

IN THE MATTER OF
THE GREAT ATLANTIC & PACIFIC TEA COMPANY,
INC.

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF FEDERAL
TRADE COMMISSION ACT

Docket 8916. Complaint, Feb. 16, 1973 - Final Order, Mar. 25, 1975

Order requiring one of the nation's two largest supermarket chains, headquartered in Montvale, N.J., among other things to have advertised items readily available for sale at or below advertised prices.

Appearances

For the Commission: *Michael C. McCarey, Joel P. Bennett and Rosalind A. Lazarus.*

For the respondent: *Donald J. Mulvihill, Cahill, Gordon & Reindel, Wash., D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that The Great Atlantic & Pacific Tea Company, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Great Atlantic & Pacific Tea

Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 420 Lexington Ave., N.Y., N.Y.

PAR. 2. Respondent is now, and for some time last past has been engaged in the operation of a large chain of retail food stores. Respondent presently operates 4,329 retail food stores in 36 States of the United States, the District of Columbia and Canada. Its volume of business has been and is substantial. In the operation of its retail food stores, respondent offers to its customers an extensive line of products, including food, as that term is defined in the Federal Trade Commission Act, groceries and other merchandise. Many of the said products offered for sale and sold are manufactured or processed by respondent through its various divisions, subsidiaries and affiliates at manufacturing and processing plants located in various States. Many of the said products, however, are purchased from numerous independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid food and grocery products and other merchandise to be shipped and distributed from the aforesaid manufacturing and processing plants or from its other sources of supply to warehouses and distribution centers and thereafter to its retail food stores located in various States other than the State of origination, distribution or storage of said products. Respondent maintains, and at all times mentioned herein has maintained a substantial course of trade in the production, processing, distribution, advertising, offering for sale and sale of the aforesaid food and grocery products and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, as aforesaid, and for some time last past respondent has been and is now disseminating, and causing the dissemination of, certain advertisements concerning the aforesaid food and grocery products and other merchandise by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which were and are likely to induce, directly or indirectly, the purchase of said products from respondent; and respondent has been and is now disseminating, and causing the dissemination of, advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were and are likely to induce,

directly or indirectly, the purchase from respondent of the said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Many of the said advertisements list or depict the aforesaid food and grocery products and other merchandise, and also contain statements and representations concerning the price or terms at which said products would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the geographical areas in which the offers would be made.

PAR. 5. Through the use of such advertisements disseminated and are now being disseminated in various areas of the United States served by respondent's retail food stores, respondent has represented and is now representing directly or by implication, that in its retail food stores in the aforesaid various areas of the United States in which said advertisements were and are being disseminated, in those stores covered by the said advertisements, during the effective periods of the advertised offers, the items listed or depicted in the said advertisements would be or are:

1. Readily available for sale, and
2. Conspicuously available for sale at or below the advertised prices.

PAR. 6. In truth and in fact, in a number of respondent's retail food stores located in the aforesaid various areas throughout the United States in which the aforesaid advertisements were and are being disseminated, in stores covered by the said advertisements, during the effective periods of the advertised offers, a substantial number of the items listed or depicted in the said advertisements were or are:

1. Not readily available for sale, or
2. Not conspicuously available for sale at or below the advertised prices.

Therefore, the statements and representations as referred to herein, were and are false, misleading and deceptive, and each of the said advertisements was and is misleading in material respects and constituted, and now constitutes a "false advertisement", as that term is defined in the Federal Trade Commission Act.

PAR. 7. By disseminating or causing the dissemination of advertisements which offer or present for sale, food or grocery products or other merchandise, as aforesaid, and by failing to have in each of its stores located within the areas covered by such advertisements, during the effective periods of the advertised offers, in quantities sufficient to meet reasonably anticipated demands, the advertised items:

1. Readily available for sale to customers; or

2. Conspicuously available for sale at or below the advertised prices;

respondent has been and now is engaged in unfair acts and practices.

PAR. 8. In the course and conduct of its business, and at all times referred to herein, respondent has been, and now is, in substantial competition in commerce, with corporations, partnerships, firms and individuals in the retail food and grocery business.

PAR. 9. The use by respondent of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices including the dissemination of the aforesaid "false advertisements," has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items.

PAR. 10. The acts and practices as aforesaid, and the dissemination by respondent of the false advertisements, as aforesaid, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE
LAW JUDGE

JANUARY 24, 1975

I

Allegations of Complaint

In a complaint served on Mar. 1, 1973, the Commission charged The Great Atlantic & Pacific Tea Company, Inc. (A&P), with disseminating advertisements in various metropolitan areas in which its retail food stores were located offering food and grocery products, and other merchandise, at particular prices when, in a number of stores covered by such advertisements, a substantial number of advertised items were not available at or below the advertised prices. According to the complaint respondent A&P had engaged in false, misleading and deceptive advertising, and had utilized unfair acts and practices in violation of Sections 5 and 12 of the Federal Trade Commission Act.

More particularly, Paragraph Five of the complaint alleged that

A&P's advertisements for food, grocery and other products constituted representations that its retail food stores, in the areas covered by the advertisements, during the effective periods of such advertisements, would have the particular items listed or depicted in the advertisements:

1. readily available for sale, and
2. conspicuously available for sale at or below the advertised prices.

The complaint alleged under Paragraph Six that a substantial number of the items listed or depicted in the advertisements were "not readily available for sale," or were "not conspicuously available for sale at or below the advertised prices," in a number of the retail food stores located in the areas in which the advertisements were disseminated during the effective periods of the "advertised offers." The complaint charged that the advertisements were therefore "false, misleading and deceptive," were "misleading in material respects," and constituted false advertisements. The complaint further alleged that the challenged advertisements had the tendency and capacity to mislead members of the purchasing public, to induce them to go to respondent A&P's retail food stores, to purchase substantial quantities of the advertised items at prices in excess of those advertised, and to purchase substantial quantities of items other than those advertised, all to the prejudice and injury of the public and of A&P's competitors.

On Apr. 11, 1973, A&P filed an answer denying that any of its advertisements were unfair, misleading or deceptive. The answer denied that its advertisements for food and grocery products, and other merchandise, made the representations as to availability set forth in paragraph five of the complaint, and denied that any of its advertisements were misleading or deceptive in any material respect or constituted false advertisements.

The answer of A&P affirmatively declared that the complaint and proposed order were discriminatory as to A&P, and violative of its constitutional rights of due process. A&P asserted that the Commission had previously promulgated a Trade Regulation Rule for the Retail Food Industry "in less onerous terms than the standard announced" in the complaint and notice order issued against it. A&P asserted that the Commission, being frustrated in its efforts "to establish a standard for the entire food industry due to the successful challenge to its rulemaking authority," had sought to establish such a standard by selecting A&P, as one of the industry's largest and most visible members, for an adjudicatory proceeding. A&P asserted that the complaint and notice order were discriminatory because they sought to establish a far stricter standard for A&P than the standard previously established for the retail food industry in the Trade Regulation Rule,

and that whereas the Commission previously sought to "regulate" the retail food industry, it now sought to "annihilate" A&P by such far stricter standard. The answer asserted that under the notice order, contrary to previously articulated policy, the Commission would refuse to consider as relevant for A&P (1) failure of delivery due to circumstances beyond the A&P's control, (2) failure to have advertised items "conspicuously and readily available" for sale "at or below the advertised prices" due to circumstances beyond A&P's control, and (3) the availability of "rain checks."

The answer of A&P contended that the complaint and notice order were premised on the theory that a food retailer's advertising was a virtual guarantee that all advertised items would be, for the entire duration of the advertisement, "in stock and readily available" for sale, with the advertised price "conspicuous" thereon, and that the complaint failed to allow for underestimation of demand or even for failure of delivery because of circumstances beyond the advertiser's control. According to the answer, the complaint did not take into account A&P's "rain check" policy, that every item out of 7,500 to 12,500 could not be individually marked and, further, that prices on some sale items were adjusted at the check-out counter. The answer contended that if the theory in the complaint and notice order were sustained, the result would be to impede the flow of truthful and important information because A&P, and others, would be forced to resort to meaningless, noninformative advertising.

Finally, A&P asserted that the proceeding was based on the assumption that A&P's advertisements represented that the advertised food items would be "readily" and "conspicuously" available for sale at the advertised prices, that complaint counsel had the burden of proving that the advertisements in fact made such express or implied representations, but that the complaint made it clear that the Commission had already "prejudged this issue against A&P." In conclusion, A&P asserted that the relief sought in the proposed order was arbitrary and capricious, and that the relief would violate A&P's constitutional right to communicate to the public "truthful and factual" information.

History of Proceeding

Pretrial proceedings including discovery were commenced as soon as the answer of respondent A&P was filed. The first pretrial conference was held on May 8, 1973, and a number of such conferences were held thereafter. Inasmuch as the heart of complaint counsel's evidentiary proof consisted of surveys of supermarket and retail food stores of A&P and other leading chains for the availability and pricing of

advertised products, conducted in a number of metropolitan areas, the validity of the methodology and the correctness of execution of these surveys became a major focus of pretrial preparations. In July 1973 complaint counsel filed a detailed offer of proof of two surveys, together with tables, charts, statement of methodology, legal authority and underlying data, requesting a preliminary ruling that the surveys were admissible in evidence.

The first survey of complaint counsel was designed and conducted under the supervision of a member of the faculty of the School of Law of the University of North Carolina, and was done in the Raleigh, Durham and Chapel Hill areas in the spring of 1972 by law students and members of the North Carolina Consumer Council. The second survey had been conducted in 1971 by Commission personnel from its Regional Offices under the general supervision of the Commission's Bureau of Economics. Supermarkets and retail food stores were surveyed in cities in four geographic areas, the Northeast, Southeast, Midwest and Far West. Regional office employees monitored supermarket and retail food stores of A&P and its leading competitors in 12 medium sized and small cities in their assigned areas.

After complaint counsel submitted their offer of proof respondent A&P engaged consulting economists, the National Economic Research Associates, Inc., and an expert in social research from the faculty of American University, Wash., D.C., to analyze the surveys, the methodology and execution thereof, and all underlying material. On Nov. 16, 1973, a comprehensive analysis of the North Carolina survey and the survey conducted by the Commission's regional offices, and all underlying material, was filed by A&P, together with a legal memorandum vigorously opposing any preliminary ruling that the surveys were admissible in evidence. A number of serious problems with the surveys, both in design and execution, were identified.

While complaint counsel's offer of proof containing the North Carolina and 1971 Commission surveys were under analysis by A&P and its experts, it developed that a new Commission survey had been conducted in April and May of 1973, and that the results of this survey were being prepared for presentation in this proceeding.

On Dec. 20, 1973, the undersigned denied the motion of complaint counsel for a preliminary or tentative ruling that the North Carolina and the Commission surveys were admissible in evidence. The undersigned concluded that "enough questions had been raised" by A&P's experts, "which could or might be serious" as to render full evidentiary hearings on the reliability and admissibility of the surveys necessary before any ruling, even preliminary, could be made. At the

same time counsel for both sides were requested to submit the earliest practicable date for commencement of hearings on the merits.

On Jan. 15, 1974, A&P moved the Commission for reexamination of the Trade Regulation Rule governing "Retail Food Store Advertising and Marketing Practices" issued July 12, 1971, and filed with the undersigned a motion for a stay of proceedings pending Commission action on such motion, requesting certification thereof to the Commission. The undersigned certified the motion for a stay, and on Jan. 31, 1974, the Commission denied it.

On Feb. 6, 1974, the National Association of Food Chains filed a motion with the Commission to intervene in this proceeding, and on Feb. 7, 1974, respondent A&P moved the Commission to reconsider its denial of the motion for a stay pending Commission action on the motion for reexamination of the trade regulation rule.

In the meantime, the undersigned set hearings on the merits to commence May 21, 1974, this being the earliest date complaint counsel considered practical for commencing the case-in-chief.

On Mar. 11, 1974, the Commission denied the motion of the National Association Of Food Chains to intervene noting that such motion should initially have been made to the Administrative Law Judge. On Mar. 11, 1974, the Commission also denied the request of A&P for reconsideration of its motion for a stay pending Commission ruling on A&P's request for reexamination of the Trade Regulation Rule. On Apr. 16, 1974, the National Association Of Food Chains filed a motion with the undersigned to intervene in the proceeding. This motion was denied on May 1, 1974.

On Apr. 29, 1974, A&P moved for dismissal of the complaint insofar as it alleged violation of Section 12 of the Federal Trade Commission Act. The motion was grounded on the contention that the complaint, as amplified by responses of complaint counsel to A&P's requests for admissions, did not, as a matter of law, allege conduct violative of Section 12. The undersigned deferred ruling on this motion until the filing of the initial decision, and it will be disposed of herein.

Pursuant to motion of complaint counsel on May 15, 1974, official notice was taken of the Trade Regulation Rule on "Retail Food Store Advertising and Marketing Practices" and, for a limited purpose, of certain documents in the record thereof.

On Apr. 17, 1974, both A&P and the National Association Of Food Chains filed suit in the United States District Court for the Southern District of New York to enjoin the Commission from (1) further proceeding in this matter, (2) enforcing the Trade Regulation Rule governing Retail Food Store Advertising and Marketing Practices, (3) further prosecuting the allegation of the complaint that Section 12 of

the Federal Trade Commission Act had been violated, and (4) for an order affirmatively directing the Commission to clarify or amend the trade regulation rule. This suit for injunctive relief was dismissed by the United States District Court on May 16, 1974.

The case-in-chief was commenced on May 30, 1974, rather than May 21, 1974, because of the receipt in evidence by stipulation of the new and most recent Commission survey conducted in the late Spring of 1973, resulting in the withdrawal by complaint counsel of the offer in evidence of the North Carolina and the 1971 Commission surveys. As a result of the stipulation, the need to conduct evidentiary hearings on the admissibility of the 1973 Commission survey was obviated. The case-in-chief was concluded in all essential details on June 21, 1974.

The case-in-defense began July 15 and was completed on July 31, 1974, except for an expert witness who was heard on Aug. 28, 1974. Rebuttal and surrebuttal were completed on Sept. 4 and 5. A number of additional exhibits offered by A&P were received pursuant to motion on Oct. 2, 1974. The record was then closed for reception of evidence and a briefing schedule was issued.

Twenty-nine (29) witnesses testified, thirteen (13) were called by complaint counsel and sixteen (16) by A&P. Each side presented expert testimony. The record consists of three volumes of motions, pleadings, etc., approximately 2,952 pages of transcript, and nine volumes of exhibits, some of which are tables and charts, assembling data elsewhere in the record.

Basis of Decision

This matter is now before the undersigned for initial decision based on the allegations of the complaint, answer, evidence, and the proposed findings of fact, conclusions and briefs filed by A&P and complaint counsel. All proposed findings of fact, conclusions and arguments not specifically found or accepted herein are rejected. The undersigned, having considered the entire record, and all the contentions of both sides, makes the following findings and conclusions and issues the order set out at the end hereof:

II

FINDINGS OF FACT

Respondent

1. The Great Atlantic & Pacific Tea Company, Inc., well known to everyone, is one of the two largest supermarket chains in the United States. A&P operates around 3,600 to 3,700 self-service retail food and grocery stores in 36 states, the District of Columbia and Canada (CX

270). The precise number of A&P stores in operation at any particular time varies due to the closing of old stores and the opening of new ones as business conditions change. Gross annual sales in the fiscal year ending Feb. 24, 1974, were nearly \$6,747,000,000 (CX 272). A&P operates retail food stores in small and medium sized communities as well as in the nation's most populous metropolitan centers. Food stores range in size from ultra-modern supermarkets handling virtually every conceivable kind of food and grocery product, and surrounded by spacious parking facilities, to relatively small stores in downtown urban centers, such as New York City, with crowded aisles, packed shelves and display cases (RX 1085a-d, RX 1105a-f, and RX 1108a-e). During a typical week \$110,000,000 worth of merchandise is sold (CX 270f and i) to between 16 and 20 million customers (Cairns, Tr. 1289) involving about 250,000,000 units of packaged goods, as well as enormous quantities of fresh meat, fish, produce, dairy products, etc. (RX 1031). Combined full-time and part-time employees approximate 100,000, the two categories being about equal in number (Stiffler, Tr. 2488). In addition to retail food stores, A&P operates bakeries, coffee-roasting facilities, dairy processing plants, meat packing plants, and many other types of food processing installations in many different states and localities in which it manufactures or packages food, grocery and other merchandise under its own brand names, example "Ann Page" (RX 1031). A&P retail food stores sell the packaged goods of independent suppliers located in various parts of the country, marketed under nationally or locally known brand names of such suppliers, as well as goods supplied to A&P for resale under A&P's brand names. A&P maintains national buying organizations in various parts of the country for basic items such as meat, fish, and produce (MacDonald, Tr. 880-82, 891-92). At the time of the complaint, A&P's national headquarters was in New York City, but has since been moved to Montvale, N.J. (Cairns, Tr. 1142; Stiffler, Tr. 2475). At all times relevant to this proceeding, A&P has maintained a substantial course of trade in food and grocery products, and other merchandise, in commerce as "commerce" is defined in the Federal Trade Commission Act, and has been in substantial competition in commerce with other firms and individuals engaged in the retail food and grocery business.

2. A&P's retail food stores are organized into 31 or 32 divisions, including a division for Canadian stores. A division is responsible for supervising the operation of A&P stores in a particular geographic area, usually centered on a major city. For example, the Cleveland Division, based in that city supervises A&P stores in northeastern Ohio (Weschler, Tr. 372). The Detroit Division supervises A&P stores in that city and elsewhere in the State of Michigan (MacDonald, Tr. 767-68).

Other divisions are located in Chicago, Indianapolis, Kansas City, Milwaukee, St. Louis, Toledo, Baltimore, Philadelphia, Scranton, New Orleans, Jacksonville, Boston, and many comparable cities. A&P's divisions are grouped into five regions, each headed by a regional president (Cairns, Tr. 1349). At the top of this organization is A&P's national headquarters.

3. Each division is headed by an executive entitled "vice president and general manager" (MacDonald, Tr. 767; Van Lentin, Tr. 2108). Each divisional vice president is assisted by subordinate executives responsible for sales, purchasing, store operation, warehousing, and other functions (MacDonald, Tr. 879-886; Van Lentin, Tr. 2110-15). The individual divisions of A&P are substantial operations. For example, the Bronx Division oversees 162 stores in New York City's five boroughs and suburban counties north of the city, has a work force of about 5,900 employees, and does about \$350,000,000 worth of business annually (Van Lentin, Tr. 2108-2110).

4. Divisions in general prepare and place advertising for stores within their jurisdiction, maintain warehouses, arrange for the purchase of food and grocery products, and other merchandise, and supervise the distribution thereof to divisional stores (Browning, Tr. 1003, 1056-57). An exception is the New York City area where the headquarters of A&P's Eastern Region provides centralized purchasing, and handles the formulation and dissemination of advertising for the four metropolitan area divisions, Bronx, Long Island, Newark and Paterson, which in the aggregate operate about 588 stores (Burtis, Tr. 1834-38).

The Retail Food Industry

5. Official notice was taken for general and background purposes of information relating to the retail food industry set out in the Statistical Abstract of the United States for 1973, and in the Commission's statement of basis and purpose for the trade regulation rule effective July 12, 1971, on Retail Food Store Advertising and Marketing Practices.¹ Retail sales by food stores in 1972 were \$95 billion of which \$49.8 billion were made by multi-unit food chains, that is, those operating 11 or more stores. Food represents about 17.6 percent of total U.S. personal consumption expenditures, and sale of groceries and other foods represents about 20.3 percent of all retail trade. Expenditures for advertising by retail food stores amounted in 1970 to \$674 million.

A[P's Advertising

¹ No "adjudicative facts" material to this proceeding were the subject of official notice (see ruling on complaint counsel's motion to take official notice dated July 10, 1974, and ruling on respondent's conditional motion to take official notice dated Aug. 7, 1974).

