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COOPERATIVE CONDITIONAL ADVERTISING AGREEMENTS: THE REQUIREMENT OF PROPORTIONALLY EQUAL TERMS UNDER THE ROBINSON-PATMAN ACT

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The purpose of advertising is to sell goods, services or ideas to large groups of prospective purchasers. The advertiser has at his command a large variety of media to transmit his message. These media (newspapers, TV, magazines, radio, outdoor advertising, motion pictures, direct-mail advertising, catalogues and many others), differ widely in form, characteristics and fields of effectiveness.[1] The advertiser has not been trained to deal with perplexing or even ordinary Robinson-Patman Act problems, but by education and experience he has been trained to select the advertising vehicle that will produce the most sales.[2]

A seller or businessman is concerned with sales and the vitality of his business. The Robinson-Patman Act, however, is concerned with the vitality of competition generally. A seller's vigorous promotional policy which does not take into account the provisions of the act may result in difficulties. Although the act does permit a seller a wide choice of media and approaches to advertising and other promotional programs, complete freedom of action is denied him. Nevertheless, under the act a seller may pursue a program that will meet the needs and preferences of his retail or wholesale customers, which in turn produce sales for all parties concerned.

Section 2(d) of the Robinson-Patman Act deals with the payment of advertising allowances to customers, and 2(e) deals with the furnishing of services or facilities to customers.[3] Under section 2(d) it is unlawful for a seller to make payments to a customer for sales services unless the payments are proportionally available to all competing customers. Section 2(e) makes it unlawful for the seller to render sales services to persons who buy for resale

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1 ALEXANDER, SURFACE, ELDER AND ANDERSON, MARKETING 467-72 (1940); CONVERSE, HUEGY AND MITCHELL, ELEMENTS OF MARKETING 636-38 (1952).

2 See authorities cited *supra* note 1. For an excellent discussion of the ramifications of false or misleading advertising, see Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat Emptor,* 24 FED. B.J. 548 (1964).

3 Stat. 1527 (1936), 15 U.S.C. §§ 13(d), 13(e) (1964). Section 2(d) provides:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Section 2(e) provides:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale,

unless these services are proportionally available to all buyers. Both sections view the buyer and seller as a team interested in promoting the sale of goods to the ultimate consumer.

The act was primarily designed to prevent and eliminate price discrimination and is not concerned with promotional programs as such. Such programs were subjected to legal strictures because discrimination may take place by a seller favoring one customer with a discount in the form of an advertising allowance while denying such treatment to others. For example, one widely used vehicle is cooperative advertising — a joint undertaking by the seller and his customer which is designed to increase the sales of both. However, as in any other advertising venture, the success of such a program may depend as much on the nature of the purchaser's "image" as it does on the nature of the advertisement. A *Bergdorf* image may, in fact, be more important to a manufacturer than his own brand name. The result may be that a manufacturer prefers to channel his cooperative advertising to retailers whom he believes can do more for his product than other, less well-known retailers.

It is at this point that a conflict between business needs and legal demands arises. Sections 2(d) and (e) of the Robinson-Patman Act require that all competing purchasers be permitted to share in the benefits of cooperative advertising program on "proportionally equal terms."

There is little difficulty in determining violations when a seller secretly grants cooperative advertising payments to a few favored customers.[4] However, consider the case of Kay Windsor,[5] a dress manufacturer which devised a promotional program designed to present its line of dresses as prestige garments through advertisements early in the season at only the better department stores. To effectuate this program, it became necessary to offer these department stores an advertising allowance while withholding it from competing customers. The FTC found that Windsor had violated 2(d) by its program of selective allowances. Windsor was motivated by the fact that the large department stores were better suited to promote its dresses rather than the smaller, less pretentious

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> or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

The Federal Trade Commission Guides for Advertising Allowances and Other Merchandising Payments and Services describes the two sections as follows:

> Sections 2(d) and (e) of the Act deal with discriminations in the field of promotional services made available to purchasers who buy for resale. Where the seller pays the buyer to perform the service, Section 2(d) applies. Where the seller furnishes the service itself to the buyer, Section 2(e) applies. Both sections require a seller to treat his competing customers on proportionally equal terms.

