is *Bell & Howell Co., supra*. In that case the complaint, issued on February 20, 1957, charged the respondent with illegally enforcing Fair Trade agreements. On January 16, 1957, Bell & Howell announced that effective February 1, 1957, its Fair Trade system would be terminated, and on that date such termination was fully carried out, thus rendering inoperative the methods of enforcement questioned by the Commission. The hearing examiner denied Bell & Howell's motion to dismiss. In overruling the examiner and

dismissing the case, the Commission upheld the defense *which was based on the ground of changed business conditions*.

Again, it was possible for Bell & Howell to Fair Trade in the future; it was possible that Bell & Howell's dominant competitors, including Eastman Kodak, would resume Fair Trade in the future.

In *Ward Baking Co.*, the Commission demonstrated that it is always ready to entertain a showing of changed competitive conditions as a basis for the abandonment defense. In denying the abandonment defense in the *Ward Baking* case, the Commission declared:

The instant proceeding contains none of the unusual circumstances which existed in the *Argus* case, or any other factors so out of the ordinary that they would call for dismissal. The plain fact is that here we have simply a showing of a discontinuance following the issuance of the complaint and a promise not to resume in the future. *On the other hand, the same competitive conditions which allegedly induced respondent to initiate the challenged advertising program apparently still exist.* Clearly, the Commission would not be required to rely on the promise not to further engage in the practices. (54 F.T.C. at 1921-1922, emphasis added.)

Among the reasons for denying dismissal on the basis of abandonment in *The Grand Union Co.*, Docket No. 6973 (Aug. 12, 1960) [57 F.T.C. 382, 425], the Commission pointed out that " * * * respondent has not given any assurances that it will not again engage in the practice challenged by the complaint or some similar practice, nor can it be said that competitive conditions have so changed that respondent is not likely to engage in such practice."

Similarly, in *Carter Products, Inc.*, Docket No. 7943 (April 25, 1962) [60 F.T.C. 782, 796], the current Commission in upholding the hearing examiner's rejection of the abandonment defense, pointed out the absence of any change in the competitive conditions: "There has been no showing of unusual circumstances which would indicate that entry of an order is unnecessary nor does it appear that there has been any change in the competitive conditions which may have influenced respondents to use advertising of the type under consideration."

In *N. Erlanger, Blumgart & Co., Inc.*, Docket No. 5243, 46 F.T.C. 1139 (1950), one of the reasons for the dismissal on the ground of abandonment was that " * * * the economic conditions in the industry prior to 1944 under which producers of rayon materials felt it necessary to create in the consuming public a demand for products fabricated from rayon yarns no longer exist * * *" (46 F.T.C. at 1144). *National Retail Furniture Ass'n*, Docket No. 5324, 48 F.T.C. 1540 (1951), and *National Coat and Suit Industry Recovery Board*, Docket No. 4596, 47 F.T.C. 1552 (1950), were both also dismissed cases in which the questioned practices took place " * * * under economic con-

ditions which differed materially from those now prevailing * * * (48 F.T.C. at 1558; 47 F.T.C. at 1568).

Complaint counsel, citing *Hillman Periodicals, Inc. v. Federal Trade Commission*, 174 F. 2d 122 (2d Cir. 1949), state that respondents' admitted abandonment is a "partial abandonment" and, therefore, the defense of abandonment is unavailable. In the *Hillman* case respondents were charged with such false and misleading statements as "Complete and unabridged" and "A full-length novel" on the covers of their abridged editions, without indicating that the books were not complete reprints of the originals. Respondents abandoned use of the statement "complete and unabridged" but continued to use the statement "A full-length novel." *Hillman Periodicals, Inc.*, Docket No. 5440, 44 F.T.C. 832 (1948). This is the discontinuance "in part" of which the court speaks (174 F. 2d at 123). Obviously, the abandonment in the present proceeding is not remotely similar. In *Hillman*, respondents abandoned only one of two false and misleading statements relating to the product being considered. In the present proceeding Tung-Sol has abandoned *all* the questioned practices relating to the two products being considered. Therefore, the abandonment here involved can in no way be deemed a "partial abandonment."

C. Other Considerations

Other factors bearing on the likelihood of resumption are the "attitude of respondent towards the proceedings"⁸ and "the character of the past violations" of the law, if any.⁹

In the instant case respondents have supplied counsel in support of the complaint with all documents and data requested without requiring resort to compulsory processes.¹⁰ There has been complete cooperation.

Moreover, in its 50-odd years of existence, Tung-Sol has never been proceeded against by the Federal Trade Commission (Schulte, p.6).

Respondents' situation is thus to be deemed in clear contrast to those cases in which assurances of future compliance with the law were held to be vitiated or neutralized by a past history of respondent's misbehavior. In *Consolidated Royal Chemical Corp. v. Federal Trade Commission*, 191 F. 2d 896, 898 (7th Cir. 1951), the court

⁸ *Eugene Dietzgen Co. v. Federal Trade Commission*, *supra*.