6. In common with its major competitors, and the supermarket industry generally, A&P advertises extensively in various media, but predominately in mass-circulation metropolitan dailies, for the purpose of promoting its business and to induce the public to patronize its stores and to purchase the items advertised. Typically, advertisements are published in metropolitan areas at the beginning of the week, usually Monday, in both morning and evening papers, picturing or listing items and prices featured in the A&P stores in the market area through the first half of the week (Cairns, Tr. 1326; Burtis, Tr. 1846; Browning, Tr. 993; Hare, Tr. 694; Wyatt, Tr. 940; Loeb sack, Tr. 166; Eliassen, Tr. 524). Advertisements are again published in the middle of the week, usually on Wednesday in the area's evening daily (example, CX 17) or in the major morning daily on Thursday, or in both, setting out the items and prices featured through the end of the week until store closings, generally on Saturday evening (Loeb sack, Tr. 249; Eliassen, Tr. 524; Wyatt, *supra*). The mid-week placement is the week's main advertisement (MacDonald, Tr. 773; Browning, Tr. 993). The beginning of the week advertisements usually contain some items which are also contained in the mid-week advertisements (Weschler, Tr. 373; also Loeb sack, *supra*).

7. Full page advertisements are commonly utilized, and multi-page advertisements are not infrequent, especially for the mid-week placement (CX 22a-c). A wide variety of different items, often as many as 120 to 130 per advertisement (CX 1-2, 4-5, 17-39), are typically offered drawn from the main categories of products, meat, fish and poultry, canned goods and groceries, fruits and vegetables, and miscellaneous household and other products. Certain items—"features"—are given particular prominence, with many others being simply "line items." "Line items" are national or regional brands which are included, usually in a line in the lower half of the newspaper advertisement, generally in return for an advertising allowance or discount (MacDonald, Tr. 787, 892-94; Weschler, Tr. 392-93; Browning, Tr. 1002). The record contains a substantial number of A&P's advertisements, as well as those of other supermarket chains (CX 1-2, 4-5, 17-39; RX 1112).

8. A key aspect of the newspaper advertising just described is the fact that the price of each advertised item is presented with prominence. The advertisements are price-oriented, and represent price competition in a real sense. Food and other products are frequently offered in these advertisements at substantial reductions, often on the presentation of a coupon included in the advertisement, and also at the "regular" price normally charged (Browning, Tr. 1020; Cairns, Tr. 1162-63, 1178; see also Dr. Goodman, Tr. 2589-2590).

Products offered at reduced prices make up a significant proportion of the total number of items advertised (Cairns, Tr. 1178), and efforts are made to feature prices on items on which A&P has a competitive advantage (Cairns, Tr. 1168). A&P's advertising appears to present shoppers with an opportunity to achieve major savings on many products. During 1973 A&P spent approximately \$94,500,000 on advertising (CX 272a; Tr. 1143-44).

9. A&P's newspaper advertisements are prepared at the divisional level by the divisional sales department headed by a sales director. The divisional sales department decides the items to be put in advertisements to be published in a particular area, and the prices to be featured (Cairns, Tr. 1147; MacDonald, Tr. 781; Browning, Tr. 999-1001). National headquarters of A&P supplies model advertising layouts and general guidelines as to what should and should not appear in advertisements, and monitors the advertisements run by the divisions and their competitors (Cairns, Tr. 1161-65). The divisions, however, decide on the precise items and the prices. The divisional sales director is assisted by a staff of varying size, depending on the number of stores in the division. Such staff includes specialists in the purchase and sale of the different product categories handled, groceries, produce, meat, fish, dairy and bakery items, and other merchandise, such as health and beauty aids (Weschler, Tr. 382-83; MacDonald, Tr. 779-780; Gilbert, Tr. 2290-91; Niezgoda, Tr. 1942). Divisional sales directors are provided with assistant sales directors and advertising managers who supervise the layouts and coordinate with specialists and purchasing executives (Weschler and MacDonald, *supra*; Browning, Tr. 1000-01).

10. After deciding the items to feature in a particular advertisement, and the prices to list, the divisional sales department notifies the individual A&P stores in the division of the products to be advertised and the prices to be featured (Loebsack, Tr. 171; MacDonald, Tr. 825; Browning, Tr. 1031-32). In the New York City area, the Eastern Region performs this function for the New York area divisions. After receiving notice from the division sales departments advising of the items and prices to be advertised, individual A&P stores in the area are responsible for ordering whatever supplies of such items the store manager thinks necessary to make all advertised items available in his stores (Loebsack, Tr. 174-75; Weschler, Tr. 427-28; Cairns, Tr. 1280-82). *Representations In A[P's Advertising*

11. A&P's newspaper advertising represented to the purchasing public that each item advertised could be purchased at the price advertised in any of A&P's retail food stores in the geographic area covered by the advertisement during the effective period announced, usually through the end of the week in which the advertisement was

run. Stated somewhat differently, the advertisements represented that the advertised items were readily available for sale at the prices advertised in each A&P store covered by the advertisements during their effective periods.

12. Consideration of any of A&P's newspaper advertisements, in the opinion of the undersigned, can lead to no other conclusion than the foregoing. For example, an advertisement which appeared in the *Cleveland Press* (CX 38a-b; CX 275zzl), on Apr. 18, 1973, offered Semi-Boneless Hams at 95 cents a lb., asparagus at 36 cents per lb., Grade-A Turkeys, 18 to 22 lb. size at 65 cents per lb., and fresh A&P 3.5 percent homogenized milk at 88 cents per gallon jug, among many other items. Advertising these items at the foregoing prices "Effective thru Saturday, April 21st at A&P 'WEO' Food Stores" represented to the public that the A&P stores in the Cleveland, Ohio, metropolitan area, had the items available for sale at the prices advertised, and that members of the purchasing public could buy any or all of such items at the advertised prices by going to any A&P store in the Cleveland area "thru Saturday, April 21st." Another advertisement, in the *Atlanta Journal* on May 2, 1974 (CX 34a-b; CX 275d-e), offered 2 percent low fat milk in a gallon jug at 95 cents, "Russet" potatoes in a 10 lb. bag for 99 cents, two pints of fresh strawberries for 89 cents, Florida oranges 5 lb. bag for 59 cents, "Maxwell House" Coffee 1 lb. bag 58 cents ("Limit 1 bag per Family"), and a host of other products at particular prices. Similarly, this advertisement represented to the purchasing public in the Atlanta, Ga., metropolitan area that the A&P stores located there had the foregoing items advertised for sale at the prices advertised, and that members of the public could buy any or all of such items at the advertised prices by going to any A&P store in the counties specified "through Saturday night May 5, 1973." Neither the existence of a "rain check" policy nor the fact that experienced shoppers may not expect perfection, and anticipate that on occasion an advertised item will not be available (Dr. Katona, Tr. 1755-56, 1787), alters the foregoing conclusion. The undersigned finds that the advertisements of A&P reproduced in this decision, and the many contained in the record, listing or depicting grocery, meat and other products at particular prices in a manner familiar to everyone, represented to the public that the advertised products could be bought at the prices listed in the advertisements at the A&P stores in the areas covered by the advertisements during the effective periods stated, or, if no effective periods were stated, during the several days immediately following publication of the advertisements. The undersigned further finds that the foregoing representations in A&P's advertisements were material, that they were disseminated to induce members of the public to

journey to and to patronize A&P's retail food stores, and that the advertisements had the tendency and capacity to cause this result.

The Commission's Survey

13. During Apr., May and June of 1973 the Commission conducted a survey of availability and pricing of advertised items in 640 retail stores and supermarkets of leading food chains in forty Standard Metropolitan Statistical areas. The purpose was to measure compliance with the Commission's trade regulation rule. 16 C.F.R. § 424.1. As in 1971, this survey was generally directed by the Commission's Bureau of Economics using personnel from the Commission's Regional Offices. Retail food stores and supermarkets were surveyed in 33 major metropolitan areas with populations over one million, and in seven smaller areas with populations over 700,000 and four firm concentration ratios believed to be in excess of 60 percent. Results were collected and tabulated. The survey instructions, results and underlying documents (CX 40-221), and the tabulations, based on them (CX 222-28), were received in evidence pursuant to stipulation (CX 264a-u; see also CX 263a-l).

14. Four stores of each of the four leading chains in each metropolitan area were surveyed. Included were 80 retail food stores of A&P in 20 metropolitan areas covered by 23 different advertisements (CX 17-39). The metropolitan areas were the following:

Atlanta	Kansas City
Baltimore	Louisville
Birmingham	Milwaukee
Buffalo	Newark
Chicago	New Orleans
Cleveland	New York City
Clifton-Paterson	Philadelphia
Detroit	Pittsburgh
Indianapolis	Rochester
Washington, D.C.	Toledo

15. The four stores to be surveyed for each chain, including A&P, in each metropolitan area were selected at random. Two lists derived from telephone books, trade directories, etc., were prepared of all the stores of each chain (1) within the city limits and (2) outside the city limits but within the standard metropolitan statistical area. A table of random numbers was then applied to each list and two "within city" and two "outside city" stores were drawn (CX 264b). With some exception, each store selected in this random manner was surveyed once during the two days following the publication of the mid-week newspaper advertisement, the items and prices being effective through the following Saturday. In the great majority of instances the mid-week advertisement was published on Wednesday, and the survey was

completed by late afternoon on Friday. In fact, 40 A&P stores were surveyed on Thursday, and 36 on Friday. The exception was Philadelphia where the advertisement checked was published on Sunday, and one store was surveyed on Monday, two on Tuesday, and one on Wednesday. The advertisements containing the items surveyed, as stated, are in the record (CX 17-39).

16. For purposes of the Commission's survey, the term "unavailable" was defined as meaning that a "unit of an advertised item" was (a) neither on display for sale anywhere in the part of the store open to the public, and (b) was not available on request from any storeroom or other part of the store not open to the public (CX 264i).

A "unit of an advertised item" was defined as a "can, bottle, package", or in the case of multiple offers, *e.g.*, "3 cans for a dollar," the unit was defined as "3 cans."

An item was not marked unavailable if the advertisement contained a disclaimer such as "item not available in stores without a bakery department."

The term "overpriced" was defined as meaning an advertised item marked with a price higher than the advertised price. In the case of coupon offers, that is, a reduced price offered on the presentation of a coupon, an item was not listed as overpriced where the difference between the price marked on the item and the advertised price did not exceed the amount of reduction promised with the coupon. Similarly, with "cents-off" items, that is, items where the advertisement, and often the label, offered a certain amount off the price marked on the unit, an item was not listed as overpriced where the difference between the price marked on the item and the advertised price did not exceed the amount of money promised "off" (CX 264j and k).

17. It was stipulated that the Commission's survey was soundly conceived, substantially complete, and well conducted "as a means to measure the phenomena which the survey results purport to measure" (CX 264s).

Unavailability and Overpricing Shown in Commission's Survey

18. Two Tables, which are copies of exhibits in evidence, are attached hereto setting out some of the results of the Commission's survey. Table I, CX 222a-c, "Availability and Pricing of Advertised Items: A&P by Store" shows the degree of "unavailability" and "overpricing" found in each of the 80 A&P stores surveyed in each of the 20 cities listed previously. Table III, CX 224a-c, "Average Results of Availability and Pricing of Advertised Items: All Chains by Chain" shows the degree of "unavailability" and "overpricing" overall for each chain surveyed. Other tables presenting the data from the survey in various ways are in the record but have not been reproduced herein.

Table II, CX 223a-e, shows the degree of "unavailability" and "overpricing" combined for the four stores of each chain, A&P and its leading competitors, in each city. Table IV A "Detailed Breakdown for A&P (Availability)" shows the absolute number and percentage of unavailable items combined for all A&P stores surveyed, and for each individual A&P store, together with a breakdown of the reasons advanced by store managers why items were not available (CX 225a-b). Table IV B "Detailed Breakdown for A&P (Pricing)" shows the absolute number and percentage of "overpriced" items combined for all A&P stores surveyed, and for each individual store together with certain details, including the number and percentage of units that were

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Table I-Availability and Pricing of Advertised Items: A&P By Store

Chain and address of of survey	Date and time of survey	Surveyor's name	Total no. items surveyed (Line 13)	No. items unavailable (Line 27A)	Unavailable as percent of total	No. items overpriced (Line 28 A)	No. over- priced as percent of total	Total unavail. or overpriced (col. 4 & 6)	Overpriced or unavail. as percent of total	No. items underpriced (Line 28 D)	Underpriced as percent of total
Atlanta											
1. #8, 1250 W. Paces Ferry Rd. N.W.	5-4 AM	Feagler	112	4	3.6	9	8.0	13	11.6	3	2.7
2. #37, 3871 Peachtree Rd. N.E.	5-4 PM	Feagler	112	1	0.9	2	1.8	3	2.7	1	0.9
3. #51, 4462 Jonesboro Rd.	5-3 AM	Feagler	112	2	1.8	7	6.3	9	8.0	1	0.9
4. #98, 1000 Main St.	5-3 PM	Feagler	112	11	9.8	6	5.4	17	15.2	2	1.8
Baltimore											
1. #804, 5510 Baltimore Pike	4-20 PM	McDonough	185	18	9.7	7	3.8	25	13.5	2	1.1
2. #809, 2711 Foster Ave.	4-20 AM	McDonough	185	21	11.4	2	1.1	23	12.4	0	—
3. #833, 6836 Reisterstown Rd.	4-19 AM	McDonough	185	21	11.4	7	3.8	28	15.1	1	0.5
4. #913, Rte. 140 & Engler Rd.	4-19 PM	McDonough	185	14	7.6	2	1.1	16	8.6	0	—
Birmingham											
1. #16, 728 N. 18th Street	5-10 PM	Feagler	118	15	12.7	6	5.1	21	17.8	3	2.5
2. #19, 4260 Cahaba Heights Rd.	5-10 AM	Feagler	118	8	6.8	7	5.9	15	12.7	6	5.1
3. #23, 137 6th Ave. S.W.	5-11 AM	Feagler	118	23	19.5	3	2.5	26	22.0	2	1.7
4. #32, 718 Bank Street	5-10 PM	Feagler	118	25	21.2	1	0.8	26	22.0	1	0.8
Buffalo											
1. #8, 118 Grant St.	6-7 PM	Woocker	114	6	5.3	1	0.9	7	6.1	1	0.9
2. #9, Central Park Plaza	6-7 PM	Woocker	114	10	8.8	1	0.9	11	9.6	0	—
3. #28, 33 Legum Drive	6-7 PM	Woocker	114	1	0.9	5	4.4	6	5.3	3	2.6
4. #34, 791 Center St.	6-8 AM	Woocker	114	2	1.8	7	6.1	9	7.9	1	0.9
Chicago											
1. #001, 1901 Glenview Road	5-11 PM	Brown	133	8	6.0	8	6.0	16	12.0	3	2.3
2. #002, 1876 1st St.	5-11 AM	Brown	133	6	4.5	10	7.5	16	12.0	6	4.5
3. #009, 319 E. 103rd St.	5-10 AM	Brown	133	20	15.0	8	6.0	28	21.1	5	3.8
4. #010, 8031 S. Racine Ave.	5-10 PM	Brown	133	23	17.3	10	7.5	33	24.8	3	2.3
Cleveland											
1. #230, 10310 St. Clair	4-19 AM	Plotner	138	45	32.6	15	10.9	60	43.5	3	2.2
2. #232, 4940 Turney Rd.	4-19 PM	Plotner	138	13	9.4	4	2.9	17	12.3	2	1.4
3. #237, 15770 Broadway Ave.	4-20 PM	Plotner	138	28	20.3	5	3.6	33	23.9	2	1.4
4. #307, 14035 Puritas Ave.	4-20 AM	Plotner	138	10	7.2	3	2.2	13	9.4	5	3.6
Clifton-Patterson											
1. #661, Rt. 46	5-11 PM	Karlin	136	8	5.9	10	7.4	18	13.2	1	0.7
2. #663, 396 Demerest Ave.	5-11 AM	Karlin	136	12	8.8	8	5.9	20	14.7	2	1.5
3. #655, Wyckoff & Clinton Ave.	5-11 PM	Karlin	136	3	2.2	2	1.5	5	3.7	0	—
4. #739, 375 Union Ave.	5-11 PM	Karlin	136	18	13.2	3	2.2	21	15.4	0	—

Table I—Availability and Pricing of Advertised Items: A & P By Store (cont'd)

Chain and address of of survey	Date and time of survey	Surveyor's name	Total no. items surveyed (Line 13)	No. items unavailable (Line 27A)	Unavailable as percent of total	No. items overpriced (Line 28 A)	No. over- priced as percent of total	Total unavail- or overpriced (col. 4 & 6)	Overpriced or unavail- as percent of total	No. items underpriced (Line 28 D)	Underpriced as percent of total
Detroit											
1. #12, 17120 Kercheval Ave.	5-24 PM	Kennedy	216	27	12.5	15	6.9	42	19.4	2	0.9
2. #105, 8234 Telegraph Ave.	5-25 AM	Kennedy	216	19	8.8	10	4.6	29	13.4	6	2.8
3. #126, 9911 E. Jefferson Ave.	5-24 AM	Kennedy	216	30	13.9	22	10.2	52	24.1	5	2.3
4. #229, 14815 E. Jefferson Ave.	5-24 PM	Kennedy	216	35	16.2	13	6.0	48	22.2	2	0.9
District of Columbia											
1. #901, 5452 Annapolis Rd.	4-12 PM	McDonough	230	15	6.5	3	1.3	18	7.8	2	0.9
2. #911, 6899 Geo. Palmer Hwy.	4-12 AM	McDonough	230	20	8.7	5	2.2	25	10.9	5	2.2
3. #956, 1729 Benning Rd. N.E.	4-13 AM	McDonough	230	32	13.9	5	2.2	37	16.1	1	0.4
4. #974, 500 12th St. S.E.	4-13 PM	McDonough	230	31	13.5	9	3.9	40	17.4	1	0.4
Indianapolis											
1. #1, 321 S. 1st St.	5-31 PM	Brown	95	2	2.1	2	2.1	4	4.2	0	—
2. #2, 4711 W. 30th St.	5-31 AM	Brown	95	3	3.2	1	1.0	4	4.2	1	1.0
3. #7, 1244 W. Main St.	5-31 PM	Brown	95	2	2.1	4	4.2	6	6.3	0	—
4. #7, 715 E. 38th St.	6-1 AM	Brown	95	3	3.2	1	1.0	4	4.2	0	—
Kansas City											
1. #10, 99th & Holmes	5-25 PM	Alvord	181	7	3.9	2	1.1	9	5.0	0	—
2. #36, 712 State Ave.	5-24 AM	Alvord	181	1	0.6	2	1.1	3	1.7	0	—
3. #69, 2508 Johnson Drive	5-24 PM	Alvord	181	8	4.4	1	0.6	9	5.0	2	1.1
4. #78, 11154 Blue Ridge Blvd.	5-25 AM	Alvord	181	7	3.9	2	1.1	9	5.0	1	0.6
Louisville											
1. #3, 786 Miller Ave.	5-17 PM	Cole	98	2	2.0	5	5.1	7	7.1	0	—
2. #7, 2421 W. Market	5-18 AM	Cole	98	2	2.0	1	1.0	3	3.1	1	1.0
3. #8, 1250 Bard Storrow	5-17 PM	Cole	98	4	4.1	2	2.0	6	6.1	0	—
4. #37, Dixie Manor Shopping Center	5-17 AM	Cole	98	5	5.1	3	3.1	8	8.2	3	3.1
Milwaukee											
1. #009, 682 E. Wisconsin Ave.	5-18 PM	Brown	174	13	7.5	10	5.7	23	13.2	8	4.6
2. #010, 16895 Appleton	5-18 AM	Brown	174	5	2.9	7	4.0	12	6.9	5	2.9
3. #10, 2020 W. State St.	5-17 AM	Brown	174	18	10.3	14	8.0	32	18.4	3	1.7
4. #022, 7610 W. Capitol	5-17 PM	Brown	174	5	2.9	2	1.1	7	4.0	7	4.0
Newark											
1. #915, 217 Harrison St.	5-3	Tedeschi	114	1	0.9	0	—	1	0.9	0	—
2. #943, 409 Main St.	5-3	Tedeschi	114	12	10.5	5	4.4	17	14.9	0	—
3. 278 S. Orange Ave.	5-3 PM	Kirgin	114	22	19.3	5	4.4	27	23.7	1	0.9
4. 550 Orange St.	5-3 AM	Kirgin	114	26	22.8	12	10.5	38	33.3	3	2.6