1 TRADE REG. REP. ¶ 3980, at 6072-73 (1960).

4 The primary legislative purpose in enacting §§ 2(d) and 2(e) was to stop price discriminations concealed as promotional payments. 80 CONG. REC. 6282, 7759, 9418 (1936).

For typical cases involving "payment" arrangements subject to § 2(d) see, *e.g.*, Atalanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958); Beatrice Foods Co., 3 TRADE REG. REP. ¶ 17311 (F.T.C. July 29, 1965); Lovable Co., 3 TRADE REG. REP. ¶ 17282 (F.T.C. June 29, 1965); Act Books, Inc., 3 TRADE REG. REP. ¶ 17273 (F.T.C. June 18, 1965); Flotill Prods., Inc., 3 TRADE REG. REP. ¶ 16970 (F.T.C. June 26, 1964); General Foods Corp., 52 F.T.C. 798 (1956).

For typical "service" cases under § 2(e) see, *e.g.*, Simplicity Pattern Co. v. FTC, 360 U.S. 55 (1959); Joseph A. Kaplan & Sons v. FTC, 347 F.2d 785 (D.C. Cir. 1965); Dantzler v. Dictograph Prods., Inc., 272 F.2d 172 (4th Cir. 1959); Corn Prods. Refining Co. v. FTC, 144 F.2d 211 (7th Cir. 1944), *aff'd*, 324 U.S. 726 (1945).

5 Kay Windsor Frocks, Inc., 51 F.T.C. 89 (1954).

stores. Nevertheless, this promotional assistance gave the favored stores a definite advantage over other customers.

More difficulty is engendered when the seller makes a payment which can only be taken advantage of by a few customers, but which is, in fact, theoretically available to all.[6] While Congress may have been concerned with the seller's desires and the benefit obtained by him from cooperative promotional payments, it was even more concerned with the benefit such payments confer on that seller's customers.[7] The seller is not free to consider only the implications of the benefit he receives. Rather, he must ensure that if any of his payments confer a benefit upon one class of competing customers, the same benefit — or, as some cases hold, an equivalent benefit — must be conferred on all. This position is exemplified by the Seventh Circuit's decision in *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*[8] In this private suit, a number of

6 Typical arrangements of this kind were involved in the following: Shreveport Macaroni Mfg. Co. v. FTC, 321 F.2d 404 (5th Cir. 1963), *cert. denied,* 375 U.S. 971 (1964); Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480 (2d Cir. 1962); Transogram Co., 61 F.T.C. 629 (1962). Buyer violations arising from the receipt and inducement of such illegal payments are illustrated by: Giant Food, Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied,* 372 U.S. 910 (1963); American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962), *cert. denied,* 371 U.S. 824 (1962); Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962).

7 Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 486-87 (2d Cir. 1962), involved payments for newspaper advertising to Weingarten, a preferred customer. The court pointed out that: "[S]ince Weingarten would have had to furnish more newspaper advertising than its competitor, respondent would have derived greater benefit from the larger payment. . . . But Weingarten would have received an enormously greater benefit from respondent than the equally entitled competitor." Thus, the court looked at the benefit accruing to the favored buyer in declaring that the standard of proportional equality was not satisfied.

Moreover, in P. Lorillard Co. v. FTC, 267 F.2d 439, 444 (3d Cir. 1959), *cert. denied,* 361 U.S. 927 (1960), the court stated that: "[T]his section of the Act [2(d)] does not concern itself with motive or intention. It is only concerned with the consequences which flow from an act. If those consequences eventuate, the act from which they result is forbidden."

This case involved a tripartite agreement whereby suppliers of retail food stores had made payments to broadcasting companies for the benefit of certain such stores, "to the favored customers for said customers' own advertising purposes." The broadcasting companies first contracted with the retail chains to conduct in-store promotional displays of products for free network time. The networks then sold time to suppliers, offering as an inducement the in-store promotion already contracted for with the chains.