⁹ *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

¹⁰ In *Fred Bronner Corp.*, Docket No. 7068 [57 F.T.C. 771, 779], Hearing Examiner Johnson, in finding abandonment and no likelihood of resumption noted: "The record shows that respondents cooperated to the fullest extent in the course of the investigation, withholding no information and making freely available to the investigator all records and information requested."

Initial Decision

63 F.T.C.

upheld the Commission in its refusal to accept respondent's assurances of future compliance on the ground that respondent had already violated the terms of two stipulations made 6 and 16 years previously.

Complaint counsel point out that in respondents' April 12, 1962, notice of change to a one-price policy, this change is referred to as a temporary change. Based on this, it is urged that there can be no finding of a non-likelihood of resumption. However, viewing the drastic and radical change being made and its certain adverse impact on certain old and loyal customers (Kirchner affidavit, p.6), the language employed in the notice is wholly logical and consistent with business objectives. For example, as Kirchner points out in his affidavit, the company calculated that it could keep some of its warehouse distributor accounts, even though jobbers to whom these warehouse distributor accounts had previously sold could buy at the same price as warehouse distributors themselves. The notice was no more than a diplomatic announcement of a change in pricing structure which had been in existence for over 40 years. In any event, the hard fact is that more than one year later respondents still have a one-price policy and the affidavits thoroughly support the complete unlikelihood of any change in the future.

Procedural Issues

Counsel supporting the complaint argues that a full record must be made and that the issue is presented to the hearing examiner "in a factual vacuum" (Br., p.3). In the same vein it is asserted that there should be evidence as to the actions of respondents' competitors and that the abandonment issue cannot properly be decided apart from "the considerations which led the Commission to issue the complaint in the first instance" (Br., p.3).

These assertions are wholly without merit. It can and must be assumed that the Commission in issuing the complaint had "reason to believe" that respondents had violated the Robinson-Patman Act as alleged. Upholding a defense of abandonment assumes, without deciding, that the abandoned practices were unlawful. Therefore, evidence that they were in fact unlawful, if such be the case, would add nothing. It would, as complaint counsel so aptly observed, be "whip[ping] a dead horse" (Tr. 10).

In view of counsel's reluctance to "whip a dead horse" the examiner gave complaint counsel until November 23, 1962, to investigate and satisfy themselves as to the current facts (Tr. 15-17). At the hearing on November 23, 1962, counsel for respondents advised the ex-

aminer that respondents had prepared a motion to dismiss as to two products on the ground of abandonment, supported by affidavits and brief. In response to this suggestion the hearing examiner inquired whether Commission counsel took issue with the facts stated in the supporting affidavits, as follows:

MR. MATHIAS: It is my understanding that April 2 a radical change did occur in their sales program which—

HEARING EXAMINER HINKES: Have you seen the affidavits referred to by Mr. Baker?

MR. MATHIAS: Yes, sir.

HEARING EXAMINER HINKES: Do you disagree with them or are you going to contest their factual basis?

MR. MATHIAS: No (Tr. 33).

At a further hearing on January 15, 1963, Commission counsel affirmed that there was no question as to facts and that their answer was not meant to be interpreted as raising issues of fact and that the only issue was as to the "conclusion to be drawn from the facts" (Tr. 44-45). Again counsel for respondents offered to produce the affiants for interrogation and again Commission counsel stated they were not contesting the facts but only the "conclusions to be drawn" (Tr. 51).

The examiner invited Commission counsel to put in any evidence they had which they thought would have a bearing on the abandonment issue (Tr. 53), but counsel declined to avail themselves of this opportunity and stated they would "stand on the fact that these affidavits we do not believe give any basis for a plea of abandonment" (Tr. 54). Nevertheless, complaint counsel infer that the briefs and affidavits submitted so far in this proceeding do not form an adequate legal basis for deciding whether there is a good abandonment defense. However, decision of controversies through affidavits, and especially uncontroverted affidavits, is commonplace both in the courts and the Commission.

In *Bell & Howell Co.*, *supra*, the Commission's decision dismissing the complaint on the ground of abandonment was made on the basis of affidavits and attached exhibits and the briefs of opposing counsel. In *Argus Cameras, Inc.*, *supra*, the decision to dismiss for abandonment was made on the basis of one affidavit, attached exhibits, a supplementary affidavit, and memoranda. In *N. Erlanger, Blumgart & Co., Inc.*, *supra*, the dismissal for abandonment was made on the basis of one affidavit and a supporting brief.

In *Oneida, Ltd.*, Docket No. 7236, 55 F.T.C. 1669 (1959), at the oral hearing on the motion to dismiss for abandonment, the examiner granted the dismissal on the basis of the affidavit and attached

Initial Decision

63 F.T.C.

exhibits and memoranda without the taking of any evidence. In the oral argument before the Commission on appeal from the dismissal, complaint counsel maintained that he would have liked to have had further testimony given on the question of abandonment but that the examiner never granted him the opportunity to put respondent's officials on the stand and instead asked several questions of respondent's counsel and dismissed the case forthwith. The Commission nevertheless affirmed the examiner's dismissal.