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Table I—Availability and Pricing of Advertised Items: A & P By Store (cont'd)

Chain and address of	Date and time of survey	Surveyor's name	Total no. items surveyed (Line 13)	No. items unavailable (Line 27A)	Unavailable as percent of total	No. items overpriced (Line 28 A)	No. overpriced as percent of total	Total overpriced or unavail. (col. 4 & 6)	Overpriced or unavail. as percent of total	No. items underpriced (Line 28 D)	Underpriced as percent of total
New Orleans											
1. #54, 725 Veterans Highway	6-14 PM	Aquila	47	5	10.6	2	4.3	7	14.9	0	—
2. #71, 701 Royal Street	6-14 PM	Aquila	47	7	14.9	1	2.1	8	17.0	0	—
3. #72, 5330 St. Claude Ave.	6-14 PM	Aquila	47	4	8.5	3	6.4	7	14.9	0	—
4. #4525 West Bank Expwy.	6-14 AM	Chandler	47	8	17.0	0	—	8	17.0	0	—
New York City											
1. #166, 482-490 Mamaroneck Ave.	4-27 AM	Merolla	113	6	5.3	0	—	6	5.3	6	5.3
2. #175, 318 East Third St.	4-27 PM	Merolla	113	29	25.7	6	5.3	35	31.0	3	2.7
3. #525, 41-02 New Utrecht Ave.	4-26 PM	Merolla	114	4	3.5	0	—	4	3.5	0	—
4. #913, 680 Arthur Kill Road	4-27 AM	Paul	93	15	16.1	2	2.2	17	18.3	1	1.1
Philadelphia											
1. #46, 1350 Washington Lane	4-18 AM	Taggart	151	19	12.6	2	1.3	21	13.9	0	—
2. #48, 1201 Filbert St.	4-17 AM	Taggart	151	19	12.6	13	8.6	32	21.2	4	2.6
3. #92, 30 E. State St.	4-17 PM	Taggart	151	18	11.9	7	4.6	25	16.6	0	—
4. #158, 1315 State Road	4-16 PM	Taggart	150	27	18.0	4	2.7	31	20.7	1	0.7
Pittsburgh											
1. #6, 302 1st St.	4-20 AM	Shapiro	141	14	9.9	0	—	14	9.9	1	0.7
2. #21, 2571 Wenzell Ave.	4-19 AM	Shapiro	141	11	7.8	0	—	11	7.8	1	0.7
3. #87, 2900 Staxton St.	4-19 PM	Shapiro	141	10	7.1	2	1.4	12	8.5	0	—
4. #275, 741 Miller Ave.	4-20 PM	Shapiro	141	21	14.9	0	—	21	14.9	0	—
Rochester											
1. #37, 48 Spencerport Rd.	6-1 PM	Woocher	68	9	13.2	3	4.4	12	17.6	1	1.5
2. #300, 50 N. Main St.	5-31 PM	Woocher	68	6	8.8	5	7.4	11	16.2	1	1.5
3. #380, 1000 N. Clinton Ave.	6-1 AM	Woocher	69	9	13.0	1	1.4	10	14.5	2	2.9
4. #381, 131 S. Main St.	5-31 PM	Woocher	69	7	10.1	1	1.4	8	11.6	2	2.9
Toledo											
1. #1, 245 Golden Gate	5-10 PM	Cole	140	4	2.9	2	1.4	6	4.3	4	2.9
2. #10, 2304 Lagrange	5-10 AM	Cole	140	6	4.3	1.3	9.3	19	13.6	4	2.9
3. #35, 5838 Monroe	5-11 PM	Cole	140	3	2.1	7	5.0	10	7.1	7	5.0
4. #69, 5006 Lewis	5-11 AM	Cole	140	6	4.3	6	4.3	12	8.6	2	1.4

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Table III — Average Results of Availability and Pricing of Advertised Items: All Chains

Chain	No. cities in which chain surveyed	No. stores surveyed	Total no. items surveyed (Line 13)	By Chain			No. over- priced as percent of total	Total overpriced or unavail. (col. 4 & 6)	Overpriced or unavail. as percent of total	No. items underpriced (Line 28 D)	Underpriced as percent of total
				No. items unavailable of total (Line 27 A)	Unavailable as percent of total	No. items overpriced (Line 28 A)					
1. A.J. Bayless	1	4	496	4	0.8	88	17.7	92	18.6	0	—
2. A&P	20	80	10,798	1,000	9.3	402	3.7	1,402	13.0	158	1.5
3. Acme Super Saver (Alpha Beta)	8	32	5,848	247	4.2	145	2.5	392	6.7	34	0.6
4. Albertson's	3	12	1,432	143	10.0	411	28.7	554	38.7	28	2.0
5. Applebaum's (Target)	2	8	384	6	1.6	4	1.0	10	2.6	0	—
6. Art Thompson's Food City	1	4	584	6	1.0	76	13.0	82	14.0	0	—
7. Big Apple	1	4	368	12	3.3	12	3.3	24	6.5	2	0.5
8. Big Bear	1	4	468	23	4.9	11	2.4	34	7.3	15	3.2
9. Big "C"	1	4	180	3	1.7	22	12.2	25	13.9	4	2.2
10. Bohack	1	4	136	3	1.9	2	1.3	5	3.2	2	1.3
11. Bruno's Food Stores	1	4	328	14	4.3	5	1.5	19	5.8	9	2.7
12. Buddies	1	4	520	14	2.7	18	3.5	32	6.2	8	1.5
13. Colonial Stores (Albers)	2	8	820	34	4.2	11	1.3	45	5.5	7	0.8
14. Country Club Markets	1	4	488	6	1.2	4	0.8	10	2.0	1	0.2
15. Farmer's	1	4	436	48	11.0	14	3.2	62	14.2	27	6.2
16. Farmer Jacks	1	4	240	24	10.0	16	6.7	40	16.7	0	—
17. First National Stores	1	4	588	54	9.2	7	1.2	61	10.4	8	1.4
18. Fisher-Fazio-Costa (Dominicks)	2	8	1,064	28	2.6	28	2.6	56	5.3	12	1.1
19. Food Basket	1	4	696	27	3.9	5	0.7	32	4.6	0	—
20. Food Fair (Pantry Pride)	5	20	2,748	212	7.7	63	2.3	275	10.0	14	0.5
21. Foodtown (Newark)	1	4	656	122	18.6	56	8.5	178	27.1	6	0.9
22. Foodtown (Toledo)	1	4	688	24	3.5	2	0.3	26	3.8	4	0.6
23. Fred Meyer	1	4	516	3	0.6	120	23.3	123	23.8	2	0.4
24. Giant Eagle	1	4	392	32	8.2	3	0.8	35	8.9	2	0.5
25. Giant Food	2	8	908	29	3.2	2	0.2	31	3.4	9	1.0
26. Great Scott	1	4	388	9	2.3	3	0.8	12	3.1	3	0.8
27. Grand Union	3	12	1,416	88	6.2	59	4.2	147	10.4	2	0.1
28. H. E. B.	1	4	532	36	6.8	14	2.6	50	9.4	19	3.6
29. Handy Andy	1	4	580	31	5.3	114	19.7	145	25.0	0	—
30. Harvest Markets	1	4	472	35	7.4	1	0.2	36	7.6	1	0.2

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Table III—Average Results of Availability and Pricing of Advertised Items: All Chains (cont'd)
By Chain

Chain	No. cities in which chain surveyed	No. stores surveyed	Total no. items surveyed (Line 13)	No. items unavailable (Line 27 A)	Unavailable as percent of total	No. items overpriced (Line 28 A)	No. over- priced as percent of total	Total unavail. or overpriced (col. 4 & 6)	Overpriced or unavail. as percent of total	No. items underpriced (Line 28 D)	Underpriced as percent of total
31. Heinen's	1	4	444	3	0.7	15	3.4	18	4.1	0	—
32. Jewel Foods (Star Markets- Boston)	2	8	560	15	2.7	10	1.8	25	4.5	4	0.7
33. Joseph's	1	4	264	11	4.2	9	3.4	20	7.6	2	0.8
34. Kash n' Carry	1	4	878	45	5.1	7	0.8	52	5.9	10	1.1
35. King Soopers (Fry's)	3	12	1,508	62	4.1	7	0.5	69	4.6	4	0.3
36. Kohl's	1	4	616	5	0.8	6	1.0	11	1.8	2	0.3
37. Kroger	11	44	7,692	541	7.0	269	3.5	810	10.5	98	1.3
38. Lewis and Coker	1	4	340	9	2.6	45	13.2	54	15.9	6	1.8
39. Liberal Supermarkets	1	4	500	37	7.4	23	4.6	60	12.0	13	2.6
40. Lucky	4	16	2,996	145	4.8	62	2.1	207	6.9	54	1.8
41. Marsh	1	4	780	19	2.4	8	1.0	27	3.5	3	0.4
42. Mayfair (El Rancho)	3	12	1,400	32	2.3	166	11.9	198	14.1	19	1.4
43. Milgram Food Stores	1	4	968	73	7.5	51	5.3	124	12.8	2	0.2
44. Minyard	1	4	388	20	5.2	31	8.0	51	13.1	9	2.3
45. National Tea (Loblav's-Millers)	9	36	3,915	180	4.6	160	4.1	340	8.7	59	1.5
46. Pathmark	3	12	1,652	172	10.4	72	4.4	244	14.8	30	1.8
47. Penn Fruit	1	4	244	44	18.0	12	4.9	56	23.0	2	0.8
48. Pick n' Pay	1	4	724	59	8.2	16	2.2	75	10.4	2	0.3
49. Piggly-Wiggly	2	8	1,148	100	8.7	137	11.9	237	20.6	25	2.2
50. Publix	2	8	1,045	22	2.1	76	7.3	98	9.4	1	0.1
51. Purity Supreme	1	4	272	4	1.5	0	—	4	1.5	1	0.4
52. Q. F. I.	1	4	476	2	0.4	87	18.3	89	18.7	0	—
53. Raley's	1	4	396	1	0.3	97	24.5	98	24.7	1	0.3
54. Ralph's Market	1	4	672	15	2.2	20	3.0	35	5.2	14	2.1
55. Red Owl	2	8	712	27	3.8	8	1.1	35	4.9	9	1.3
56. Rice Foods	1	4	376	22	5.9	194	51.6	216	57.4	3	0.8
57. Safeway	14	56	10,355	315	3.0	549	5.3	864	8.3	80	0.8
58. Schnuck's	1	4	584	17	2.9	8	1.4	25	4.3	11	1.9
59. Schwegmann's	1	4	132	0	—	1	0.8	1	0.8	0	—
60. Scott's	1	4	196	1	0.5	4	2.0	5	2.6	1	0.5

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Table III—Average Results of Availability and Pricing of Advertised Items: All Chains (cont'd)
By Chain

	Chain	No. cities in which chain surveyed	No. stores surveyed	Total no. items surveyed (Line 13)	No. items unavailable (Line 27 A)	Unavailable as percent of total	No. items overpriced (Line 28 A)	No. over- priced as percent of total	Total unavail. or overpriced (col. 4 & 6)	Overpriced or unavail. as percent of total	No. items underpriced (Line 28 D)	Underpriced as percent of total
61.	Star Markets (Rochester)	1	4	476	7	1.5	3	0.6	10	2.1	1	0.2
62.	Stater Bros.	1	4	620	19	3.1	94	15.2	113	18.2	3	0.5
63.	Stop and Shop	1	4	620	38	6.1	16	2.6	54	8.7	1	0.2
64.	Thorofare	1	4	240	14	5.8	0	—	14	5.8	2	0.8
65.	Thriftway	1	4	640	14	2.2	61	9.5	75	11.7	1	0.2
66.	Tom Thumb	1	4	396	7	1.8	127	32.1	134	33.8	6	1.5
67.	Tridewell	1	4	464	15	3.2	214	46.1	229	49.4	2	0.4
68.	Von's	1	4	764	18	2.4	26	3.4	44	5.8	8	1.0
69.	Waldbaums	1	4	288	24	8.3	4	1.4	28	9.7	2	0.7
70.	Wegman's	1	4	452	41	9.1	2	0.4	43	9.5	0	—
71.	Weingarten's	1	4	792	27	3.4	54	6.8	81	10.2	2	0.3
72.	Western Supermarkets	1	4	244	5	2.0	25	10.2	30	12.3	3	1.2
73.	Winn Dixie	5	20	2,092	59	2.8	61	2.9	120	5.7	19	0.9
74.	Wrigley	1	4	836	126	15.1	37	4.4	163	19.5	11	1.3
74	Totals	160	640	86,347	4,729	5.5	4,592	5.3	9,321	10.8	903	1.0

purchased at the higher price (CX 226a-f). Table II B "Average Results of Pricing of Advertised Items: All Chains" shows survey date on "overpricing" which distinguishes stores which claim to remark items advertised as reduced in price from stores which claim that adjustments are made at the check-out counter CX 227a-e). Table III B "Average Results of Pricing of Advertised Items: All Chains by Chain" shows the same data, but with all stores claiming to use either system combined for each chain (CX 228a-c).

19. In 80 A&P stores in the 20 cities listed, 10,798 items were surveyed and 1,402 items were found to be either unavailable or overpriced. Stated mathematically, 13 percent of A&P's advertised items were either not available at all, or were price marked with a price higher than that advertised. An average of 17.5 items per A&P store were either unavailable or overpriced. Broken down, 1,000 items out of the 10,798 surveyed were unavailable, about 9.3 percent, and 402 were overpriced, about 3.7 percent. Inasmuch as A&P's checkers are instructed to charge the price marked on the item, as discussed in greater detail later herein, the higher than advertised price marked on the item was the price charged the customer in most cases of overpriced items.

20. In 47 out of the 80 A&P stores surveyed over 10 percent of the advertised items were unavailable or overpriced, and in 27 A&P stores the figure was 15 percent or more. One or more of the four stores surveyed in Atlanta, Baltimore, Birmingham, Chicago, Cleveland, Clifton-Paterson, Detroit, Washington, D.C., Milwaukee, Newark, New Orleans, New York City, Philadelphia, and Rochester, had 15 percent or more of the advertised items unavailable or overpriced. In Birmingham, two stores out of four had over 20 percent unavailability or overpricing of advertised items. The same was true of Chicago, Cleveland, Detroit, Newark, and Philadelphia. In one store in Cleveland 43 percent of the advertised items were unavailable or overpriced, almost every other advertised item. In Newark one of the four stores surveyed had combined unavailability or overpricing of 33 percent, almost one item out of three, and in New York City one of the four stores had 31 percent unavailability and overpricing of advertised items, likewise close to one item out of three.

21. In terms of numbers of advertised items unavailable or overpriced the results were as follows:

Advertised Items Unavailable	No. of A&P Stores
25 or more	11
20-24	8
15-19	10
10-14	11

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5-9	21
1-4	19
	80
Advertised	
Items Overpriced	No. of A&P Stores
15 or more	3
10-14	10
5-9	25
1-4	35
None	7
	80

See CX 222a-c, attached.

22. As previously noted, the record contains the advertisements placed by A&P in the metropolitan dailies covering the markets surveyed. These advertisements show the exact products advertised and surveyed for unavailability in the subject 80 A&P stores (CX 17 through CX 39; see stipulation CX 264, para. 7). The record also contains photocopies of each of these A&P advertisements with the specific items circled in red which were found unavailable by the Commission's surveyors in *any* of the four A&P stores surveyed in the metropolitan areas in which each advertisement was published (CX 275a-qq). Two of these exhibits have been reproduced in this decision. They are the advertisements published in the *Atlanta Journal* on Wednesday, May 2, 1973 (CX 275d-e), and the advertisement published in the *Detroit News* on May 23, 1973 (CX 275s-u). The exhibits provide an illustration of the type of advertised item found unavailable in A&P's stores by the surveyors.² Such items were of all kinds covering a wide range of products. The *Atlanta Journal* advertisement (CX 275d-e), reproduced herein, should be compared with the list of unavailable products contained in Finding 24, *infra*, and the *Detroit News* advertisement (CX 275s-u) with the list in Finding 26.

23. The record also contains the A&P advertisements published in the *Birmingham News*, the *Chicago-Tribune*, the *Cleveland Press*, the *New Jersey Record*, the *Detroit News*, the *Washington Star-News*, the *Newark Star-Ledger*, the *New Orleans States-Item*, the *New York Daily News*, the *Staten Island Advance*, the *Philadelphia Inquirer*, and the *Pittsburgh Press*, which have the items circled in red which were found unavailable in *specific, individual* A&P stores surveyed in the metropolitan areas served by the foregoing dailies (CX 275uu-zz22).

² The process of printing has changed the red lines around unavailable products on the original exhibits to black lines on the copies herein, making such products less obvious and in some instances difficult to distinguish from items having black borders in the original advertisements. To avoid any uncertainty, the unavailable products have been enumerated in the text, and such lists should be checked against the reproduced advertisements.

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Two of these advertisements (CX 275zz-zz1; CX 275zz11-zz12) have been reproduced in this decision as examples of the advertised items unavailable in specific stores. The first advertisement, published in the *Cleveland Press* on

STORE #51 4462 JONESBORO RD, FOREST PARK
STORE #98 1000 MAIN ST., FOREST PARK

4. U.S. AGORAS Journal Wednesday, May 2, 1971

EX 275 d

- 30 -

STORE #12 17126 KECHEVAL AVE., CROCE PLANT || STORE #126 77th EAST JEFFERSON AVE
STORE #106 8234 TELEGRAPH RD || STORE #229 14815 EAST JEFFERSON AVE
DETROIT

Weeeeeo!

YOU COULD SHOP ALL NIGHT AND NOT FIND VALUES LIKE THESE!

AP WEO
WHERE ECONOMY ORIGINATES

ORANGES
CALIFORNIA 1 1/2 SIZE
49¢
DOZ.