Payments to a third party were also involved in Swanee Paper Corp. v. FTC, 291 F.2d 833 (2d Cir. 1961), *cert. denied,* 368 U.S. 987 (1962). The court held that payments made by a seller of paper products to the owner of a "spectacular" sign at Times Square were made for the benefit of the chain store customer, Grand Union, "in consideration for . . . services rendered 'by and through' the customer." Since such payments were not made available on proportionally equal terms to other customers § 2(d) was held to have been violated. In this case, Grand Union had leased the sign space and then induced Swanee to pay the cost. Here, the lease of the sign by Grand Union was contingent upon participation by the supplier. For this reason, the court suggested that this case was stronger than the "Chain Lightning" case, P. Lorillard Co. v. FTC, *supra,* because there the agreements were not contingent upon participation by the supplier.

What is significant is that the court in both cases viewed the separate agreements as one and focused its attention on the benefit flowing to certain favored customers of the suppliers. In this connection, in a very recent statement regarding three-party promotional plans devised by neither a supplier nor a customer but a hopeful intermediary, the Commission stated:

> Even though an intermediary is employed, it remains the supplier's responsibility to make certain that each of the supplier's customers who compete with one another in reselling his products is offered either an opportunity to participate in the promotional assistance plan on proportionally equal terms or a suitable alternative if the customer is unable as a practical matter to participate in the plan; if not, the supplier, the retailer, and the promoter participating in the plan may be acting in violation of Section 2(d) or (e) of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

FTC News Release, Sept. 21, 1965.

8 258 F.2d 831 (7th Cir. 1958), *cert. denied,* 358 U.S. 947 (1959).

retail grocers and two wholesalers sued General Foods, Hunt Foods, Morton Salt and A & P, charging that advertising placed by the first three suppliers in a magazine owned by A & P, *Women's Day,* violated various sections of the Robinson-Patman Act. The district court held that the suppliers violated section 2(d) because similar advertising was not made available to all other customers. The defendants had argued successfully in the lower court that the purchases of advertising in *Women's Day* were based on the advertising value of the publication and had no relation to the fact that A & P was a large purchaser of these suppliers. The court concluded that the evidence "clearly reveals that the defendant suppliers receive full value for their payments for their advertisements in Women's Day."[9] The court added that:

> . . . [P]laintiffs do not publish or sell a store distributed magazine and, thus, they are unable and unequipped to render or furnish the services for which payment would be made and for which the defendant suppliers in this case pay Women's Day. Being so unable to furnish these services, plaintiffs have no standing to complain about the defendant suppliers' advertising in Women's Day even if it were assumed that these payments violated the Act.[10]

On appeal, the court viewed the transactions realistically and was concerned with the position in the market place of grocers competing with A & P that did not own publications like *Women's Day.* Rather than look to the benefit accruing to the suppliers, the court focused its attention on the detriment to the unfavored buyers by stating:

> In determining the proportionally equal terms upon which a seller shall make available any payment or consideration referred to in 2(d), the Act requires a frank recognition of the business limitations of each buyer. An offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer at all.[11]

Thus, unintentional denial of promotional payments is placed on the same plane as intentional or concealed payments. Nor does it matter that the seller's decision resulting in the favoritism was based on the demands of his business. The court did not believe that a promotional program could be tailormade or devised so as to exclude certain customers from participation. In short, if the peculiar characteristics of a customer's business put the seller's offer out of the reach of that customer, then the seller is required to devise an alternative plan.

The most difficult questions arise when the seller openly announces a plan which he intends to offer to all customers, places limits on participation which deny the use of one feature of the plan to some customers but at the same time offers an "alternative" to those customers. In this situation, the knotty problem of the meaning of the term "on proportionally equal terms" is squarely raised. All customers can participate and all can receive payments — yet it must be

9 154 F. Supp. 471, 478 (N.D. Ill. 1957).
10 *Id.* at 483.
11 258 F.2d 831, 839 (7th Cir. 1958).

asked whether all customers are being fairly treated. True, all can participate — but can they participate "on proportionally equal terms"?