In *R. H. White Corp.*, Docket No. 6884, 54 F.T.C. 1734 (1958), the examiner dismissed the proceeding without prejudice on the ground of abandonment, and complaint counsel appealed. In its opinion the Commission stated:

No oral testimony was received. The record which was the basis for the hearing examiner's challenged ruling was composed of the complaint and the respondent's combined answer and motion, and attached memorandum, together with counsel's reply in opposition to the motion and an affidavit submitted by the respondent. Hence our consideration of the appeal is likewise limited to those record matters. (54 F.T.C. at 1736.)

Later on in its opinion the Commission stated:

** * * After the motion to dismiss was filed, counsel supporting the complaint took no exception to the basic or essential facts asserted in the respondent's answer and affidavit and made no effort to supplement the record with additional facts bearing on the good faith of the respondent's discontinuance. They thus permitted the motion to go to the hearing examiner for decision virtually by default and, on the record presented to him, the hearing examiner's action of dismissal without prejudice clearly was appropriate. [Emphasis added.]*

Under the circumstances, we are of the opinion that our action should be governed similarly. We recognize, of course, the Commission's power to remand a proceeding to a hearing examiner for the reception of such evidence as may be necessary to provide an adequate basis for an informed decision on any question presented for review. But such a procedure is costly, time-consuming, and, to a degree, harassing to the respondent. We believe that in the instant matter the public interest will be best served by allowing the initial decision to stand undisturbed and by underwriting the professions of respondent's affidavit of abandonment by continued close scrutiny of its future operations. (54 F.T.C. at 1737-1738.)

Scope of the Order

Although statements of complaint counsel at the prehearing conferences reflected no issue between the parties respecting the scope of the order and no objection to an order which would mention flashers alone, a brief exposition of the issue might be appropriate. Many cases have held that it is appropriate to confine the order in a litigated case to the products in connection with which violation is shown under circumstances where no exculpable defense is available.

In *Vanity Fair Paper Mills, Inc.*, Docket No. 7720 [60 F.T.C. 568, 584], the Commission limited the order to "paper products" and refused to include "other merchandise." There the record failed to disclose "whether respondent makes or sells any other product." Had the complaint been dismissed with respect to "other products" for failure of proof or because of an affirmative defense, the same result should obtain. In *the Matter of Transogram Company, Inc.*, Docket No. 7978 [61 F.T.C. 629]. This would also appear to be consistent with the opinion in *Swanee Paper Corp. v. Federal Trade Commission*, 291 F. 2d 833 (2d Cir. 1961) [7 S.&D 175, 181] that "there must be some relation between the facts found and the breadth of the order." Moreover, there is a practical basis for a distinction in the treatment of flashers vis-a-vis miniature bulbs and sealed-beam lamps. The competitive nature of the two markets is entirely distinct. For example, while General Electric and Westinghouse are major competitors of Tung-Sol in connection with miniature bulbs and sealed-beam lamps, they do not compete with Tung-Sol in connection with flashers, of which Tung-Sol is the leading manufacturer and seller. The "tailoring" of the order here is, therefore quite appropriate in view of the voluntary, good faith abandonment of the practice with respect to miniature bulbs and sealed-beam lamps, the difference in the competitive market for these two products compared to flashers, and the failure of complaint counsel to take issue with the proposed narrow scope of the order.

ORDER

It is ordered, That Tung-Sol Electric Inc., a corporation, and Tung-Sol Sales Corporation, a corporation, their officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale and distribution for replacement purposes of automotive flashers in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of said products of like grade and quality, by selling to any purchaser at net prices higher than the net prices charged any other purchaser who, in fact, competes in the resale and distribution of said products with the purchaser paying the higher price.

It is further ordered, That the complaint be, and it hereby is, dismissed with respect to miniature bulbs and sealed-beam lamps without prejudice to the right of the Commission to take such further action against respondents as future facts and circumstances may warrant.

Complaint

63 F.T.C.

FINAL ORDER

The hearing examiner filed an initial decision in this case on May 13, 1963. Subsequently, on July 25, 1963, the Commission, having been informed by complaint counsel that no petition for review would be filed, issued an order staying the effective date of the initial decision. The Commission has now determined not to place the case on its own docket for review. Accordingly,

It is ordered, That the Commission's order of July 25, 1963, staying the effective date of the initial decision, be, and it hereby is, vacated.

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

It is further ordered, That respondents shall file with the Commission, within sixty (60) days after service of this order upon them, a report in writing, signed by them, setting forth in detail the manner and form of their compliance with the order.

By the Commission, Commissioners Dixon and MacIntyre not concurring.