TOMATOES
VINE RIPE
16-oz. Tray **49¢**

Cucumbers
OR
Red Radishes
2 For **29¢**

Green Peppers 19¢
Grapefruit ... 6 For 79¢

Spanish Peanuts ... 2 1/2 LBS. 159¢
Fresh Cole Slaw ... 12-oz. 29¢

Oreo
Creme Sandwich
Cookies
1.15 LBS. **49¢**

Campbell's
Pork
and Beans
1.15 LBS. **15¢**

Faygo
Pop
12-oz. can **10¢**

FROM THE JANE PARKER BAKERY
MADE WITH NEW POTATOES!
Potato Chips
16-oz. pkg. **59¢**

THIN-SLICED Sandwich Bread ... 3 LBS. \$1

Apple Pies
1.15 LBS. 7-oz. size **49¢** each

Angel Food Cake
1.15 LBS. **49¢**

PLAIN, CINNAMON or SUGAR DONUTS ... 3 DOZ. \$1
ALL-BUTTER Cinnamon Rolls ... 1 DOZ. 89¢

White Bread
3 LBS. **85¢**

ANN PAGE
Saled Mustard 39¢
ANN PAGE
Egg Noodles 3 LBS. \$1
ANN PAGE
WOL. BARS 5 LBS. \$1
ANN PAGE
Charcoal Briquets ... 28 LBS. 129¢
ANN PAGE
Charcoal Lighter ... 69¢

ANN PAGE
Saled Olives
16-oz. jar **49¢**

AMP FRESH
Potato Salad
2 LBS. **69¢**

CLEARWATER WHITE BUNCH SIZE
Paper Plates
100 **59¢**

ANN PAGE
Dressings 3 LBS. \$1
ANN PAGE
Hot Cocoa Mix 10 LBS. 39¢
ANN PAGE
Stuffed Olives 49¢
ANN PAGE
Soil Detergent 59¢

DAILY RELISHES
Hot Dog, Hamburger or Sausage
10-oz. jars **4** \$1

GELATIN
Desserts
6 \$1

Dole
Pineapple
37¢

SOFT & DRI
Anti-Perpirant
89¢
Q.T. LOTION
1 1/2 LBS. **139¢**

White Rain Shampoo 79¢
Body All Deodorant 139¢
Coppertone Lotion 139¢
Pillsbury Flour 65¢
Maxine Instant Tea 139¢

WITH THIS COUPON
Pepsi Cola
8 12-oz. cans **97¢**

SAVE 15¢ With This Coupon
Liquid Planner
for Chopped Drinks
49¢ **74¢** (TV)

SAVE 15¢ With This Coupon
Cascade
for Automatic Dishwash
2.15 LBS. **54¢**

STOR #230 10810 ST. CLAIR
CLEVELAND

AP WEO
WHERE ECONOMY ORIGINATES

Double Your Money Back Meat Guarantee

SUPER-RIGHT HICKORY SMOKED FULLY COOKED HAM
SHANK PORTION 78¢
HAM CLAY 45¢
HUT. PORTION 89¢
SHANK HALF 89¢
CENTER HAM SLICES 6129

HICKORY SMOKED FULLY COOKED SEMI-BONELESS HAM
WHOLE OR GIGANTOUS SIZE PORTION 95¢
LEAN, SUPER-RIGHT BONELESS CANNED HAM 4 lb. \$4.98 (8-10.99)

TURBOT FILLETS 68¢
PORK ROAST 98¢
SLICED BACON 98¢

«MORE PRODUCE VALUES!»
FINE SELECTION OF TOP QUALITY
EASTER FLOWERS AND PLANTS
AVAILABLE FOR EASTER AT ACP
IRIS, ANEMONES, HYACINTHS, PANSIES, PRIMULAS, VIOLETS, ORCHIDS, CAMELIAS

ORCHID CORSAGES A HOLIDAY MUST! \$1.99

ALUMINUM FOIL 19¢
12" x 23" ROLL

SAVE 2¢ FRESH ACP SOUR CREAM 48¢

SAVE 1¢ FRESH ACP FRUIT COCKTAIL 4 \$1

SHAPPIN' FRESH FLAVORFUL ASPARAGUS 36¢
1 lb. IDEAL FOR YOUR HOLIDAY VEGETABLE

CRISP, FRESH, CALIF. PASCAL CELERY 19¢
TEXAS, RUBY RED SEEDLESS GRAPEFRUIT 88¢
GREAT FOR YOUR HOLIDAY DELISH TRAY FRESH GREEN ONIONS 10¢
HORSE RADISH ROOT 5¢ **RED BEETS** 29¢

White Angel Food Mix 49¢
Devon House Muffin Mix 49¢
Coconut Flakes 39¢
Fresh Apple Pie 59¢
Hot Cheese Buns 55¢
Wishbone Dressing 3 \$1.00
Our Own Tea Bags 89¢

SAVE HERE! CRESCENT DINNER ROLLS 29¢
CRISP POTATO CHIPS 59¢
Libby's Cat Buns 5 \$1.00
Libby's Buns 3 \$1.00
Libby's Green Beans 79¢
K-Brand Pickles 59¢

Knott's Dressing 59¢
Vegetable Salad 53¢
Mott's Applesauce 39¢
Taney Applesauce 4 89¢

VALUABLE COUPON
SAVE UP TO 1¢
BETTY CROCKER WHITE ANGEL FOOD 49¢
VALUABLE COUPON
SAVE UP TO 1¢
HEAVY DUTY ALCOA FOIL 49¢

SAVE 1¢ FRESH CORN 4 89¢
FRESH GREEN BEANS SWEET PEAS 4 \$1

MADE SWEET PICKLES 69¢
FRESH PACK CLASSIC DILLS 59¢

FRESH JARRED ANGEL FOOD 49¢
BROWN & SERVE TWIN ROLLS 3 \$1

CX27533 2x27402

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578AE - 278 S. ORANGE STREET, NEWARK

Gas routs 38 rebel inmates in Illinois

STAB LEDGER, Wednesday, May 2, 1971

AP

Looking for the best values on fresh fruits & vegetables?
COMPARE OUR PRODUCE PRICES!
CHECK OUR QUALITY, TOO!

WHERE ECONOMY ORIGINATES **Extra Low Prices! Absolutely No Compromise in Quality!**

Great Buys For The Gardener
 Garden Seed 129¢
 Lawn Builder 39¢
 A.P. Lawn Seed 99¢
 Rose Bushes 169¢

U.S.A. FOOD STAMPS
COUPONS
 Gladly Accepted

Yellow Onions
 25¢
 U.S. NO. 1 GRADE

Watermelon
 15¢
 First Of The Season
 Red Ripe

Roasted Peanuts
 89¢
 ALP BRAND
 10 SHELL
 2 L.B. BAG

String Beans 39¢
Eggplant 29¢
Red Radishes 2-29¢
Grapefruit 3-48¢

Johnson's Pledge
 FURNITURE POLISH
 69¢

Special Price
FOR BEVERAGES
Dixie Cup
 39¢
 40 in box
 9-oz size

White Bread 89¢
 22-oz. Loaves

Marvel Brand
 Lemon Pies 59¢
 Donuts 59¢
 Whole Bread 39¢

Marvel Brand
 Devil's Food Cake 69¢
 Sunshine Cake 69¢
 Pound Cake 63¢

WITH COUPON BELOW
Joy Liquid
 39¢
 In Stores With Deli Dept!

Massaroni Salad 35¢
Baked Lasagne 99¢
Schickhans Bologna 65¢
Margit Liverwurst 57¢

DOVE
 57¢
 22-oz. block

WISK
 75¢
 12-oz. bottle

Dairy Dept. Features of the Week

Land O' Lakes Butter 79¢
 1-lb. stick

Land O' Lakes
 Borden's 69¢
 Eagle Brand 63¢
 Eagle Brand 49¢
 Good Luck Margarine 35¢

Land O' Lakes
 A.P. Cottage Cheese 39¢
 Laska Whip 57¢
 P. B. Margarine 45¢
 A.P. Biscuits 2-15¢

Duncan Hines
Cake Mixes
 100¢
 18-oz. box

WITH COUPON BELOW
Log Cabin Syrup and
Sunnyfield Waffles
 20¢

WITH COUPON BELOW
Joy Liquid Detergent
 15¢
 12-oz. bottle

WITH COUPON BELOW
Check Full O' Nuts
 25¢
 12-oz. can

WITH COUPON BELOW
Lipton Tea Bags
 25¢
 12-oz. box

CV 2753-11 ex 279 a

Revolutionary prison evidence lacking

[illegible]

You can cut your food costs without sacrificing quality!

ENJOY GREAT MEAT OR DOUBLE YOUR MONEY BACK

Double Your Money Back Meat Guarantee

WHERE ECONOMY ORIGINATES

ALP'S OWN SLICED
Allwood Bacon
99¢

ANY SIZE CASSEROLE
Ground Beef 89¢
ANY SIZE PACKAGE
Ground Chuck 99¢
PLACE IT TENDERLY AND SAVE
Stuffed Beans 79¢
ANY SIZE
Beef Liver 69¢
ANY SIZE 1/2 POUNDS
Sausage - Right French 89¢
ANY SIZE
French Fries 109¢
Shrimp Cocktail 3 109¢
ANY SIZE
Meat Filler 69¢
Flounder Fillet 109¢

Special Feature!
Glamour - Amplex
Panty Hose
Price Match or Money Back
99¢

WITH COUPON BELG
Savarin Coffee
185¢

WITH COUPON BELG
Maxwell House Coffee 185¢
ANY SIZE
Gran Canelas 39¢
ANY SIZE
Gran Pateas 45¢

Kraft
Parkay
Regular Margarine
1-lb
25¢

GENUINE IS REVOLUT
Wheaties Cereal
8¢
READY TO EAT

BROILING or FRYING
Chickens
Whole 49¢ lb
2 in 3 Lbs Average
UNTRIMMED LOIN
Shell of Beef
WHOLE or HALF 139 lb

1/2 QUARTERS
Fresh Chicken Parts 59¢
UNDER 4 LBS.
Roasting Chickens 59¢
1/2
Italian Sausage 129¢
ALP'S Pork Roll 109¢

Frozen Food Feature 2¢ the Week
12 ORIGINAL
Aunt Jemima Waffles 3 100¢
ANY SIZE
Omelette 2 49¢
ANY SIZE
A.P. Ham 39¢
COMBON FOR SALAD
Brilliant Shrimp 99¢
ANY SIZE 2 CANS
Macaroni 69¢
ANY SIZE
Spaghetti 79¢
ANY SIZE
Macaroni 79¢
ANY SIZE
Macaroni 79¢

GRADE A FROZEN
A&P Spinach 2 27¢
GRADE A FROZEN
French Fries 2 69¢
ALP GRADE A
Sweet Green Peas 2 55¢

Del Monte Buffet Sale At A & P WED
Tomato Sauce 4 43¢
Golden Corn 2 29¢
Sweet Peas 2 29¢
Pineapple 2 29¢

WITH COUPON BELG
Savarin Coffee
20¢
WITH COUPON BELG
Maxwell House Coffee
20¢

IMPORTANT FOR YOU!
A&P POLICY
RAINCHECK
GUARANTEE

GET THE FACTS!

Pat Bessie with Flavor-In Your Cup
English Oatmeal Cereal
83¢
243
100% BRAZILIAN
100% DELICIOUS

WITH COUPON BELG
Wheaties Cereal
185¢
ANY SIZE
Kimberly Dispers 139¢
ANY SIZE
A.P. Dispers 69¢
ANY SIZE
Wheaties Cereal 59¢

DISCOUNT
Wheaties Cereal
49¢
ANY SIZE
Wheaties Cereal
66¢

WITH COUPON BELG
A&P Coffee
10¢

CY 27533-12

~~CX 819 - u~~

Wednesday, Apr. 18, 1973, and effective through Saturday, Apr. 21, shows the items found to be unavailable the next day on Thursday, Apr. 19, 1973, between 10:20 a.m. and 11:30 a.m. in the A&P store at 10310 St. Clair St. (see also CX 87a-h). The copy of this advertisement (CX 275zz-zz1), reproduced herein, should be compared with the list of unavailable items set out in Finding 28, *infra*. The second advertisement, published in the Newark *Star-Ledger* on Wednesday, May 2, 1973, effective through Saturday, May 5, shows the items found not to be available the next day on Thursday, May 3, 1973, between 12:30 p.m. and 2 p.m., by the Commission's surveyor in the A&P store at 278 S. Orange St., Newark, N.J., (see also CX 163c-i). The copy of this advertisement CX 275zz11-zz12) should be compared with the list of unavailable items set out in Finding 30, *infra*.

24. In Atlanta, Ga., two A&P stores were surveyed on Thursday, the day following publication of A&P's two-page advertisement in the *Atlanta Journal* on Wednesday, May 2, 1973 (CX 34a-b), effective through Saturday, May 5, 1973, one in the morning and one in the early afternoon. Two stores were surveyed on Friday, also in the morning and in the early afternoon (CX 42a-f; CX 44a-f; CX 46a-f; CX 48a-f). In one or another of these four stores surveyed the following 14 items were not available (CX 275d-e):

Oxford Park 20-10-5	Lysol Spray Disinfectant
Fertilizer 22 lb. bag	7 oz. can \$.87
\$1.99	Wishbone 1,000 Island
Merico Cinnamon Buns	Dressing 8 oz. btl. \$.41
10 oz. can \$.30	Kraft Sharp Wedge Cracker
A&P Plain Yogurt	Barrel Cheese 8 oz. pkg.
8 oz. ctn. \$.25	\$.75
Mrs. Filbert's Margarine	Minute Maid Frozen
1 lb. pkg. \$.39	Grapefruit Juice
Eckrich Farm Smoked	6 oz. can \$.29
Sausage lb. \$1.29	Stouffer's Frozen Macaroni &
Howard Johnson's Frozen	Cheese 12 oz. pkg. \$.55
Chicken Croquettes	Stouffer's Frozen Potato
12 oz. pkg. \$.73	Augratin 11 1/2 oz. pkg. \$.55
Chocolate Pudding	Stouffer's Frozen Corn or
2 (5 oz.) cups \$.29	Spinach Souffle 12 oz. pkg. \$.55

25. In one of the Atlanta, Ga., A&P stores "Oscar Mayer" link sausage, advertised at \$1.17 per lb., was price marked and the surveyor was charged \$1.45, "Maxwell House" coffee 1 lb. can, advertised at 58 cents, was price marked and purchased at 89 cents, and A&P yogurt, advertised at 25 cents per 8 oz. carton price marked and purchased at 28 cents per carton (CX 42h-i). In another Atlanta A&P store "Golden Rise" biscuits, advertised at four 4 oz. cans for 23 cents, were price

marked and purchased at 27 cents, and "Beacon" Mop & Glo, advertised at \$1.29 was priced marked and purchased at \$1.35 (CX 48c, e).

26. In Detroit, Mich., where A&P published a three-page advertisement on Wednesday, May 23, 1973 (CX 27a-c), effective through Saturday, May 26, in one or another of the four stores surveyed the following 53 items were not available, three stores being surveyed on Thursday, May 24, in the morning, afternoon and early evening, and one store on Friday morning, May 25 (CX 275s-u; CX 105a-l; CX 107a-l; CX 109a-l; CX 111a-l):

A&P Sliced Lunch Meat lb. \$.98 (3 of 6 varieties unavail.)	Fresh Dressed Smelt \$.49 lb.
Riegal Semi-Boneless Ham \$1.29 lb.	Northern Paper Towels 3 roll pkg. \$1
Pork Steaks \$1.09 lb.	Funk & Wagnalls Encyclopedia (7 out of 23 vols. unavail.)
A&P Thin-Sliced Lunch Meat (5 of 7 varieties unavail.) 3 oz. \$.43	\$1.99 each
Hygrade Sandwich Spread 12 oz. \$.75	Doumak Marshmallows 1 lb. pkg. 4 for \$1
Lamb Chops \$.89 lb.	A&P Frozen Coffee Creamer (pt ctn.) \$.17
Super-Right Lamb Patties \$.89	Frank's Red Hot Sauce 12 oz. jar \$.57
Super-Right Sliced Pork Liver \$.69 lb.	Pillsbury's Donut Puffs 9.5 oz pkg. \$.33
Smoked Pork Chops \$1.39 lb.	Dole Fancy Sliced Pineapple 14 1/2 oz. can \$.29
Super-Right Liver Sausage Braunschweiger \$.59 8 oz.	Comstock's Mixed Bean Salad 1 lb. \$.39
Allgood Sliced Bacon \$.99 1 lb.	Lawry's Seasoned Salt 8 1/2 oz. \$.57
A&P Sliced Beef Bologna \$.69 8 oz.	Balsam Every Night Shampoo 8 oz. \$.95
A&P Pretzels (2 out of 3 varieties unavail.) 10 oz. pkg. \$.35	Q.T. Lotion 2 oz. tube \$1.39
Cool Whip Swiggle 6 1/4 oz. pkg. \$.55	Body All Deodorant 5 oz. \$1.23
Shedd's Safflower Margarine 1 lb. ctn. \$.39	Pillsbury Flour 5 lb. \$.65
Aunt Jane's Sweet Sandwich Pickles qt. jar \$.39	A&P Spanish Peanuts 2 1/2 lb. can \$1.59
Pepsodent Tooth Brush adult size hard \$.39	Paper Plates 100 ct. pkg. \$.59
Grapefruit 6 for \$.79	Dailey Relishes 4 10-oz. jars \$1
Fresh Cole Slaw 12 oz. pkg. \$.29	Marvel Cellulose Sponges 4 in pkg. \$.29
Waldorf A&P fresh Salads 3 13-oz. cups \$1	Gebhardt's Hot Sauce 6 oz. jar \$.19
Lawry's Seasoned Salt	Contac Cold Capsules

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16 oz. \$.87	10 ct. pkg. \$.96
Nu-Maid Soft Margarine	Ant & Roach Killer
1 lb. bowl \$.50	14 oz. \$.99
Renuzit Air Freshener	Crisco Oil (1 qt. 16 oz.)
7 oz. size \$.67	\$1.09
Minute Rice	Robin Hood Flour
(1 lb. 12 oz.) 85	25 lb. bag \$2.59
Orange Marmalade	Soft & Dri Anti-Perspirant
(14 oz.) \$.49	5 oz. twin pack \$.89
Elec. Perc. Chase &	White Rain Shampoo
Sanborn 1 lb. can \$.98	14 oz. \$.79
Libby Lemonade 12 oz. can	Coppertone Lotion
\$.23	4 oz. \$1.59

27. In one store "Erkrich" smoked sausage, advertised at \$1.35 lb., was price marked and the surveyor was charged \$1.55, "Tiger Town" boiled ham, advertised at \$1.59 for 12 oz., was price marked and the surveyor was charged \$1.79, "Charmin" bathroom tissue, four rolls being advertised for 37 cents, was price marked and the surveyor was charged 43 cents, "Ann Page" cole-slaw dressing, advertised 3 jars (8 oz.) for \$1, were price marked and the surveyor was charged 39 cents a jar, "Ann Page" Russian dressing, advertised 3 jars (8 oz.) for \$1, was price marked and the surveyor was charged 37 cents per jar, "Dole" pineapple, advertised at 37 cents for a 1 lb. 4 oz. can, was price marked and the surveyor was charged 38 cents per can, "Soft & Dri" anti-perspirant, 5 oz. twin pack, advertised for 89 cents, was price marked and the surveyor was charged \$1.78 (CX 105n). In another store "Charmin" bathroom tissue, advertised, as stated, four rolls for 37 cents, was price marked and the surveyor was charged 43 cents, "Oreo" cookies, advertised at 49 cents for a 1 lb. 3 oz. pkg., were price marked and the surveyor was charged 66 cents, "Campbell's" pork and beans, advertised at 15 cents for a 1 lb. can, was price marked and the surveyor was charged 19 cents, "Ann Page" cole-slaw dressing, advertised, as stated, at 3 jars (8 oz.) for \$1, was price marked and the surveyor was charged 39 cents a jar, "Nu-Maid" soft margarine, advertised at 50 cents a lb., was price marked and the surveyor was charged 51 cents (CX 107n). In the third store "Doumak" regular marshmallows, advertised 4 pkgs. (1 lb.) for \$1, were price marked and the surveyor was charged 28 cents per pkg., "Aunt Jane's" Kosher Dill pickles, advertised at 49 cents per qt., were price marked and the surveyor was charged 59 cents, a "Pepsodent" toothbrush, advertised at 39 cents, was price marked and the surveyor was charged 59 cents, "Ann Page" cole-slaw dressing, advertised, as stated, 3 jars (8 oz.) for \$1, was price marked and the surveyor was charged 39 cents a jar, "Ann Page" Russian dressing, advertised 3 jars (8 oz.) for \$1, was price marked and the surveyor was charged 37 cents per jar, "Dole"

pineapple, advertised at 37 cents for a 1 lb. 4 oz. can, was price marked and the surveyor was charged 38 cents, "Robin Hood" flour, advertised at 65 cents for a 5 lb. sack, was price marked and the surveyor was charged \$1.09, "Soft & Dri" anti-perspirant, advertised at 89 cents per 5 oz. twin pack, was price marked and the surveyor was charged \$1.78, and "Nestea" instant tea, advertised at \$1.35 for a 3 oz. container, was price marked and the surveyor was charged \$1.39 (CX 109n). In the fourth store surveyed, "Charmin" bathroom tissue, advertised at 37 cents for four rolls, was price marked and the surveyor was charged 43 cents, "Ann Page" cole-slaw dressing, advertised at 3 jars (8 oz.) for \$1, was price marked and the surveyor was charged 39 cents each, "Ann Page" Russian dressing, advertised at 3 jars (8 oz.) for \$1, was price marked and the surveyor was charged 37 cents each, "Dole" pineapple, advertised at 37 cents for a 1 lb. 4 oz. can, was price marked and the surveyor was charged 38 cents, "Skippy" creamy peanut butter, advertised at 58 cents for a 1 lb. 2 oz. jar, was price marked and the surveyor was charged 68 cents (CX 111n).