One position that can be taken is that if some customers cannot take advantage of the most desirable features of a plan, no "alternative" is possible. The court in *Elizabeth Arden, Inc. v. FTC*,[12] came close to so holding by flatly rejecting the contention of a cosmetic manufacturer that the demonstrator service offered to certain department store customers was of a kind that could not be proportionalized. The Commission had found that:

> The furnishing of a service or facility which cannot be proportionalized . . . so as to make it reasonably possible for competing purchasers to avail themselves of such services or facilities if they desire to do so, constitutes a failure to accord such services or facilities upon proportionally equal terms.[13]

Consistent with this opinion the Commission's order included a paragraph specifically prohibiting failure to proportionalize demonstrator services.[14]

Of course, it can be argued that, since no alternatives were offered by respondent to its unfavored customers, the question of the legality of offering them alternatives was neither raised nor answered. However, the language quoted above comes perilously close to announcing that a seller *must* proportionalize every single feature of a plan and cannot offer alternatives. In other words, complete freedom of choice must be offered to the purchaser.[15]

However, the Commission shortly thereafter, in approving trade practice conference rules for the cosmetic industry, amplified its views in *Arden* by sanctioning a promotional program offering alternative services of "equivalent measurable cost" and suitable to the customer whenever the same promotional arrangement was not suitable to all customers.[16]

The doctrine of reasonable alternatives was fully adopted by the Commission in *Lever Bros. Co.* where in dismissing the case it emphasized that any merchandising program "must be honest in its purpose and fair and reasonable in its application."[17] Lever Brothers had a program in which its customers

12 156 F.2d 132 (2d Cir. 1946), *affirming* 39 F.T.C. 288 (1944), *cert. denied*, 331 U.S. 806 (1947).

13 39 F.T.C. 288, 302 (1944).

14 *Id.* at 305.

15 See Trade Practice Rules for the Cosmetic and Toilet Preparation Industry, 4 TRADE REG. REP. ¶ 41221 (1951); EDWARDS, THE PRICE DISCRIMINATION LAW 169 (1959); PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 137-38 (1963).

16 Trade Practice Rules for the Cosmetic and Toilet Preparation Industry, 4 TRADE REG. REP. ¶ 41221 (1951).

See EDWARDS, *op. cit. supra* note 15, at 169, wherein it is opined that the *Arden* case as precedent has been clouded by the Rules because:

> [T]he Commission abandoned the principle of its *Arden* decision that any service offered to anyone must be proportionately available to all. Instead it adopted the view that the services offered to different customers may be of different kinds, if, in the aggregate, the group of services available to various customers satisfies the test of proportionality.

Similarly, Representative Patman described the Rules as a "retreat" from the "acceptable standards approved by the courts for determining the meaning of the phrase 'proportionally equal terms.'" He said "this relaxation stemmed from . . . the Commission pronouncing that any method or plan that is found to be *'suitable'* or *'equitable'*" satisfies the statute. PATMAN, *op. cit. supra* note 15, at 137-38.

17 50 F.T.C. 494, 512 (1953).

could avail themselves of newspaper advertisements, handbill promotions or indoor display alone. The program authorized reimbursement from 12½ cents to 20 cents per case for newspaper advertising, an allowance of 8 cents to 9 cents per case for handbill promotions and only 6 cents for indoor displays. Although small customers failed to earn the highest cooperative payment for newspaper advertising, the Commission found that newspaper advertising was more expensive. The Commission adopted the following finding of the hearing examiner:

> There is no evidence in this record to support a finding that even the highest rate of payment offered by respondent for feature sales, including newspaper advertising, is not reasonably available to all of respondent's customers. The customer can avail himself of this rate either through use of the annual contract by advertising one or more products three times each contract period of four months, or on such products which he cares to advertise through the Cooperative Merchandising Plan with only one insertion of the advertisement. The respondent places no restrictions on the newspapers which he may use except that it [*sic*] cover the area where his store or stores are located thus enabling the use of neighborhood papers or weekly or monthly papers at a greatly reduced rate. The respondent has accepted as low as 2 or 3 lines of advertising as compliance with the contract which reduces the advertising expense. In the absence of evidence that respondent has refused or withheld its annual contract from customers for not advertising all of its products or a substantial number thereof, it must be assumed that even a customer executing the annual contract could, if he so desired, participate by advertising only one or more products as his financial condition or needs might dictate.[18]

Thus, the Commission made a finding that for all practical purposes the higher rate newspaper allowances were in fact available to all customers. This, coupled with the alternative forms of promotional participation offered, satisfied the Commission that the requirements of the act were met. Hence, this case should not be construed as permitting a supplier to pay more for one type of promotion than another where some customers may be unable to use the higher paying promotional program.[19] Any other interpretation would completely frustrate the intent of the act to eliminate discrimination.