28. In Cleveland, Ohio, following the publication of A&P's two page advertisement in the *Cleveland Press* (CX 38a-b) on Wednesday afternoon, Apr. 18, 1973, effective through Saturday, Apr. 21, the A&P store at 10310 St. Clair Street, was surveyed the next day beginning at 10:20 a.m. (CX 87a-h). The following items were not available in this store (CX 87a-h):

Hot Cross Buns pkg. \$.55	Kleenex Napkins 50-ct. \$.29
Wishbone French Dressing	A&P Spanish Peanuts
3 (8 oz.) btls \$1	40 oz. can \$1.59
K-Brand Pickles 20 oz. jar	Virginia Peanuts
\$.59	40 oz. can \$1.79
Tasty Sliced Cheese	Cling Free Softener
3 kinds lb. \$.99	13 oz. can \$1.49
Stouffer's Pecan Streusel	Birds Eye French Beans
10 oz. pkg. \$.79	w/almonds 9 oz. \$.45
Easter Flowers and Plants	Birds Eye French Beans
(5 of 7 varieties unavail.)	w/mushrooms 9 oz. 45
Horseradish Root lb. \$.59	Kraft Whipped Cream Cheese
Red Beets bu. \$.29	8 oz. \$.59
Libby's Beets 3 (16 oz.)	Kraft Mayonnaise 16 oz. \$.47
cans \$1	Kellogg Stuff, Chicken or
Hanover 3 Bean Salad	Meat 5 oz. box \$.49
17 oz. jar \$.53	Solo Poppyseed Filling
All Pork City Chicken	12 oz. \$.45
lb. \$.98	Solo Lemon Filling
Jiffy Cubed Beef Patties	12 oz. \$.43
or Breaded Veal Patties	Dole Pineapple (2 of 3
10-ct pkg. \$.98	varieties unavail.)
Lady Borden Ice Cream	3 (20 oz.) cans \$1

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qt. ctn. \$.66	Birds Eye Mixed Vegetables
Del Monte Pear Halves	w/onion sauce
30 oz. can \$.53	8 oz. pkg. \$.45
Eight O'Clock Instant	Birds Eye Broccoli in
Coffee 6 oz. jar \$.79	Hollandaise sauce
	10 oz. pkg. \$.45
Reddi Whip Topping	Solo Apricot Filling
7 oz. \$.65	12 oz. can \$.49
Hydrox Cookies Sunshine	Birds Eye Awake
14 oz. \$.54	3 (12 oz.) cans \$1

29. In the same store Pork Roast featured in the advertisement at 98 cents a lb., was price marked and the Commission surveyor was charged \$1.15 a lb., dressed Whiting featured at \$1.98 for a 5 lb. box was price marked and the surveyor was charged \$2.39, "Freshlike" green beans and sweet peas advertised 4 (14 oz.) cans for a \$1, were price marked and the surveyor was charged 29 cents and 26 cents per can respectively, "Ched-O-Bit" wrapped cheese slices, advertised at 86 cents (16 oz.) pkg., were price marked and the surveyor was charged 99 cents, "Mrs. Filbert's" soft margarine, advertised at 49 cents 1-lb. pkg., was price marked and the surveyor was charged 53 cents, "Borden" ice cream bars advertised at 78 cents for a carton of 12, were price marked and the surveyor was charged 99 cents, "Birds Eye Awake", advertised at 3 for \$1 (12 oz. size), were price marked and the surveyor was charged 39 cents each, "Kraft" Thousand Island dressing advertised at 59 cents for a 16 oz. jar, was price marked and the surveyor was charged 69 cents, "Johnson & Johnson" baby powder advertised at 69 cents for a 14 oz. container, was price marked and the surveyor was charged 99 cents, and "Gallo" Rose Wine advertised at \$1.19 for a fifth of a gallon, was price marked and the surveyor was charged \$1.25 (CX 87j).

30. In Newark, N.J., following publication of A&P's advertisement on Wednesday afternoon, May 2, 1974, in the *Star-Ledger* (CX 23a-b), the A&P store at 278 S. Orange Street was surveyed beginning at 12:30 p.m. the next day (CX 163c-i). The following advertised items were unavailable (CX 163c-i):

Watermelon \$.15 lb.	Land O'Lakes Butter
Eight O'Clock Instant	1 lb. pkg. \$.79
Coffee 2 oz. jar \$.41	Tip-Top Fruit Punch
White Bread 3 (22 oz. loaves) \$.89	64 oz. ctn. \$.63
Sunshine Cake	A&P Cottage Cheese
15 oz. pkg. \$.69	1 lb. pkg. \$.39
Dixie Cup Refills (40 in box) 9 oz. size \$.39	Lucky Whip 9 oz. can \$.57
Herb-Ox Bouillon Cubes	Minute Maid Orange Juice
25 in cont. \$.37	2 (6oz.) cans \$.49
	Brilliant Shrimp (cooked)
	8 oz. pkg. \$.99

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Duncan Hines Cake Mixes	Cap'n John's Haddock Dinner
3 (18 oz. pkgs.) \$1	12 oz. pkg. \$.69
Sliced Beef Liver \$.69 lb.	A&P Pork Roll (mild or fancy)
All Meat Armour Franks	1 1/2 lb. roll \$1.69
1 lb. pkg. \$1.09	Carnation Shrimp (peeled &
Frozen Hake Fillet \$.69 lb.	deveined) 1 lb. pkg. \$2.99
Kraft Parkay Regular	
Margarine 1 lb. pkg. \$.25	

No overpriced items were found at this store (CX 163a-i).

31. The record in this proceeding contains extensive additional evidence of unavailability and overpricing of advertised items, similar to the foregoing, in A&P stores in Baltimore, Birmingham, Alabama, Buffalo, Chicago, Indianapolis, Kansas City, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Rochester, Toledo, and Washington, D.C. See: Baltimore, CX 275f-g, CX 51a-j, CX 55a-g, CX 56h-j, CX 57a-j; Birmingham, CX 275h-i, CX 60a-g, CX 62a-g, CX 64a-g, CX 66a-g; Buffalo, CX 275j-k, CX 69a-g, CX 71a-g, CX 73a-g, CX 75a-g; Chicago, CX 275 l-n, CX 80a-g, CX 82a-g, CX 84a-g; Indianapolis, CX 275x-y, CX 123a-e, CX 125a-e, CX 127a-e, CX 129a-e; Kansas City, CX 275z-aa, CX 132a-m, CX 134a-m, CX 136a-m, CX 138a-m; Louisville, CX 275bb-cc, CX 141a-f, CX 141h, CX 143a-g, CX 143h, CX 145a-f, CX 145h, CX 147a-f, CX 147h; Milwaukee, CX 275dd-ff, CX 150a-i, CX 152a-h, CX 154a-i, CX 156a-i; Newark, CX 275gg-hh, CX 159c-i, CX 161c-h, CX 163c-i, CX 165c-i, CX 165k; New Orleans, CX 275ii, CX 275zz15, CX 168c-e, CX 170c-e, CX 172c-e, CX 174c-e; New York, CX 275jj-ll, CX 275zz16-zz18, CX 177a-f, CX 179a-f, CX 181a-f, CX 183a-e, CX 183i; Philadelphia, CX 275oo-pp, CX 275zz19-zz20, CX 186a-k, CX 188a-k, CX 190a-k, CX 192a-k; Rochester, CX 275qq, CX 204a-e, CX 206a-e, CX 208a-e, CX 210a-e; Toledo, CX 275rr-ss, CX 213a-h, CX 213j, CX 215a-h, CX 215j-k, CX 217a-h, CX 217j, CX 219a-h, CX 219j; and Washington, D.C., CX 275v-w, CX 275zz9-zz10, CX 116a-l, CX 116n, CX 118a-l, CX 118n, CX 120a-l, CX 120n.

32. As the foregoing findings disclose, unavailable and overpriced items were of all types. Although some of the unavailable and overpriced items were not basic food products or essential household articles, many were in those categories. Items given prominence in A&P's advertisements were unavailable and overpriced, as well as items given only one line in the advertisements. In 16 of the A&P stores surveyed, three or more of the items most prominently featured in the advertisements were unavailable (RX 1130).

33. Substantial and significant unavailability and overpricing were found in the "within city" A&P stores, as well as in A&P stores in the suburban areas, in large stores as well as small, in both relatively affluent and nonaffluent neighborhoods, and in most cities surveyed,

regardless of size or geographic location (see CX 222a-c; CX 264c-f; Tr. 1432; Eliassen, Tr. 523; Hare, Tr. 693; Van Lentin, Tr. 2253; Okoniewski, Tr. 613). As complaint counsel note, had the items found to be unavailable or overpriced in one or another of the A&P stores in each city surveyed been removed from the A&P advertisements published in those cities, such advertisements in many instances would have been quite different from what they were.

Unavailability and Overpricing Found in A&P Stores Exceeded Any Irreducible Minimum Due to Human Error or Other Factors Beyond the Control of A&P

34. In an organization as large and complex as A&P's, as well as in the operation even of a single, modern supermarket, some occasional unavailability and overpricing of advertised items are probably inevitable due to human error beyond the ability of the organization, however efficient, to wholly eliminate, or due to outside, uncontrollable factors such as transportation delays, strikes, weather, actions of third party suppliers, and the like. The substantial and widespread unavailability disclosed by the Commission's 1973 survey to exist in A&P stores, and reviewed to some extent in prior Findings, however, was not due to human error beyond the power of A&P to eliminate, and was not the result of circumstances beyond A&P control such as nondelivery to A&P of items previously ordered in quantities sufficient to meet reasonably anticipated demands, extraordinary purchases of advertised items by the public which could not have been reasonably anticipated, storms, weather, or the like. Although there were instances of unavailability attributable to such factors, the great bulk of unavailability did not result from such causes. Unavailability of advertised items, on the contrary, resulted from A&P's own practices and procedures.

35. The fact must not be lost sight of that A&P's management in the metropolitan areas surveyed prepared the advertisements published in the newspapers serving such areas, and selected the items to be included and the prices to be published. Having determined to advertise particular products, it was the responsibility of A&P's management to see to it that the items were available in the A&P stores covered by advertisements during the effective periods at the prices featured, unless the advertisements included a proper notice of stores not having a particular item, or unless factors beyond A&P's control prevented availability or correct price marking. As a generality, it would seem beyond argument that a product advertised at a price in a marketing area must be available to the public in the stores of the advertiser in the area covered by the advertisement, at the price

advertised, in the absence of a lawful disclaimer, or factors truly beyond the control of the advertiser.

36. What is involved in this proceeding is not the unavailability of an isolated advertised item, or even of a few items, or unavailability of items, for example, on Saturday evening near the end of the effective period of an advertisement, or even unavailability in a few stores out of many. Instead, the evidence discloses substantial and widespread unavailability of relatively large numbers of advertised products, in many stores of A&P, during what the undersigned would conclude to be prime shopping periods on days immediately following the publication of full page advertising in major metropolitan dailies. And, as already indicated, the unavailable products consisted of all kinds of items including meat, fish, canned goods, frozen food, fruit, produce, dairy products, bakery items, household supplies, and miscellaneous items. Unavailability ranged from items which might be regarded as luxuries (orchid corsages (CX 275q)), to staples (ordinary white bread (CX 275zzll)). Similarly, all types of products were marked with prices higher than those advertised.

37. A&P officials who testified in this proceeding did not ascribe the unavailability and overpricing found overall in the Commission's 1973 survey to factors beyond the control of A&P. Unavailability and overpricing were generally attributed to internal decisions, procedures or mistakes. Managers or representatives from 41 out of the 80 A&P stores surveyed told the Commission's monitors that one or more items were unavailable because they were not regularly carried (CX 225a-f). The former sales director of the Cleveland Division testified that the principal cause of unavailability of advertised items was store manager error, either failure to order the item or failure to order in adequate quantities (Weschler, Tr. 462-63, 422, 437-38). The A&P vice president and general manager of the Bronx Division testified, based on inquiry in 1974, that errors by the individual A&P store manager were the principal causes of unavailability (Van Lentin, Tr. 2259-2260):

[the manager] either does not order or he fails to order enough, this is the kind of thing, or he doesn't follow up on his people or something like that.

The general superintendent of A&P's Birmingham Division also testified that practices of A&P store managers were the major cause of unavailability of advertised items (Browning, Tr. 1058):

Not following all the procedures that are sent out, not following the sales program exactly to order the merchandise, and occasionally not ordering enough, not seeing the potential in the sale.

38. A&P management did not effectively detect and eliminate unavailability in individual food stores. The testimony of the former A&P sales director of the Detroit Division, where substantial unavailability and overpricing were uncovered by the 1973 Commission

survey, reveals that internal A&P procedures for preventing unavailability of advertised items in A&P stores were not fully enforced (MacDonald, Tr. 828-837). This official testified that the amount of unavailability and overpricing of advertised items in the Detroit Division was "totally unsatisfactory" (Tr. 856). Two of the "within city" A&P stores in Detroit often did not order items advertised by the Division (Hare, Tr. 703-08, 715-16). The manager of one A&P store surveyed in Detroit testified that he did not stock all advertised items believing that he had discretion in this area (Eliassen, Tr. 537). The Commission's survey revealed that 30 advertised items in this store were unavailable and 22 advertised items were overpriced (CX 222a), and the store was not adequately checked for unavailability and overpricing by A&P supervisory personnel in the Detroit Division (Hare, Tr. 548-49). Another Detroit store manager testified as to the official company policy of A&P to have all advertised items available (Okoniewski, Tr. 636):

It was company policy and requirement of having the merchandise on hand but I never took it very seriously.

Mr. Okoniewski's store was not carefully checked by the A&P supervisor in charge to determine the availability of advertised items (Tr. 640). The Commission's survey found 35 advertised items to be unavailable and 13 items overpriced (CX 222a; see also Okoniewski, Tr. 639).

39. A&P's divisions did not restrict advertised items to those which were stocked by all the A&P stores in the area covered by the advertisements published (MacDonald, Tr. 788-791; Browning, Tr. 1011). Thus, the advertisement surveyed in the Detroit area contained 28-32 items that were not part of the regular inventory of the A&P stores covered by the advertisement (MacDonald, Tr. 805), and in the Cleveland area there were 35 items advertised not regularly stocked in all the stores covered by that advertisement (CX 225c). In the eight stores surveyed in Cleveland and Detroit, three listed 12, 17, and 35 items as unavailable because they were not stocked (CX 225c). Indeed, the A&P divisions handling advertising for the A&P stores in their areas did not even know whether or not every A&P store to be covered by a proposed advertisement actually carried all the products to be included in the advertisement (Cairns, Tr. 1148-49; Gilbert, Tr. 2285; Niezgoda, Tr. 1946-1950; Burtis, Tr. 1861-62; Browning, Tr. 1005-08). Where items were not stocked by A&P stores, they obviously had to be specially ordered by the nonstocking store to be available when advertised. As a management technique, however, A&P in general did not follow a policy of shipping products to a store manager unless they were specifically ordered. A&P may have had sound business reasons

for this practice, but it may have been related to unavailability. It was A&P policy to vest responsibility for successful operation of its retail food stores in the store manager. Company policy also emphasized inventory control, and discouraged the accumulation of excessive inventory of products. A&P's National Purchasing Department established "inventory ceilings" for each division to avoid the inefficiencies and costs of tying up capital in unnecessary inventory (MacDonald, Tr. 911; Allen, Tr. 1170-71). A&P management regarded it as inconsistent to hold a store manager responsible for the successful operation of the store committed to his charge, including the control of its inventory, yet to ship him products not ordered (Weschler, Tr. 428). For this reason, as earlier stated, it was not A&P's practice for the warehouse to ship products to stores, which were not specifically ordered (Cairns, Tr. 1280-81). The sales director of the Cleveland Division testified (Weschler, Tr. 427-28):

* * * when a store places an order that is exactly what he will get. Even if we know that he didn't order something that we are going to advertise, we don't have the liberty of adding a case to his order. He is the only one who can requisition it from the warehouse.

Individual store managers, however, as already described, did not always order advertised items for various reasons. On this point a former Cleveland Division sales director testified (Weschler, Tr. 422):

Q. From your experience with A&P have you frequently found that a manager's judgment of what he thinks he is going to sell is wrong, an underestimate of what he thinks he is going to sell?

A. It is, but only because of the pressures that have been put upon him.

Q. What pressures are those?

A. That is because from the Vice President and the Treasurer on down he is continually being pressured to keep his inventory under control. He will get more censure for a high inventory than almost anything he can do, and knowing this, unfortunately he is going to be conservative in this judgment instead of generous.

The policy of not shipping products being advertised from A&P's warehouses to individual A&P stores covered by the advertisements appears to have contributed to the unavailability found, and was a policy within the control of A&P.

40. The practice by which local A&P management advertised items regardless of, or without knowing, whether they were carried in all the A&P stores covered by the advertisements affected stores with limited shelf space and was related to unavailability. Where a store did not regularly stock an advertised item, and also had limited shelf space, the item not only had to be specially ordered but space had to be provided for displaying it (Cairns, Tr. 1164). Arrangements for the display of items advertised by the area A&P management, but not stocked in a particular store, required the time and effort of store clerks (Dr. Holdren, Tr. 1496-97, 1420-21; Cairns, Tr. 1207-09), and this factor, combined with A&P's inventory control, affected the ordering of

advertised items not regularly carried. Advertising items not stocked in all the A&P stores within the coverage of the advertisement appears to have accounted for substantial unavailability, and was a factor within the control of A&P management (CX 225a).

41. Likewise, failure of individual A&P store managers to order, and to have in stock, sufficient amounts of advertised items was a factor within the control of A&P. Store managers attributed a substantial degree of unavailability of advertised items to being "sold out" (CX 225a). Yet, the Commission's survey was conducted on Thursday, the day following the mid-week advertisement, and on Friday, during prime shopping hours, except for only four of the 80 stores. There is nothing to suggest that the overall unavailability found was due to exceptional purchases by the public which could not have been anticipated by A&P. There were individual stores in Detroit, New Orleans and Pittsburg which store managers asserted were "sold out" of certain advertised items on Thursday morning following the Wednesday evening advertisement, which was advertised as effective through Saturday (CX 222a-c; CX 225a-f).

42. It was A&P's "official" company policy that all advertised items must be available in all A&P stores covered by advertisements at the prices advertised (RX A-12, RX A-15, RX A-17, RX B-25). This policy, however, was not "policed" to make sure that it was actually carried out, and that every individual store consistently had available all the items advertised in its area. The sales director of the Birmingham Division testified that, although checks of availability of advertised items were required to be made by each supervisor in charge of a number of individual A&P stores, the checks were not regularly carried out (Browning, Tr. 1049). The vice president and general manager of the Toledo Division likewise indicated that the checks of individual stores for advertised item availability were not effectively conducted and monitored (MacDonald, Tr. 828-29, 835-38). His testimony was as follows (Tr. 837):

Q. * * * Did your system of checks indicate to you that your smaller stores were in fact abiding by the official policy? Did your system of checks indicate to you and assure you that your smaller stores were in compliance?