For example, assume a seller has two programs, one of which entitles the customer to reimbursement at 5 percent of the dollar volume of purchases during a specified time, and another which provides for reimbursement at 10 percent. If the latter program paying the higher allowance is not available to a customer because "the economic status of" his "business renders him unable to accept the offer," it "is tantamount to no offer at all." This is precisely what

18 *Id.* at 509-10.

19 See Baum, The Robinson-Patman Act: Summary and Comment 63 (1964), wherein the author states that: "Lever Brothers cannot be read broadly. Rather it must be considered in the light of certain express caveats and the facts."

However, a contrary view is expressed in Rowe, Price Discrimination Under the Robinson-Patman Act 408 (1962): "[T]he FTC rejected the contention that a supplier's payments for diverse forms of advertising must be at a uniform rate, and instead sanctioned more favorable reimbursement terms for newspaper advertising as compared with handbills or store display."

the court was referring to in *State Wholesale Grocers.*[20] Precise quantitative proportionality occurs when all customers receive the same percentage based on their purchases.

This approach has been followed by the FTC in its Guides for Advertising Allowances and Other Merchandising Payments and Services, which states that to ensure proportional equality the plan "may require offering all customers more than one way to participate in the plan," and where "the seller has alternative promotional plans, his customers must be given the opportunity to choose among the plans."[21] But the FTC warns that the "best" method of ensuring proportionality is "by basing the payments made or the services furnished on the dollar volume or on the quantity of goods purchased during a specified time."[22] Thus, it is clear that the position which seems to have been adopted in *Lever Bros.* is no longer honored by the Commission.[23]

Yet, many difficulties are encountered when the legality of a plan which offers alternatives is questioned — what is a "reasonable alternative"? The *Lever Bros.* case has been read as permitting an alternative under which a lesser payment can be made to a purchaser who uses an advertising medium which is less desirable than newspaper advertising.

If *Lever Bros.* does stand for this proposition, it is doubtful that the same result would occur today for still another reason. Aside from the criteria

20 258 F.2d 831, 839 (7th Cir. 1958).
21 1 Trade Reg. Rep. ¶ 3980, Rule 9 (1960).
22 *Id.*, Rule 7.
23 50 F.T.C. 494 (1953). Chairman Dixon, commenting on the decision in Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480 (2d Cir. 1962), stated that:

> [T]he company's "policy" of participating in special promotional events sponsored by its customers requiring only that the payments requested by those customers be "reasonably related to the cost of the services to the customer[s]" fell short of 2(d)'s requirements . . . [because] it established no workable basis for making the payments "proportionally equal." It simply permitted each buyer to devise and propose his own individualized promotional plan, and request payments that were reasonably related to the amount he proposed to spend. No other limitations, such as, for example, "up to 5% of the buyer's purchases" from respondent, were set out. Under such a "plan," of course, one buyer might receive promotional payments equal to only 2% of his purchases from Vanity Fair, while a competitor across the street was receiving, say, 10%.

Dixon, Significant New Commission Developments 23-24 (August 12, 1963).