A. I don't recall seeing the checks on small stores as to number of items unavailable.

Q. So the answer is no, your system did not assure you that your smaller stores were in compliance?

A. Right.

Q. Did your system assure you that your middle-size stores were in compliance?

A. I can not say that it did.

The testimony of the vice president and general manager of the Bronx Division was similar, indicating clearly that prior to the 1973 Commission survey there was relatively inadequate monitoring of individual A&P stores for availability of advertised items (Van Lentin,

Tr. 2257-58). To a degree, A&P top management seems simply to have taken for granted that the Company's declared policy of having every advertised item available in every individual A&P store was being followed. The vice president and national sales director testified (Cairns, Tr. 1238):

We asked them for compliance. If they could not comply, if there was any problem they would be required to come back to us and tell us what the problem was. Otherwise, we would assume they had complied.

Yet, it seems to have been general knowledge within the A&P organization that many individual A&P stores were not making all the items advertised in their areas available to the public (Hare, Tr. 707-08; see also Eliassen, Tr. 187-191, and Wyatt, Tr. 954). As early as 1971 a study of A&P prepared by a leading trade publication, *Progressive Grocer*, which was distributed throughout the A&P organization, reported that a "grievance" most often complained about by A&P's customers was the unavailability of advertised products (CX 255c; CX 258a-d).

43. Evidence that the degree of unavailability and overpricing in A&P stores is not due to factors beyond its control, and far exceeds the irreducible minimum beyond the power of A&P to eliminate, may be found in the great variations in performance among A&P stores. The distribution of advertised but unavailable items among the 80 A&P stores surveyed has been set out (see Finding 21, *supra*). From this it may be seen that 11 A&P stores had 25 or more unavailable items, 18 A&P stores had between 15 and 24 unavailable items, 11 had between 10 and 14, and 19 A&P stores had four or fewer (CX 222a-c). The record does not disclose anything unique or exceptional with respect to the 19 A&P stores with few unavailable advertised items. The low level of unavailability in some A&P stores indicates that the much higher rate prevailing in most of the 80 stores surveyed was far beyond any irreducible minimum caused by human error impossible to eliminate, and was not due to factors beyond A&P's control. Furthermore, the low level of unavailability in some A&P stores indicates that significantly higher operating costs are not required to lower substantially the unavailability rate found in A&P stores generally, or in the more poorly performing segment of A&P stores.

44. Similarly a comparison of the 80 A&P stores surveyed with respect to overpricing (also set out earlier in Finding 21) reveals great variability among them, indicating that the incidence of overpricing found in a large number of A&P stores was also above any irreducible minimum caused by human error impossible to eliminate, and was not due to factors beyond A&P's control. The low levels of overpricing in some A&P stores likewise indicate that significantly higher operating costs would not be required to lower substantially the degree of

overpricing found in the 1973 Commission survey. About 10 percent of the 80 stores of A&P surveyed had no overpricing of advertised items and a little over 10 percent had only one advertised item overpriced (CX 222a-c). Thus 20 percent of A&P's stores were generally free of this problem. In contrast, 13 stores surveyed had 10 or more advertised items overpriced, and almost half of the A&P stores surveyed had more than five advertised items overpriced. The record provides no evidence that the A&P stores with substantial overpricing could not achieve the low incidence of overpricing of other A&P stores without incurring significant additional costs.

45. A&P's own internal standards for auditing its stores to find and eliminate ordinary price marking errors suggest that the degree of overpricing found in the 1973 Commission survey was neither inevitable nor acceptable. A&P systematically audits its stores to make sure items are priced correctly. In conducting such audits, A&P considers 0-20 errors out of 6,000 to 10,000 items "good," 20-40 mispriced items "fair," and anything over 40 pricing errors "poor" (Cairns, Tr. 1244). In other words, in relation to the number of items stocked, 6,000 to 10,000, A&P rates one of its stores "poor" if pricing errors reach as much as .67 percent. If this standard were applied to advertised items, a large proportion of the A&P stores surveyed would be in the "poor" category. A newspaper advertisement often may contain 120 or more items. A&P's internal standard for pricing of its overall inventory would rate as "poor" anything over one or two instances of overpricing of advertised items. Although A&P's auditing system is designed for the purpose of assuring correct pricing in stores of its overall inventory, the considerations applicable to price marking items on the shelves generally, and to price marking of items advertised would not seem significantly different. When a product is put on a shelf it must be price marked, and when an item is advertised at a lower than regular price, those on the shelves must be remarked with the lower price advertised. In either instance the procedure is essentially the same. This view is consistent with the testimony of A&P's national sales director who believed that the simple procedure of having a store clerk check the prices on advertised items before the sale period began should "nearly" eliminate overpricing (Cairns, Tr. 1180). The A&P store managers who testified in this proceeding, and whose stores had a significant number of items priced higher than the advertised prices for such items, testified that price checks had not been made in their stores to make sure that all advertised items were correctly marked with the prices advertised (Loebsack, Tr. 185; Koss, Tr. 330; Eliassen, Tr. 547; Okoniewski, Tr. 637). Checking advertised items to make certain that the item on the shelf does not bear a price

higher than that advertised is a procedure within the control of A&P. Dr. Holdren, Professor of Economics, Iowa State University, who has had some practical experience in the retail food industry, testified that in his expert opinion unavailability and overpricing could be reduced to one percent for each if procedures "to effect maximum compliance with the rule" were adopted (Dr. Holdren, Tr. 1492-94).

46. Comparison of the unavailability of all supermarket chains surveyed provides evidence that the levels of unavailability and overpricing found in the A&P stores are far above any irreducible minimum due to human error which cannot be eliminated, or cannot be eliminated without substantially increasing costs, and are not the result of factors beyond the control of A&P. Although A&P was not the worst from the standpoint of unavailability of advertised items, a heavy preponderance of chains had lower levels, and some far lower (Table III, attached). In all, 74 chains were surveyed and A&P's percentage of unavailable advertised products was greater than that found in the stores of 66 of them. A&P had greater unavailability than Safeway, Kroger, Acme, Lucky, Jewel, Winn-Dixie, Food Fair, Grand Union, and National Tea Stores. A&P's percentage of overpriced advertised items was much closer to that of its competitors, but still exceeded many. Combined percentages of unavailability and overpricing of A&P was greater than that of 51 of its chainstore competitors. Such a comparison does not imply that other retail food chains necessarily had levels of unavailability of overpricing which approached an irreducible minimum. The contrary is probably the case since A&P has asserted that unavailability and overpricing of advertised items is an industrywide problem (see A&P's motion for a stay of this proceeding pending Commission action on A&P's request for reexamination of the Trade Regulation Rule, dated Jan. 15, 1974, p. 5). Nor does a comparison imply that the operating conditions of all leading chains were identical. Nevertheless, A&P's operations do not appear to be unique as to invalidate any comparison whatever of its levels of unavailability or overpricing with those of its competitors, particularly in view of the large number of metropolitan areas surveyed and the random method by which stores to be surveyed were selected. Furthermore, if A&P has different operating conditions, such as a greater number of stores in central city locations which are smaller in size than suburban stores, and which may also have a greater proportion of "ethnic" or minority clientele, that circumstance does not justify or warrant the advertising of products and failing to have them in A&P's retail food stores at the prices quoted. A&P had an obligation to tailor its advertising to fit its operating conditions.

Advertising Products and Failing to Have Them Available in All Stores Covered by the Advertisements or Failure to Have Them at the Prices Advertised is Unfair, Misleading and Deceptive

47. As already indicated, when A&P advertised a product at a particular price in the newspapers circulated in a particular area, A&P had an obligation to have such product available in its retail food stores in the area covered by the advertisement at the price advertised. Failure to meet this obligation, unless due to factors beyond A&P's control, is unfair, misleading and deceptive to members of the purchasing public, and is unfair to competitors.

48. As earlier found, A&P's advertisements constituted representations to members of the public by A&P that the products advertised would be available for purchase in any of the A&P stores in the areas covered by the advertisements at the prices advertised. The very purpose of A&P in disseminating advertisements was to cause members of the public to patronize A&P's retail food stores, drawing them by the attraction of the products advertised and the prices featured. A&P invited reliance on its advertisements, and the public properly had the right to rely, and to entertain the expectation that the advertised products would be in A&P's stores, and that the prices thereof would be the prices stated in the advertisements. To be sure, on occasion an advertised item will not be available and most shoppers know this. But that is not to say that shoppers anticipate that any significant and substantial numbers of items will not be available, or that any specific advertised item will not be available, or do not rely on the advertisements. Indeed, it would seem that if the public did not rely on advertisements, they would be wholly ineffective. Having advertised products for the purpose of inducing members of the public to travel to its stores to obtain them, respondent A&P is in no position to denigrate the significance of such advertisements or the products featured in them. Advertisements representing that particular products are available for sale in the retail food stores of A&P are unfair, misleading and deceptive if such products are not in fact available in such stores.

49. It is unfair and deceptive for A&P to advertise food and grocery products and other merchandise at certain prices, and then charge customers higher prices for the items. The Commission's survey found this to be happening in a significant number of instances in A&P's stores. A&P "checkers," as previously found, are instructed to ring up the price marked on the item. The former director of sales for the Cleveland Division testified to this effect, as follows (Weschler, Tr. 444-45):

A. The price that is on the can. The shelf signs do not mean anything. Any kid coming

through the store could move 15 of those in two seconds. It is what is on the can that counts.

* * * * *

Q. You said the Checkers were told to read the price on the can. If the can is marked wrong, it gets checked out at the wrong price?

A. That is correct. That is because they have been told years back that they are not hired to be memory artists. They are hired to be a Cashier who checks out merchandise. In fact, they are told that they are wrong if they try to reprice because even in critical times like this, even the best price doesn't last. There is more danger of charging a wrong price if they resort to memory than if they make a routine of looking on every package they put through regardless of how common it is.

A&P's national sales director also testified that the checker is trained "to ring the price that is marked on the item" (Cairns, Tr. 1159). Thus, the customer will be charged the price on the item and if it is higher than the advertised price, i.e., "overpriced," the customer will wind up paying the higher price. This will be the case unless the customer spots overpriced items and brings them to the attention of the cashier, or possibly in instances when the checker notes an item which appears to be overpriced and checks the price.

50. That customers in fact are charged the prices marked on the items is verified by evidence in the record which has to some extent been already discussed. The 1973 Commission survey provided for the purchase of advertised items which were marked with prices higher than those featured in the advertisements. About 121 items were purchased by surveyors of which about 79 percent were checked out at the higher price marked on the items. In a somewhat similar survey³ in Raleigh, Durham and Chapel Hill, N.C., it was found that out of 142 items purchased which were marked with a price higher than the advertised price, 126 were checked out at the higher price marked, about 89 percent (see CX 268a-e, 269a-c).

The Existence of "Rain Check" or Substitution Policies Does Not Cure Unavailability of Advertised Products

51. Advertising products and then not having them available in stores covered by the advertisements has the potential for serious exploitation of the consuming public. Members of the public induced to go to an A&P store to obtain advertised products only to find them unavailable, not only suffer frustrations, but may have been caused to waste valuable time and effort. They may also have been put to the expense of public transportation, or of driving their cars significant distances. The existence of a "rain check" policy does not repair the

³ The North Carolina survey was withdrawn by complaint counsel, and is not in evidence except for certain limited aspects.

injury (see CX 17b, CX 18, CX 22c, CX 23, CX 24b, CX 25-CX 31, CX 35 and CX 37 which contain the printed "rain check" policy; Cairns, Tr. 1183-84). A "rain check" does not provide the customer with the product or products advertised at the time desired, and to obtain which the customer may have taken time and effort, and incurred expense, in traveling to a retail food store. When an advertised item is unavailable, and sought by a customer, a different item must be substituted, perhaps not wholly satisfactory, and perhaps at greater cost, or more time, effort and expense expended going to another store. Further, for customers not regularly shopping at a particular store, a "rain check" plainly requires a second trip with additional costs in time, effort, etc., with the possibility of unavailability on the second trip. Even for customers regularly patronizing a particular store, a "rain check" must be safeguarded, and a second hunt for the product undertaken with the possibility, as just mentioned, of continued unavailability. Although "better than nothing," a "rain check" does not cure, justify, or render permissible or acceptable the unavailability of advertised items.

52. Nor does A&P's "substitution" policy necessarily justify or cure the unfairness, deception and exploitation inherent in advertising products, and then not having them available in the stores covered by the advertisements. A&P allows a customer to obtain a "comparable" item at the advertised price, if the advertised item is not available (Cairns, Tr. 1187). As in the case of "rain checks" such a policy is beneficial, but certainly does not cure unavailability of advertised items. The practice of advertising certain items, and then offering different products to customers who responded to the advertisements appears to the undersigned quite unacceptable. This is true even where the items seem fully comparable. Customers are entitled to get what is advertised, and some customers, irrationally or not, want particular brands and no others (Weschler, Tr. 474-75; MacDonald, Tr. 841-42; Cairns, Tr. 1190-91; Dr. Holdren, Tr. 1483). Beyond that, however, for some advertised items there are no substitutes, i.e., "top round roast," "chicken cutlets," "bluefish," all featured in the (Bergen County) *Record* and unavailable in one or more stores in the Clifton-Paterson area (CX 275r). Furthermore, in most instances before a substitute item may be obtained by a customer, the unavailability of the advertised item must be established, brought to the attention of the store manager or other A&P employee in authority, the possibility of a substitute broached, and consent of the A&P employee to its substitution obtained.

53. Both "rain checks" and A&P's "substitution" policy subject customers who have been induced by A&P's advertisements to come to its stores to inconvenience, delay and possibly irritation. In stores

which may well be crowded, to obtain a "rain check" or a substitute item, as indicated, customers conceivably pressed for time may have to hunt down a clerk, or even the manager or assistant manager, explain the unavailable but advertised item, and possibly wait while it is verified. If a "rain check" is issued, a customer must then wait until the next visit to the store to obtain the item, if it is still desired, and if it is even then available (see Loeb sack, Tr. 214-220; Eliassen, Tr. 573-77). Similar factors apply to substitute items, except that the customer may have to reject a "rain check" and ask for a substitute, and the consent of the A&P employee obtained for the substitute. For these reasons neither "rain checks" nor "substitutions" appear to be in heavy use by consumers, amounting only to a few instances a week for each in one Detroit A&P store found to have had substantial unavailability (Loeb sack, Tr. 220, 222) out of what must have been thousands of transactions (see also Koss, Tr. 350-51; Eliassen, Tr. 576; Okoniewski, Tr. 658).

Advertising Products and Failing to Have Them Available In All Stores Covered by the Advertisements or Failure to Have Them at the Prices Advertised is an Unfair Method of Competition

54. Advertising of prices is procompetitive and beneficial to the public being, in fact, a preeminent example of price competition. The advertising of prices makes prices and price reductions particularly visible and, when vigorously and honestly pursued, tends to keep prices low, or even to lower them (Dr. Katona, Tr. 1750). The advertising of items at low prices coupled with the failure to have such items in the stores covered by the advertisement, or available at the prices advertised, has the tendency and capacity to substantially injure competitors, and is an unfair method of competition. The advertising of products at low prices not in fact available in the stores of the advertiser, or not available at the prices advertised, may enable a firm to persuade the public that it has lower prices than its competitors when in fact it does not. Under such circumstances, a firm may gain a competitive advantage unfairly. Advertising products at low prices which are unavailable in the stores of the advertiser, or which are unavailable at the advertised prices, furthermore, has the tendency and capacity to destroy or erode public confidence in the truth of such price advertising, presently common among retail food store chains and supermarkets, since the public is likely to generalize from specific experience. Erosion of confidence in such advertising may have the tendency and capacity to reduce the effectiveness, and the competitive benefits to the public flowing from such advertising (see with respect

to this finding, Dr. Holdren, Tr. 477-1483, and Dr. Katona, Tr. 1750-52, 1774, 1778-79, 1786-87).

III

Discussion

The meaning conveyed to the public by A&P's advertisements is basic to the disposition of this proceeding. The undersigned has found that the advertisements represented that the products featured would be available for purchase in the retail food stores of A&P, in the areas covered by the advertisements, at the prices advertised during their effective periods. A&P vigorously disputes this interpretation (Proposed Findings, pp. 28-38; Answering Brief, pp. 4a-10) arguing that the advertisements make no explicit promise to this effect, that there is no guarantee of availability, and that the public does not expect perfection, well understanding that on occasion and for various reasons some items which were advertised will not be available in the stores of the advertiser. According to A&P, therefore, the advertisements were only understood by the public to mean that the advertised products would be available and correctly priced "in the great majority of cases," and that A&P used good business practices applied in good faith to prevent unavailability and mispricing.

The undersigned does not accept this view of the matter, finding that advertisements of A&P offering, for example, lamb chops at 99 cents a pound (CX 275j) or Florida oranges at 20 for 99 cents (CX 275mm), constituted in each instance a representation to the shopping public that those particular items would be available for purchase in the A&P stores in the areas where the advertisements were disseminated, at the prices advertised, during the effective periods stated. That is the meaning of the advertisements, and the undersigned can rationally find no other meaning in them. It seems to the undersigned a *non sequitur* to argue, because shoppers have learned from experience, if that is true, that *some* advertised products may not be available or correctly price marked as advertised, that A&P's advertisements do not represent that *specific* and *particular* advertised items will be available for sale in A&P's stores at the prices advertised. Development of tolerance by the public to unavailability of advertised items does not render the practice of advertising items and then not having them available in the stores of the advertiser any the less misleading. The advertisements of A&P made the representations alleged in Paragraph Five of the complaint. In the opinion of the undersigned, there is no ambiguity whatever in them. Unqualified A&P advertisements offering lamb chops at 99 cents a pound (CX 275j) and oranges at 20 for 99

cents (CX 275mm) represent and convey the "net impression" to the public that lamb chops and oranges can be purchased in any A&P store in the areas covered by the advertisements at 99 cents a pound and 20 for 99 cents, respectively. At the very least such advertisements have the tendency and capacity to convey such net impressions and representations, and that is all that is needed for a violation, *U.S. Retail Credit Ass'n v. Federal Trade Commission*, 300 F.2d 212 (4th Cir. 1962), *Firestone*, 81 F.T.C. 398, 450 (1972), *aff'd* 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112, if the representations or net impressions are false, as they are if the products are not in fact available or the customer is charged higher prices than those advertised. The Commission may determine the meaning or net impressions conveyed, and by extension the undersigned, based upon the advertisements themselves and the circumstances surrounding their publication. *Standard Oil Company of California*, order of Nov. 26, 1974; *Crown Central Petroleum*, order of Nov. 26, 1974; *Firestone*, *supra*.

Having concluded that the advertisements made the representations alleged, the issue then presented is the conclusions to be drawn from the unavailability and overpricing disclosed by the Commission's survey. A&P challenges the implications and conclusions drawn from those statistics. A&P criticizes treatment of all items as "fungible" by the survey, according all equal weight whether a "featured meat or produce" item or the "seventh and last flavor of a line of luncheon meats" (Proposed Findings, pp. 150-51). Although for counting purposes and items were treated alike, the record contains extensive evidence showing the exact items unavailable and overpriced, and many of these products have been enumerated in this decision. It is plain that unavailability and overpricing extended to every kind of item, those prominently featured in the advertisements and those accorded only a line, staples as well as luxuries. Beyond that, however, the undersigned perceives no infirmity in counting the number of items unavailable or overpriced, and calculating the degree of unavailability or overpricing on that basis. An attempt to weigh items in accordance with their presumed importance to the public would require value judgments among items, which would inject far greater problems. Although "horseradish root" to many is an esoteric product, if it is traditionally used during the Easter season by citizens of a particular ethnic extraction, it is clear that many persons may have been drawn to A&P stores in the Cleveland area by the offer of that product in one of A&P's advertisements (CX 275zz, reproduced [p. 631] herein). To dismiss its unavailability as of no importance is unwarranted.

In a somewhat similar argument aimed at the significance of the

statistical results, A&P is critical on the ground that where an advertisement offered "Gelatin desserts, 7 flavors," each flavor was transcribed in the survey as an "item" so that if no gelatin dessert at all were available in a store, seven instances of unavailability were recorded. In contrast, if the advertisement offered "assorted flavors" only one "item" was involved. A&P is correct in contending that this is anomalous. But it seems to the undersigned to have had little significance in the overall results. Instances of this type were few in relation to the thousands of items advertised and surveyed. Furthermore, as complaint counsel point out (Reply to Respondent's Proposed Findings of Fact, pp. 9-10), A&P was probably not prejudiced by this system of counting and may even have been benefited in some instances. For example, in an advertisement published in the *Detroit News* on May 23, 1973 (CX 27a-b; CX 275t) A&P offered Funk & Wagnall's Encyclopedia. The 27 volumes of this offering were counted as 27 items. Hence, in the four Detroit stores surveyed, this Encyclopedia advertisement produced 108 items (4 x 27). In the four stores surveyed, seven volumes were unavailable resulting in a percentage of unavailability, insofar as the Encyclopedias were concerned, of 6.48 percent. On the other hand, the percentage of unavailability of advertised items overall for the four Detroit stores of A&P surveyed was 12.8 percent (CX 223b). If Encyclopedia volumes had not been counted as individual items, the unavailability percentage overall for the four Detroit stores would have been about 13.7 percent.⁴ Finally, on this point, it is obvious that a consistent methodology had to be adopted for counting items advertised as available in a specific number of varieties or flavors, and those advertised as consisting only of an "assortment" or the equivalent. The methodology utilized in the Commission's survey seems to the undersigned to have been reasonable and not unfair to A&P.

A&P contends that unavailability, by and large, consisted of items of "trivial significance in terms of likely consumer demand" (Proposed Findings, p. 152). The advertised items found to be unavailable have been reviewed in detail. Overall they certainly do not seem to the undersigned to have been of "trivial significance." Furthermore, as already stated, the contention involves a value judgment which is inappropriate for A&P under the circumstances. Having advertised products for the purpose of inducing members of the public to

⁴ In all 864 items were surveyed in the Detroit stores which included 27 volumes of Funk & Wagnall's Encyclopedia advertised on May 23, 1973. Seven unavailable items were attributed to unavailable Encyclopedia volumes (CX 107; CX 108; CX 109). Counting Funk & Wagnall's Encyclopedia as one item in all four stores would have reduced the number of items surveyed to 760, i.e., instead of counting 27 volumes in each of four stores as 27 items, there would have been counted only one (1) item "Encyclopedias" in each store. The seven missing volumes would not have been counted as unavailable items. Hence, there would have been 104 unavailable items out of 760 surveyed (see CX 222a, which shows 111 unavailable items in the four Detroit A&P stores surveyed), or about 13.7 percent.

patronize its retail food stores, A&P is in no position to disparage those advertised items found to be unavailable on the ground they were of trivial significance.

As already described, A&P insists that its internal procedures are soundly conceived, reasonable and adequate, and are applied in good faith to prevent unavailability and mispricing of advertised products (Proposed Findings, pp. 84-131). Much evidence was received in this proceeding concerning the methods by which A&P selects products for inclusion in its newspaper and other advertising, the procedures by which individual stores are advised in advance of the products which will be advertised, and the methods used to ensure that the advertised products are in fact available in the individual A&P stores at the prices advertised. As stated, there is a clear-cut A&P policy that every product advertised will be available for sale at the price advertised in every individual A&P store covered by an advertisement, unless a proper disclaimer has been published (RX A-15). The particular internal procedures to be followed to carry out this policy is a matter for A&P's management. The undersigned has no doubt that such procedures were soundly conceived, and to the extent applied, were applied in good faith. The result, however, is what counts and what the public is concerned with, and the record reveals that A&P's policies were not effective, that substantial and widespread unavailability and overpricing of advertised products existed in A&P's retail food stores. The great variability among A&P retail food stores in itself would appear to eliminate any conclusion that the overall level of unavailability and overpricing was the lowest attainable notwithstanding "soundly conceived" procedures applied in "good faith." As noted, 19 out of the 80 A&P retail food stores surveyed had four or fewer items unavailable, with an average of 2.5, out of an average of about 111 items surveyed. In contrast, 19 out of the 80 stores surveyed had 20 or more items unavailable, with an average of 26.6 out of an average of 164.1 items surveyed (CX 222a-c). A&P stores with high levels of unavailability and overpricing, and stores with low levels of both, were not limited to any particular size of store, or seemingly to A&P stores serving any particular type of neighborhood or clientele. The average number of unavailable advertised items in all 80 A&P stores surveyed was 12.5 (1000 divided by 80, see CX 224a). Individual stores of A&P showed a similar variation in items marked with higher prices than those advertised (CX 222a-c). There were 32 A&P stores with overpricing of two or fewer items, with an average of 1.25 whereas there were 26 A&P stores with between seven and 22 items overpriced, with an average of 10.2 (CX 222a-c). No contention has been made that the costs of operating the stores with few items unavailable or overpriced

overall were any higher than the stores with many items unavailable or overpriced. Much unavailability resulted from the simple failure of individual store managers to order the items advertised (CX 225a-f and underlying survey forms in evidence). Similarly, as described, overpricing was attributed by A&P store managers to failure to check the prices of advertised items, a procedure already prescribed by A&P (Loebsack, Tr. 185; Koss, Tr. 330; Eliassen, Tr. 547; Okoniewski, Tr. 637). These are only a few of the factors serving to demonstrate that the levels of unavailability and overpricing revealed to exist in the retail food stores of A&P by the Commission's survey far exceeded any irreducible minimum beyond the power of A&P to eliminate without significantly increasing costs, and were not caused by circumstances beyond the control of A&P.

A&P argues that demands for "statistical perfection" and a "remorseless insistence" that each of the stores have all the items advertised at the prices advertised will impose "real burdens on food prices" (Answering Brief, p. 11), and further that cessation of price-oriented advertising is the only means of eliminating "with total certainty statistical discrepancies of the kind observed in the 1973 survey" (Proposed Findings, p. 208). With respect to the first argument, it seems somewhat incongruous for A&P, after endorsing the concept that every advertised item must be available in every store covered by an advertisement as "always" having been "Company policy" (RX A-15), to contend that insistence that the policy be observed will increase food costs. In any event, A&P produced no specific proof to support this argument. Mere assertions on such an issue are insufficient. Furthermore, the contrary is indicated by the fact that some A&P stores seem to be operating essentially in compliance with the policy, and the circumstance that observance of already established company procedures would eliminate much of the unavailability and overpricing of advertised items found by the Commission's survey.

The second argument of A&P suggests in effect that the degree of unavailability and overpricing found in its stores, that is, 13 percent of all advertised items, cannot be eliminated, and that it may have to abandon price-oriented advertising. What has been set out earlier in this initial decision demonstrates, in the opinion of the undersigned, that a substantial amount of unavailability and overpricing can be eliminated by A&P by following already established internal procedures with no effect on currently used price-oriented advertising. If A&P is suggesting that *all* unavailability and overpricing cannot be totally eliminated without abandoning price-oriented advertising, the answer is that no one, insofar as the undersigned understands the

matter, is insisting on any such result. It is recognized that some unavailability and mispricing will always occur due to ineradicable human error, and to factors beyond the control of A&P. There is no insistence upon "perfection or near-perfection."

Another contention of A&P is that it serves inner-city neighborhoods "to a degree beyond any other chain" (Proposed Findings, pp. 51-58). A&P contends that its large number of stores in Manhattan, Bronx and certain sections of Brooklyn in the New York City area, and in inner-city locations in Detroit and Cleveland, for example, result in considerable lack of uniformity in the type of products stocked. Dr. Goodman, an expert called by A&P, testified that variations in ethnic background, income and other characteristics produced substantial variations in product demand, and that trends in food retailing are in the direction of accommodating such variations (Tr. 2572). According to Dr. Goodman, items which are popular in some neighborhoods are the subject of little or no demand in others, and that a requirement that every advertised item be carried in every store "often means" that, as a price of advertising, products must be forced into stores where there is little demand for them (Tr. 2575). A somewhat similar argument is that many A&P stores are located in "downtown" city areas, are consequently smaller than suburban stores, have less shelf space, and cannot stock all the items that larger stores in outlying areas can stock (Proposed Findings, pp. 50-51, 211; see also RX 1085, 1087, 1107, 1108). It may be noted that there is no contention that the foregoing types of stores overall are not profitable.

A&P asserts that if it is insisted that every advertised item be available in every store, small stores and inner-city stores serving "specialized constituencies defined in terms of race, ethnic background or income level" may have to be closed (Proposed Findings, pp. 211-12). The record establishes, however, that there are techniques, or combinations of techniques, available to A&P by which it can assure that advertised products will be available in such stores, or by which A&P can identify in its advertisements the stores in which particular advertised products can be found. A&P has the option of advertising a particular product, and no reason exists why local A&P management responsible for advertising can not determine whether the items planned for inclusion in advertisements are carried by all A&P stores in the area to be covered by the advertisements. Having made that determination, items available in all stores can be advertised. Where it is desired to advertise certain items only popular in stores with a particular clientele, there is no reason why the advertisement cannot list the stores where such items can be found (see CX 282, 283; RX 1034, 1153 and 1154). Similar techniques can be used where advertising

allowances are available on condition particular products are advertised, and where opportunities are presented to buy on favorable terms products not usually carried. And in appropriate instances products to be advertised can be shipped to the stores covered where such products are not normally carried. Of course, management is A&P's province, as previously noted. The foregoing possibilities are mentioned only to indicate the unfounded nature, in the view of the undersigned, of arguments that small stores and inner-city stores may have to be closed if it is insisted that A&P's own policy that every advertised item be available in every A&P store covered by an advertisement be carried out.

A&P contends more broadly that insistence on such policy offers little or no real benefit to the public and, in fact, presents the possibility of actual harm in that there would be adverse consequences to A&P's efforts to distribute food and groceries at the lowest feasible cost, and injury to a wide range of "other important social values", *i.e.*, "vigorous competition", service to "urban poor" and "minority" groups, and the pursuit of "employment goals" of various Civil Rights statutes (Answering Brief, pp. 2-4). What has already been written is applicable to most of these arguments. In the opinion of the undersigned, none of the consequences A&P claims to foresee are supported by the record. To insist that A&P have the products it advertises available in its stores, unless prevented by factors beyond its control, is neither unrealistic, arbitrary nor an example of bureaucratic meddling. On the contrary, it would seem to be a matter of elementary fairness. Indeed, A&P seems to concede as much since, as stated a number of times, its own policy is to require "all stores to stock all advertised items during a sale period," it being, as A&P's vice president for merchandising noted to all A&P Sales Directors, "only good business to have all advertised merchandise available at all times" (RX A-15).

Failure by A&P to live up to the representations of its advertisements has the tendency and capacity for substantial harm to the public. Harm has been done to any member of the public who has gone to an A&P store to purchase a product advertised, only to find it not available. If A&P contends that shoppers do not travel to supermarkets with the specific purpose of purchasing advertised items, that contention is rejected. The undersigned has enumerated many items in this decision which were advertised, and which were not available, which could well have drawn shoppers to A&P stores. In fact, the very purpose of A&P's advertisements, or one of its purposes, was to persuade members of the public to go to its stores by offering desirable or needed products at attractive prices. The unavailability of advertised items, multiplied many times over, has the tendency and capacity

for substantial and serious injury to the public and to the competitive system.

Although the unavailability and overpricing found in the Commission's survey cannot be projected with statistical precision to the total number of A&P stores in the metropolitan areas listed in Finding 14 from which the 80 A&P stores surveyed were drawn or, *a fortiori*, to all A&P retail food stores (see Dr. Shumway, Tr. 2696-2740; Dr. Holdren, Tr. 1489), it seems obvious from the evidence in the record that unavailability and overpricing of advertised items cannot have been limited to the 80 A&P stores surveyed. That the Commission's survey by chance hit upon the only A&P stores with significant unavailability and overpricing is so remote a possibility that it may be disregarded. Indeed, there are indications that unavailability is a companywide problem (see, *e.g.*, CX 258a-d, CX 255c). For the purposes of this initial decision, however, it is unnecessary to make any projection of unavailability and overpricing beyond the 80 A&P stores surveyed to any larger group of A&P retail food stores.

It is fundamental that advertisements are to be interpreted on the basis of the "net impression" conveyed to the general populace. *National Bakers Services, Inc. v. Federal Trade Commission*, 329 F.2d 365 (7th Cir. 1964), and, as already stated, the "net impression" conveyed by A&P's advertisements was that the products listed or depicted were available for purchase in the retail food stores covered by the advertisements, at the prices advertised, during the effective periods of the advertisements. When A&P did not have the products listed or depicted, or did not have them at the prices advertised, the advertisements were false, misleading, and deceptive, or at the very least had the tendency and capacity to deceive. The latter is sufficient for a violation, as previously noted. The fact that A&P may not have intended to mislead or deceive does not expunge the unlawfulness. *Ford Motor Co. v. Federal Trade Commission*, 120 F.2d 175 (6th Cir. 1941); *Montgomery Ward & Co. Inc. v. Federal Trade Commission*, 379.2d 666 (7th Cir. 1967) *National Dynamics Corporation*, 82 F.T.C. 488 (1973). Overall, the practices of A&P, found herein, were unfair to the public, oppressive and exploitive. *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

Although A&P has defended this case on the "merits," so to speak, in its Proposed Findings A&P has raised a question whether the practices challenged in the complaint are in interstate commerce. A&P contends that there has been a failure of proof on this requirement. The basis for A&P's contention is the claim that its advertising is essentially local, and that sales of the products advertised from individual A&P stores are "plainly and entirely so." A&P additionally contends that although

many products carried by its supermarkets were procured from the channels of interstate commerce, others were obtained locally. According to A&P the failure to distinguish interstate products from locally procured products is of decisive significance if the outcome of this proceeding turns on whether particular advertised products were not in particular stores when surveyed, rather than on broader questions, i.e., whether A&P's intentions were good, its procedures sound, and its performance adequate to meet the promises of its advertisements.

There is obviously no question that A&P is engaged in interstate commerce moving, as it does, vast quantities of food, grocery products and other merchandise in a continuous stream across state lines and into its warehouses and retail food stores for sale to the public. Under the circumstances it would be paradoxical, indeed, to conclude that the advertising and sale of food, groceries, and other merchandise, involved in this proceeding, were beyond the jurisdiction of the Commission. And, in the opinion of the undersigned, no such conclusion is warranted under applicable precedents. Notwithstanding the "local" purchase and sale of some products, the utilization of the channels of interstate trade by A&P in the movement and sale of others imparts an interstate character to the whole. *Safeway Stores, Inc. v. Federal Trade Commission*, 366 F.2d 795 (9th Cir. 1966), *cert. denied*, 386 U.S. 936 (1967). In that case, challenging price fixing in violation of Section 5, the bulk of the activities were local, involving bread manufactured and sold locally, but the shipment of a small amount in interstate commerce was sufficient to impress the whole with an interstate character subject to the jurisdiction of the Commission. Commission jurisdiction attaches in this matter to the whole of the advertising and sale of A&P's food, grocery products, and other merchandise, where there is massive movement of many of those products in interstate commerce. Viewed from another standpoint, A&P's "local" purchases and sales are so commingled, and have such a close, substantial and inseparable relationship with the advertising and sale of food, grocery products, and other merchandise moving in the channels of interstate commerce that the whole on this basis must be, and is, subject to Commission jurisdiction. *Ford Motor Company v. Federal Trade Commission*, 120 F.2d 175 (6th Cir. 1941); *Ashville Tobacco Board of Trade v. Federal Trade Commission*, 263 F.2d 502 (4th Cir. 1959); see also *Bakers of Washington*, 64 F.T.C. 1079 (1964).

A&P's advertisements, furthermore, were disseminated across state lines (CX 257). Interstate dissemination of advertising is an activity in "commerce" subjecting the acts and practices connected therewith to Commission jurisdiction. *Shafe v. Federal Trade Commission*, 256 F.2d 661 (6th Cir. 1958); *S. Klein Department Stores*, 57 F.T.C. 1543 (1960);

Surrey Sleep Products, Inc., 73 F.T.C. 523 (1968); *Bankers Security Corp.*, 57 F.T.C. 1219 (1960).

True, A&P's advertisements were aimed primarily at the local population since people generally shop in supermarkets and retail food stores near where they live. As a consequence, A&P insists, since there was no showing that the advertisements in issue induced, or had any likelihood of inducing, out-of-state readers to cross state lines to make purchases, there was no "nexus" between the acts and practices and the interstate advertising (see Proposed Findings, pp. 26-27, 214-19; Answering Brief, pp. 68-71). Hence, according to A&P, its advertising can not be used as a basis for subjecting its acts and practices in the sale of food, grocery products and other merchandise, to the Commission's jurisdiction. The undersigned does not read the foregoing cases as imposing the strict "nexus" insisted upon by A&P. In *Shafe v. Federal Trade Commission*, *supra*, the respondent had no intention of inducing, and indeed refused to make out-of-state sales. Nevertheless, his advertising in newspapers which crossed state lines subjected his wholly "local" sales to the Commission's jurisdiction notwithstanding the lack of showing that the advertising induced, or was likely to induce, out-of-state readers to cross into Michigan to make purchases. The fact that Section 12 was involved in *Shafe*, if anything, renders that case of greater significance on this point since A&P claims that that section is more restrictive than Section 5, covering only advertising for the "purpose" of inducing the purchase of food, drugs, etc., while Section 5 has no such requirement. The subject acts and practices of A&P were in "commerce" and subject to the jurisdiction of the Commission.

During the trial of this proceeding A&P moved for summary decision that the complaint failed to allege a violation of Section 12 of the Federal Trade Commission Act. A&P argued that the language of Section 12 and its legislative history made clear that it applied only to advertising which "misrepresents the intrinsic qualities, components, or consequences of the use of an item, that is, which contains qualitative misrepresentations" (Answering Brief, p. 54). Obviously the advertisements involved in this proceeding make no representations whatever concerning the intrinsic qualities of any of the products offered. Ruling on the motion was deferred until submission of the initial decision.

Sections 12 through 15, 15 U.S.C. §§52-55 (1970), were added to the Federal Trade Commission Act as part of the Wheeler-Lea Amendments of 1938. Section 12 made the dissemination of "any false advertisement" of "food, drugs, devices, or cosmetics" unlawful and an "unfair or deceptive act or practice," Section 13 provided procedures for obtaining injunctive relief against dissemination of false advertise-

ments of such products pending administrative hearings, Section 14 established penalties, and Section 15 defined the term "false advertisement."

The legislative history of these sections makes clear that they were designed to provide the Commission with an expeditious and effective means for stopping advertising falsely representing the intrinsic qualities of food, drugs, devices, or cosmetics because advertising of that type posed great danger to the health of the public. Congress was concerned both with the danger presented by products harmful in themselves, and with the plight of the seriously ill who might be induced by false advertising to neglect proper treatment in favor of worthless nostrums. H.R. Rep. No. 1613, 75th Cong., 1st Sess. 1937, discussed the provisions which were later enacted as Sections 12 through 15, and confirms the conclusion that the legislation was designed to deal with the danger posed by misrepresentation of the inherent qualities of food, drugs, devices, or cosmetics. In explaining the need for legislation, the Report noted that (p. 4):

* * * we cannot ignore the evil and abuses of advertising; the imposition upon the unsuspecting; and the downright criminality of *preying upon the sick* as well as the consuming public through fraudulent, false, or subtle misleading advertisements.