Former Chairman Kintner has also recommended precise proportionality by the following example:

> Suppose that the Association Cosmetics Company distributes its line through the Colossal Department Store and ten independent drug stores in Middletown. The Colossal Department Store is the largest customer by a wide margin. Association Cosmetics employs a traveling demonstrator and the Colossal Department Store has asked for an all-day demonstration in its store. If Association Cosmetics accedes to the request of the Colossal Department Store, it must make a proportionally equal offer to the independent drug stores in Middletown who distribute its line in competition with the Colossal Department Store. The offer to the drug stores need not be the same as the offer to the Colossal Department Store. Association Cosmetics complies with the Robinson-Patman Act if its offer is proportionally equal. Suppose that Colossal Department Store has an annual volume of $10,000 in Association Cosmetics products and that the value of the all-day demonstration is $100. The Tom Thumb Drug Store across the street has an annual volume of $1,000 in Association Cosmetics products. Association Cosmetics satisfies the requirements of the Robinson-Patman Act if it offers the Tom Thumb Drug Store promotional services worth $10. Here the offer to the independent drug store might take the form of a short personnel training program or the furnishing of a demonstration kit.

Kintner, An Antitrust Primer 76-77 (1964).

of "quantitative" proportionality such a plan may not meet a second, related requirement — that of "qualitative" proportionality. This can best be illustrated by considering the example referred to by the Commission in *Fred Meyer, Inc.*[24]

> Suppose, for example, it is established that a particular product can be promoted twice as effectively through one medium as another, e.g., $1 spent on *newspaper* advertising will produce twice as much in additional sales as $1 spent in *radio* advertising of the product in question. Could it then be said that a seller was distributing his money among his competing buyers on "proportionally equal terms" if he proportioned the money itself fairly but contracted with Buyer A to let him spend his share on the superior medium (newspaper) while insisting that Buyer B spend his on the inferior medium (radio)? We think not. Although they received the same number of dollars (or proportionally the same) one would still be getting an advantage over the other. The seller must not give the dollar and then dilute its value by forbidding the recipient to use it in a manner that is permitted to a competing buyer.[25]

Some advertising plans limit participation in cooperative newspaper advertising by insisting that the purchaser's advertisement contain a minimum number of lines, that it contain the manufacturer's trademark or that it contain a picture of the merchandise offered. For those who cannot pay for the advertising demanded, it is doubtful that an alternative such as in-store displays is as satisfactory as newspaper advertising. Yet, are the manufacturer's demands wholly unreasonable? Effective advertising may require that a picture of the product be included. Of course, we must insist that, as a minimum, the plan satisfy the test of quantitative proportionality. But a reasonable, balanced approach to the question of qualitative proportionality must be taken. Perhaps the test can be phrased in this way: Are the restrictions which the seller places on participation a necessary adjunct to the effectiveness of the advertisement? If so, lack of strict qualitative proportionality might well be tolerated. For example, limitations based upon the requirement that a picture is necessary in a newspaper advertisement for effective advertising seem reasonable. On the other hand, as the example in *Fred Meyer, Inc.* illustrates, the seller must not discriminate by deliberately limiting one class of customers to newspaper advertising and the other class to radio advertising.

In the final analysis, where the seller imposes conditions that the customer must meet in order to be eligible for participation, the test becomes one of reasonableness. Certainly, a supplier should not be required to contribute to his customer's advertising if it debases the former's product. Some protection is provided by the act's proviso which insures the traditional right of sellers of

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24 Fred Meyer, Inc., 3 TRADE REG. REP. ¶ 16368 (F.T.C. March 29, 1963).

25 *Id.* at 21225. The Commission held that Fred Meyer, a supermarket chain, violated § 5 of the Federal Trade Commission Act by inducing suppliers to grant promotional assistance to the chain's annual coupon book promotion for four weeks each fall. It was agreed between Meyer and the suppliers participating that during this period similar promotional assistance would not be granted to competing grocers. Thus, the Commission concluded that:

> [T]he suppliers in question would not have been in compliance with Section 2(d) if they had given to respondent's competitors a sum of money proportionally equal to that received by respondents, *but conditioned it upon a promise by those other buyers that they would not use the money in sponsoring a "coupon book" promotion.*

"selecting their own customers in bona fide transactions and not in restraint of trade."[26] But once a customer is selected the seller is under a duty to grant promotional benefits on "proportionally equal terms." Therefore, a seller cannot exculpate himself from the strictures of the act by arbitrarily imposing conditions making it difficult for customers to participate in certain features of a program.