* * * * *

Among the most obvious needs of the Federal Trade Commission Act are those giving more effective control of advertisements *affecting the public health and fraudulent impositions as to its food and medicinal supplies*. (Emphasis added.)

The Report defined devices and cosmetics, making clear that they belong in the same category as food and drugs in that all are closely related to human health and safety (Report, pp. 6-7):

Speaking generally, "devices" within the terms of the Act mean instruments and contrivances intended for use in the cure or treatment of disease.

"Devices" are included within the provisions of the bill because of their close association with drugs *as a means for the treatment of physical* ills.

Cosmetics are brought within the provisions of the bill because in many instances cosmetics are *injurious to health and produce physical injuries to the body*. (Emphasis added.)

The "Additional Views" attached to the Report contained the same emphasis (pp. 23, 27):

It is universally recognized that the advertising of these commodities [food, drugs, devices or cosmetics] the intelligent purchase and *use of which are so essential to public health and welfare* must be safeguarded from the abuses—at all times too flagrant—of a small minority.

The various ways in which misrepresentations of quality posed a danger to human health were discussed (p. 27):

The cases of injury to health resulting from the medicine itself are unusual * * * while there are occasional cases of this kind, the great bulk of patent medicine advertising is in the case of products that are innocuous, like the tuberculosis cure which was a simple

liniment, or the diabetes cure which was a brew of horsetail weed. These are the commodities responsible for most of the damage to health resulting from false advertising * * * There have been many cases where persons who could have been cured by proper treatment have sunk to such a low condition while relying upon worthless concoctions that their cases have become hopeless* * * (Emphasis added.)

The Report reflects the views of Congress as expressed in floor debates on the amendments. A common theme was the public need for protection against advertisements which posed a threat to health or bodily well-being.

Commission commentary since enactment continues to express the intent reflected in the legislative history of Sections 12 through 15. In its "Statement of Basis and Purpose" accompanying the *Trade Regulation Rule for Cigarettes*, the Commission discussed the effect of Sections 12 through 15 on the interpretation and application of Section 5 (pp. 82-83, 92):

The public policy declared by Congress in the food and drug sections of the Wheeler-Lea Act and in the specialized consumer-protection statutes is relevant in determining the requirements of the more general provisions of Section 5. The food and drug sections express a congressional determination that the lawful scope of a trade practice may depend in significant part upon the nature of the product involved and its relationship to human health and safety* * *.

* * * It seems clear that in adding Section 15 to the Trade Commission Act Congress was particularly concerned with the situation in which consumers are misled as to the consequences of using a product to the detriment of their health or safety. (Emphasis added.)

Case law confirms the Congressional purpose. Research has failed to reveal a case brought under Section 12 where the misrepresentations alleged did not concern the quality or consequences of the use of food, drugs, devices, or cosmetics.

The contention that misrepresentations other than those involving intrinsic qualities, components or consequences of use are encompassed by Section 12, in the opinion of the undersigned, does not bear scrutiny. *J.B. Williams Co.*, 68 F.T.C. 481 (1965), cited for this proposition, clearly involved qualitative misrepresentations. That case focused on the issue of the advertised beneficial effects of the use of "Geritol." 68 F.T.C. at, 546. The advertisements were found to be unlawful because they gave the false, misleading and deceptive impression that "Geritol" could relieve tired feelings of most persons. The Court of Appeals affirmed the Commission's determination of unlawfulness stating "[i]t is this representation that Geritol is good for most tiredness which is the inherent vice of the advertisements." *J.B. Williams v. Federal Trade Commission*, 381 F.2d 884, 891 (6th Cir. 1967). The "external" fact, cited by complaint counsel, that most persons suffering from tiredness do not have iron-deficiency anemia, in the opinion of the undersigned, does not support the contention that misrepresentations other than those involving intrinsic qualities are encompassed by

Section 12, but is merely the reason why the claims of beneficial results from "Geritol's" use were false. Likewise, reliance on *Thomsen-King [Co., Inc.]*, 33 F.T.C. 126 (1941), seems equally unsound since that case also involved, among other things, qualitative misrepresentations. At issue was the advertised quality of cosmetics, part of an intricate swindle scheme. Paragraph 4 of the complaint alleged, and paragraph 4 of the Findings established, that the advertisements falsely represented that the cosmetics were of "national reputation" and were "of such quality that resale to the general public [was] not difficult." 33 F.T.C. at 136, 155. Paragraph 7 of the complaint alleged that the advertising had misrepresented the effectiveness of the use of the cosmetics and paragraph 7 of the Findings so found. 33 F.T.C. at 141, 160. The order entered specifically provided that respondents cease and desist from qualitative misrepresentations. 33 F.T.C. at 163. In its decision on an emergency motion for supersedeas, pending appeal from an order of the District Court granting a preliminary injunction restraining the dissemination of the advertisements, the Court of Appeals recognized that the quality of the cosmetics was at issue and dismissed objection that the advertisements went to "extraneous matters." 109 F.2d 516, 517, 518-19 (7th Cir. 1940).

The Commission in promulgating the Trade Regulation Rule relating to Retail Food Store Advertising and Marketing Practices, 16 C.F.R. §424 (1974), did not, as the undersigned reads the "Statement of Basis and Purpose," express the view that it had authority under Section 12 as well as under Section 5 over unavailability and overpricing. The pertinent language states only:

In connection with the sale or offering for sale by retail foodstores of food and grocery products or other merchandise, *subject to the jurisdictional requirements of Sections 5 and 12 of the Federal Trade Commission Act*, it is an unfair method of competition and an unfair or deceptive act or practice* * *. (Emphasis added.)

This does not express a view on the applicability of Section 12 to such practices. It does not make a determination of jurisdiction in any particular case, but merely says that if Sections 5 or 12 apply, the rule may be applied. Moreover, it appears to the undersigned from the "Statement of Basis and Purpose" that Section 5 alone was meant to cover the practices described in the rule. Thus, in the "Summary and Conclusions," referring to provisions in the proposed rule that were excised in the final form, it is stated (p. 18):

* * * The Commission has concluded that the current practice of specifying in ads that an item is available only at those stores having a particular specialty department (delicatessen, fish, pastry) is not misleading or deceptive *within the purview of Section 5* of the Federal Trade Commission Act. Note III of the final rule explicitly permits such disclosure.

And further:

The question of failure to disclose quantity limitations in retail food store advertising

has been the subject of a number of consumer complaints. The Commission has determined that such failure is clearly a false and misleading practice *within the purview of Section 5* of the Federal Trade Commission Act* * *. (Emphasis added.)

Nowhere in the statement is it said that the practices involved violate Section 12.

Finally, consideration of Section 12 in relation to Section 5 strongly supports the conclusion that Section 12 was meant to apply to advertisements falsely representing the intrinsic qualities or consequences of use of food, drugs, devices, or cosmetics. Section 5, as amended, encompasses any false, misleading, or deceptive advertising scheme, involving any product. Section 12, however, concerns certain products only: food, drugs, devices, or cosmetics. Section 12 seems clearly designed to provide for something not included in Section 5, and to be applicable when it is of particular significance that the product being advertised is food, drugs, devices, or cosmetics. The enactment of Section 13 providing for injunctive relief shows that Congress felt it was imperative that the Commission have the power to act expeditiously against false advertising which misrepresented the safety or therapeutic value of those products, to stop such advertising without delay. Those products were singled out for such treatment because they are ingested or applied to the body, and their use directly affects human health and safety. It follows that it is the false advertising of their intrinsic *qualities* or the *results of their use* that Section 12 was designed to reach. No other conclusion reconciles Section 12 with Section 5. In the present case it is of no significance that some of the products advertised happen to be food products. Use of the product is not involved; human health and safety are not at issue. Nor are the qualities or characteristics of the food products which were advertised. Indeed, a "mix" of products is involved in this matter, some food, others not food. If the argument of complaint counsel is correct, the liability of A&P under Section 12 is anomalous and purely fortuitous. If the advertised products had been all hardware, for example, Section 12 would clearly not have been involved, although all other aspects of this proceeding would have been essentially the same. In sum, Section 5 prohibits all false, misleading or deceptive advertising with respect to any product. Section 12 provides for injunctive relief for false, misleading or deceptive advertising relating to the intrinsic characteristics or consequences of use of food, drugs, devices, or cosmetics, *i.e.*, their safety, inherent qualities, therapeutic efficacy, etc. The latter factors are completely uninvolved in this proceeding. Section 12, therefore, has no application and the allegation in the complaint of a violation of that Section is dismissed. A&P's motion to this effect is granted.

IV

Conclusions

1. The Federal Trade Commission has jurisdiction over A&P, and over the acts and practices which are the subject of this proceeding.

2. The acts and practices which are the subject of this proceeding and of the foregoing findings of fact and discussion, including the advertising and sale of food and grocery products, and other merchandise, by A&P's retail food stores, are and were in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. The dissemination of advertisements by A&P listing or depicting food and grocery products, and other merchandise, for sale at particular prices represented to the purchasing public that such items would be readily available for sale at or below the prices stated in the advertisements in the retail food stores of A&P covered by the advertisements, during the effective periods of such advertisements.

4. In a substantial number of instances in a substantial number of retail food stores, the food and grocery products, and other merchandise, listed or depicted in the advertisements, as set out in paragraph 3, were not readily available for sale, or were not readily available for sale at or below the prices stated in the advertisements, or were not sold at or below the prices stated in the advertisements, by the retail food stores of A&P covered by the advertisements, during the effective periods of such advertisements.

5. The failure of A&P to have the food and grocery products, and other merchandise, listed or depicted in the advertisements as set out in paragraph 3, readily available for sale, or readily available for sale at or below the prices stated in the advertisements, or to sell such products at or below the prices stated in the advertisements, was not due to factors beyond the control of A&P, and the degree to which such failure occurred was greater than any irreducible minimum beyond the ability of A&P to eliminate, or to eliminate without incurring substantially higher costs.

6. By disseminating advertisements as set out in paragraph 3 and by failing to have the products advertised available in its retail food stores as set out in paragraph 4, A&P engaged in false, misleading and deceptive advertising, and engaged in unfair and deceptive acts and practices, and in unfair methods of competition, in commerce in violation of Section 5 of the Federal Trade Commission Act.

V

Remedy

Although the record discloses substantial and widespread unavailability of advertised items in A&P's retail food stores, there was nothing intentional or willful about this phenomenon. A&P did not advertise items with the intent of not having them available in the stores covered by the advertisements. On the contrary, there is evidence that on a number of occasions A&P went to extraordinary lengths, and incurred substantial additional costs, to honor the commitments of advertisements and to meet the demand for advertised items which had proved to be exceptionally popular, and whose sales had far exceeded expectations (MacDonald, Tr. 881-88; Cairns, Tr. 1302-03; Niezgoda, Tr. 1956-1962; Browning, Tr. 1084-86; Kammerer, Tr. 2011-16; RX 1067). As noted earlier, however, intent or willfulness are not elements of a violation, but presence or absence of those factors may bear on the order to be entered. *Federal Trade Commission v. National Lead Company*, 352 U.S. 419, 429 (1957). The unavailability of advertised items, as well as the overpricing uncovered by the Commission's 1973 survey, had their roots in A&P's internal procedures and, possibly, in the characteristics of A&P's operations, as this decision makes clear. Based on the evidence of record, the undersigned has concluded that A&P's advertisements were unfair, misleading and deceptive, constituted unfair and deceptive acts and practices and unfair methods of competition, and violated Section 5 of the Act. The entry of an order is necessary, all aspects of this matter having been considered.

Among other provisions, complaint counsel propose that (1) A&P be required to post in the front window of each of its stores, in letters two inches high and one inch wide, a list of advertised items not in stock and unavailable for sale, (2) A&P be required to post a clear and conspicuous notice in each of its retail stores that for any unavailable item not included in such list in the window, a customer will be entitled to receive any item the customer desires as a substitute so long as the retail price of such item does not exceed the advertised price of the unavailable item by 50 cents, and (3) A&P be required to post a conspicuous notice asking customers to report to store personnel items marked with an incorrect price, and advising that the first customer of the day to report a particular item which is overpriced is entitled to receive the item free or a one dollar credit toward the purchase thereof, whichever is less.

In the opinion of the undersigned, none of these provisions is appropriate or warranted on the record of this proceeding. They are rejected *in toto*. The requirement that every A&P store post a sign in

the window in letters at least two inches high and one inch wide listing every advertised item which is unavailable is punitive, unnecessary to rectify the practices relating to unavailability disclosed by the record, and is of questionable value for the purpose of informing members of the public of advertised items not available in the stores (Dr. Katona, Tr. 1759-1760; Dr. Goodman, Tr. 2612, 2650-51; MacDonald, Tr. 865-66). As an alternative, the order issued herein requires a conspicuous sign disclosing unavailable advertised items to be posted at or near each doorway affording entrance to the public, and at or near the place where customers pay for merchandise. The second of complaint counsel's proposals is likewise punitive and unnecessary to end the violation, and additionally has the potential for subjecting A&P stores to unfair and disruptive harassment. The provision also has the potential for involving personnel of A&P operating its retail food stores in day-to-day conflicts and disputes with individual members of the public over whether or not advertised items are in fact unavailable. The provision is not in the public interest. It may be noted that A&P now has a "comparable item" policy which the evidence indicates is being honored in good faith by A&P's retail food stores.

Proposal (3) that each retail food store of A&P be required either to give to the first customer of the day who finds an advertised item marked with a price higher than the advertised price the item free, or a one dollar credit toward its purchase, also has the potential for harassment and disruption of A&P stores and the involving of personnel of A&P in conflicts with the public. The dubbing of this proposal the "treasure hunt" by counsel for A&P (Proposed Findings, p. A-1, Answering Brief, pp. 77-81) is essentially justified. It takes little imagination to conceive of the potential for mischief inherent in the provision. A&P stores could be the scene each day of hunts by the idle, young and old, searching shelves for items marked with prices higher than advertised, the reward being the item itself or a one dollar credit toward its purchase. Indeed, since price marking stamps are easily obtained, an order of this sort could be an invitation to petty thieves. As counsel for A&P point out, store managers could be drawn into disputes among claimants for the "prize" for first discovering an overpriced advertised item (Answering Brief, pp. 81-83). All in all the potential for trouble in this proposal is real and serious. In sum, as stated earlier, none of these proposals is warranted by the record, necessary to correct the unavailability and overpricing found to exist, or in the public interest.

VI

ORDER

It is ordered, That respondent The Great Atlantic & Pacific Tea Company, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereafter sometimes referred to as items, offered or sold in its retail stores, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly, disseminating, or causing the dissemination of any advertisement by any means which offers any items for sale at a stated price, unless during the effective period of the advertised offer at each retail store covered by the advertisement:

(1) Each advertised item is readily available for sale to customers in the public area of the store, or if not readily available there, a clear and conspicuous notice is posted where the item is regularly displayed which states that the item is in stock and may be obtained upon request, and said item is furnished on request;

(2) Each advertised item, which is usually and customarily individually marked with a price, is individually, clearly, and conspicuously marked with the advertised price or a lower price; *Provided*, That in the case of items which customarily contain no price markings, clear and conspicuous posting of the advertised price of such items at the point of display will be deemed in compliance with this requirement; *Provided further*, That, where optical scanning devices are used at "checkout" counters prices marked in code on items advertised below the regular shelf price need not be remarked;

(3) Each advertised item is sold to customers at the advertised price or a lower price;

Provided, It shall constitute a defense to a charge of unavailability under subparagraph (1) if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records as will show that (a) the advertised items were delivered to its stores in quantities sufficient to meet reasonably anticipated demand but were "sold out," or (b) the advertised items were ordered but not delivered due to circumstances beyond respondent's control, and that respondent, upon notice or knowledge of such non-delivery acted immediately to contact the media to revise the advertisement or proposed advertisement to reflect the limited availability or unavailability of each advertised item, and (c), if revision of the advertisement was not possible, respondent immediately

offered to customers on inquiry a "rain check" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price. If respondent or any of its employees, agents or representatives are not advised of an alleged instance of unavailability through any source including the Federal Trade Commission within three months of its occurrence, it shall be presumed that the records called for by this proviso were in the possession of respondent showing (a) or (b), and (c), *unless* clear and convincing evidence establishes the contrary.

It is further ordered, That throughout each advertised sale period in each of its retail stores covered by an advertisement, respondent shall post conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise, notices which contain the following:

(1) A copy of the advertisement.

(2) A statement that: "All items advertised are readily available for sale at or below advertised price except the following items:

Rain checks will be gladly issued for these items which will enable you to purchase them at or below the advertised price in the near future. Comparable items may also be available, but you may insist on a rain check if you wish. If you have any questions, the store manager will be glad to assist you.

It is further ordered, That respondent shall cause the following statement to be clearly and conspicuously set forth in each advertisement which represents that items are available for sale at a stated price at any of its stores: "Each of these advertised items is required to be readily available for sale at or below the advertised price in each A&P store, except as specifically noted in this ad."

It is further ordered, That:

(1) Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities as to individual retail stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

(2) Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

(3) Respondent shall, for a period of three (3) years subsequent to the date of this order:

(a) Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order;

(b) Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

(c) Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

(4) Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates on which this order becomes final, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order in the preceding year.

It is further ordered, That respondent shall notify the Commission at least thirty days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

FINAL ORDER

The administrative law judge filed his initial decision in this matter on Jan. 24, 1975, and service was completed on Feb. 6, 1975. Both parties filed notices of intention to appeal on Feb. 18, 1975, but the Commission was subsequently notified that neither side intended to perfect its appeal, and no appeal briefs were filed within the prescribed time. The Commission thereupon stayed the effective date of the Initial Decision, and has now determined that this matter should not be placed on its own docket for review, and that the Initial Decision should become effective as provided in Section 3.51 of the Commission's Rules of Practice. Therefore,

It is ordered, That the initial decision and order contained therein shall become effective on the date of issuance of this order.

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

IN THE MATTER OF
EXXON CORPORATION, ET AL.*

Docket 8934. Order, Mar. 25, 1975

Affirmation of law judge's denial of respondents' motions to rescind the order for preservation of records.

ORDER AFFIRMING DENIAL OF MOTIONS TO RESCIND ORDER FOR
PRESERVATION OF RECORDS

This matter is before us on respondents' appeal, pursuant to Section 3.23(d) of the Commission's Rules of Practice, from the administrative law judge's denial of their motions to rescind his Order for Preservation of Records, issued Nov. 12, 1974 [hereinafter sometimes referred to as "the Order"], which prohibits respondents and complaint counsel from destroying "all presently existing documents, writings, recordings, or other records of any kind whatsoever which relate in any way to the exploration, production, transportation, and refining of crude oil and the transportation and marketing of refined petroleum products* * *." The Commission placed this matter on its docket for review, solely on the question of the authority of the Commission and the law judge to issue a record-preservation order.

Although respondents are correct in pointing out that such an order has never been issued in a Commission proceeding, the failure to exercise a power does not necessarily prove its non-existence. *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F.2d 672, 686 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). This is especially true when, as is the case here, the need for the order in question will arise only rarely. Normally, the parties to a suit will be able to identify the documents which they will need to support their respective cases with sufficient specificity to seek them by compulsory process. However, it is the position of complaint counsel that a considerable amount of discovery will be needed just to identify all of the relevant materials in respondents' possession. To prevent the destruction of such materials during this early phase of discovery, complaint counsel contend that the law judge should supervise the destruction of all materials which appear to be within the general scope of the case.

Thus the effect of this order, is not, as respondents have suggested, to require that they preserve irrelevant documents but, rather that they preserve records until their relevance to the proceeding can be determined with some degree of certainty. Respondents point out that

* For appearances see p. 91, herein.