An example of a unique promotional program attacked by Commission counsel because it allegedly involved arbitrary conditions is the plan adopted by the General Electric Company in 1959 to deal with discounters.[27] Greatly disturbed by the low retail prices for its products, G.E. put into effect a cooperative advertising plan providing that in order to qualify for an advertising allowance the dealer's advertising must not disclose prices lower than those contained in a schedule of minimum retail prices published by G.E. Alternatives provided by the plan included the right to run advertisements showing *no price* for the advertised product, or demonstrators, salesmen's incentive payments and point of sale aids. The hearing examiner held that the alternatives did not "constitute adequate substitutes for effective competitive price advertising."[28]

As the case developed, complaint counsel argued that there were two classes of unfavored customers. The first consisted of those who felt that "no price" advertising was completely worthless and would not use it or any other feature of the plan. As to these customers, the hearing examiner concluded that the plan resulted in violation of section 2(d) because G.E. had effectively denied a

> . . . substantial number of retailers the benefits of cooperative advertising payments unless they adhere in their advertising to a pricing schedule which is not of their choosing or desire. . . . [The plan] is, in fact, one which they cannot possibly use because of the highly competitive nature of their market. This is not a proper basis for proportional availability under Section 2(d) of the Robinson-Patman Act. The restrictions in the plan make it effectively unavailable to those retailers who wish to or must remain competitive price wise on GE's products.[29]

However, the hearing examiner's decision did not apparently refer to the alleged discrimination incurred by a second class of customers. According to complaint counsel, this class consisted of customers who *did* accept the "no price" alternative offered by G.E. This alternative was accepted by many of those whose selling price was lower than G.E.'s minimums—thus not qualifying

26 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964). The Supreme Court in referring to the proviso stated that "Section 2(a) codifies the rules of *United States v. Colgate & Co.*, 250 U.S. 300 (1919), protecting the right of a person in commerce to select his 'own customers in bona fide transactions and not in restraint of trade.'" FTC v. Simplicity Pattern Co., 360 U.S. 55, 64 (1959).

27 General Elec. Co. 3 Trade Reg. Rep. ¶ 16330 (F.T.C. March 1, 1963) (Initial Decision summary), 3 Trade Reg. Rep. ¶ 16817 (F.T.C. Feb. 28, 1964) (Order Dismissing Complaint).

The Commission issued a two-pronged complaint against respondent General Electric on May 28, 1962, charging it with violations of § 2(d) of the amended Clayton Act for failure to make promotional funds available on proportionally equal terms to competing customers, and of § 5 of the Federal Trade Commission Act, 52 Stat. 111 (1938), 15 U.S.C. § 45 (1964), dealing with unfair methods of competition based on respondent's cooperative advertising program.

28 *Id.*, Initial Decision at 21166.

29 *Ibid.*

them for price advertising for which some customers whose selling prices coincided with those minimums could qualify. Since G.E. made payments to all customers who advertised and since such payments were based upon the same percentage of purchases, G.E.'s plan, *as to customers who advertised,* satisfied the requirements of quantitative proportionality. However, those customers who did use the "no price" alternative testified that it was not as desirable as price advertising.[30]

It was argued before the Commission that the customers who were forced to accept the "no price" alternative were discriminated against (despite the fact that they received payments proportionally equal to the payments received by those who used price advertising) since G.E. was, in effect, purchasing for them a less desirable advertising medium. It was G.E.'s position that it should not be required to subsidize loss leader advertising and that the plan provided sufficient alternatives so that all dealers could participate in its benefits.

After hearing two oral arguments, the Commission "determined that the record is not adequate to enable an informed determination on the merits."[31] Apparently, the Commission believed that complaint counsel did not carry the burden of proof and that the record did not sufficiently disclose that the "no price" advertisement was ineffective.[32]

The disposition of the Commission to understand the needs of both the seller and the buyer in formulating an effective promotional program was also evident in two recent cases. These involved the use of minimum purchase requirements as a prerequisite to qualifying for an advertising allowance. In the *Atlantic Prods. Corp.* case[33] the Commission found that the minimum purchase requirement imposed by that company, which required customers to purchase in excess of 1500 dollars over a six-month period before it could qualify for an allowance, was tantamount to not making the allowance available to competing customers on proportionally equal terms. The record in that case showed that 85 to 90 percent of Atlantic's customers did not purchase in excess of the minimum pur-

30 *Ibid.* The hearing examiner also concluded:

> . . . GE has by means of the price limitations of its cooperative advertising plans attempted to and has bolstered and stabilized the retail prices of its products at the retail level. This has been accomplished by GE independently by promulgating its plan through its Housewares Division which was adopted by the GESCO Division and put into effect with its retail dealers, and also by agreement with its independent distributors when they agreed to adopt the limitations and put them into effect with their retail dealers.

Id., Initial Decision, Dkt. No. 8487, at 29.

31 *Id.,* Order Dismissing Complaint at 21792. Commissioner MacIntyre did not concur for the reason that he believes the Commission should have adjudicated the issues involved here. It is his view that the public interest would be better served by the Commission reaching and rendering a judgment in the disposition of this important case. It is his understanding that this case is a forerunner of other like important situations, the resolution of which will be required by the public interest.

Ibid.

32 Compare Commissioner Elman's dissenting statement on the FTC Opinion on Joint Ads:

> Obviously, a joint advertisement by small retailers which does not quote selling prices would be a waste of money. The owner of a corner grocery store is not interested in "institutional" advertising. That kind of advertising would hardly attract business away from his larger rivals, whose ads invariably feature weekend specials and the like.

5 Trade Reg. Rep. ¶ 50183. See *Hearings on H. Res. 13 Before Select Committee on Small Business,* 88th Cong., 1st Sess. 146 (1963).

33 Atlantic Prods. Corp., 3 Trade Reg. Rep. ¶ 16676 (F.T.C. Dec. 13, 1963).

chase requirement during the six-month period necessary to qualify for the allowance. Thus, a relatively small percentage of customers were able to take advantage of the program and these were, generally, the large customers. On the other hand, in the *Sunbeam* case[34] the Commission found that the 440-dollar single purchase minimum requirement in order to be eligible for an advertising allowance was not a practical obstacle for participating since anyone advertising Sunbeam products would have engendered substantial demand for the product and would in turn have to stock a sufficient amount to satisfy this demand. Here again, the Commission's decision was influenced by the fact that Sunbeam made alternative promotional programs available to purchasers who did not fulfill the minimum purchase requirement. However, the Commission found that the alternative promotional material made available to the purchasers in qualifying for the advertising allowance was equivalent in value to the advertising allowances.[35]

In sum, the Robinson-Patman Act does not specify how a seller should promote goods or on what basis payment should be made to customers who join in such a program. The statute does permit a wide variety of promotional arrangements and allows the seller to impose reasonable conditions before cooperative assistance is granted to the customer, provided such limitations are related to the requirements of effective promotion and not designed to discriminate among customers.

34 Sunbeam Corp., 3 TRADE REG. REP. ¶ 17178 (F.T.C. Jan. 11, 1965).

35 In Atlantic Prods. Corp., 3 TRADE REG. REP. ¶ 16676 (F.T.C. Dec. 13, 1963), the Commission refrained from issuing a cease and desist order because of its belief that the granting of unlawful advertising allowances was widespread in the industry. The Commission instructed that industrywide proceedings be instituted looking to the promulgation of trade regulation rules. See Abby-Kent Co., 3 TRADE REG. REP. ¶ 17310 (F.T.C. Aug. 9, 1965); Chesebrough-Ponds, Inc., 3 TRADE REG. REP. ¶ 17007 (F.T.C. July 27, 1964); Max Factor & Co., 3 TRADE REG. REP. ¶ 16992 (F.T.C. July 22, 1964); Sperry-Rand Corp., 3 TRADE REG. REP. ¶ 16791 (F.T.C. Feb. 17, 1964).

For new ideas of enforcement see statement of Francis C. Mayer, Chief, Division of Discriminatory Practices, What's New Robinson-Patman Wise? 27-29 (August 10, 1965); and Rockefeller, *The Federal Trade Commission's Potential For Making Purposeful Antitrust Policy*, 24 FED. B.J. 541 (1964).