



12-1-1963

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Recommended Citation

O. W. Moyle, *Accounting Techniques for Establishing a Cost Differential Defense under the Robinson-Patman Act*, 39 Notre Dame L. Rev. 1 (1963).

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ACCOUNTING TECHNIQUES FOR ESTABLISHING A COST
DIFFERENTIAL DEFENSE UNDER THE ROBINSON-PATMAN ACT*O. Wood Moyle**

The Robinson-Patman Act is designed to secure effective suppression of price discrimination between customers of the same seller only where such discrimination is not supported by sound economic differences in the costs of serving them. Hence, while section 2(a) of the act declares it to be unlawful for any person engaged in interstate commerce to discriminate in price between different purchasers of similar commodities,¹ a statutory defense is incorporated into the act by the following proviso:

That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.²

Defenses under this proviso are known as "cost differential defenses" or "cost justifications."³

As may be inferred from the wording of the statute the burden of showing cost justification is on the respondent.⁴ Furthermore, not only must a cost difference be shown, but the difference must arise from (1) a different method by which an article is sold, (2) a different method of delivery, or (3) savings in manufacturing, selling or delivering resulting from a difference in quantity sold or delivered.⁵

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1 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1957).

2 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1957).

3 Probably because of the severity of the accounting standards set by the Federal Trade Commission, cost justification has been attempted in only a few instances. Of 239 cease and desist orders up to December 31, 1954, only 91 were based on a 2(a) violation. A full defense under 2(a) was presented in only 39 and in only 18 of the cases would the cost justification have been a valid defense if proved. Edwards, *Cost Justification and the Federal Trade Commission*, 1 ANTITRUST BULL. 563, 566-67 (1956).

The commission's severe accounting standards are expressed only through findings against the respondents, since, unfortunately, the commission has not seen fit to issue regulations in this area.

4 *FTC v. Morton Salt Co.*, 334 U.S. 37, 44 (1948). In prosecutions under § 2(f), however, the burden is upon the Commission to show knowledge of a lack of cost justification. *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953).

5 Sawyer, *Accounting and Statistical Proof in Price Discrimination Cases*, 36 IOWA L. REV. 244, 247 (1951).

The typical cost defense involves the justification of customer price brackets. Under the bracketing system customers are charged different amounts for the same item, the amount charged depending upon the number of items purchased. The seller then attempts to justify the price difference by showing that the saving in the cost of serving the customers who pay the lower price is greater than the price difference. As a simple example, assume the following figures:

Price Bracket	Cost	Price
1	\$1.50	\$2.00
2	1.00	1.75
3	.67	1.50
4	.50	1.40

The cost and price differences, then, are as follows:

Price Brackets Compared	Cost Difference	Price Difference
1 and 2	\$.50	\$.25
2 and 3	.33	.25
3 and 4	.17	.10

This results in an excess of cost difference over price difference among the brackets as follows:

Price Brackets Compared	Excess of Cost Difference over Price Difference
1 and 2	\$.25
2 and 3	.08
3 and 4	.07

The following table gives a comparison of each bracket with all higher price brackets:

Price Bracket	Excess of Cost Difference over Price Differences for Brackets		
	1	2	3
1			
2	\$.25		
3	.33	\$.08	
4	.40	.15	\$.07 ⁶

In this example, then, each lower price is justified by a cost difference when compared to every higher price. Thus, section 2(a) is satisfied.

I

SOME FTC CASES IN WHICH COST DIFFERENTIAL DEFENSES WERE ASSERTED

Before examining the accounting problems involved in establishing a cost differential defense, it may be helpful to consider some of the cases before the Commission in which the defense was put forth. In the first of these, *Bird &*

⁶ Exemplary figures based on Tone, *Product Costing to Support Price Differentials*, 37 N.A.C.A. BULL. 38, 39 (1955).

Son, Inc.,⁷ the respondent was charged with giving preferences to large mail-order customers including Montgomery Ward. The case involved sales of linoleum which constituted about ninety-six per cent of Bird & Son's business. All customers were given 5/10⁸ and 4/70 cash discounts but the preferred customers only were given quantity discounts⁹ of 13-23 per cent in addition. The average discount was 20 per cent, which was given in the form of a rebate. The Commission found that the price differential was more than justified, but the case was complicated by an unusual timing situation. Respondent had determined to discontinue direct selling to retailers before the Robinson-Patman Act was passed, thus eliminating the practices of which the Commission complained. The Commission found that the complaint covered only a negligible proportion of Bird & Son's business, direct retail selling having dropped off to about one per cent of respondent's business in the month before the complaint was issued. It is not clear why, that being the case, the prosecution was pursued, but since the Commission would be naturally reluctant to issue a cease and desist order under such circumstances, the weight given the accounting aspects of this case should not be too great.

The first successful cost study of real magnitude appears in *Minneapolis-Honeywell Regulator Co.*¹⁰ The respondent was indicted for preferential pricing of oil furnace burner control sets consisting of three units: a thermostat, a limit control, and a primary control. Although Minneapolis-Honeywell stated prices separately for each unit, the case turned on the price of complete sets since one set constituted a minimum effective purchase. The fact that such grouping was allowed considerably simplified respondent's accounting difficulties. Data was considered for the period from 1938 to 1941, but emphasis was placed on 1941, the last normal¹¹ year that the pricing system was in effect. The respondent attempted to justify price brackets which depended on the expected purchases of customers during the coming year. The brackets and prices, both of which varied from time to time for 1941 were as follows:

Bracket	Unit Volume	Set Volume	Price per set
Discount	1-149	1-49	\$20.25
1	150-1049	50-349	17.35
2	1050-2999	350-999	16.45
3	3000-7499	1000-2499	15.35
3A	7500-14999	2500-4999	15.35
4	15000-22499	5000-7499	14.90
4A	22500-29999	7500-9999	14.25
5	30000 and over	10000 and over	13.75
6	—	—	— ¹²

⁷ 25 F.T.C. 548 (1937).

⁸ i.e., purchaser is allowed to deduct 5% of the list price if he pays cash within ten days.

⁹ A quantity discount is a reduction in unit price depending upon the size of the individual order. A volume discount depends on the total purchases of the customer during a given time period. See generally Taylor, *Cost Accounting Under the Robinson-Patman Act*, 3 ANTITRUST BULL. 188, 193-95 (1958).

¹⁰ 44 F.T.C. 351 (1948).

¹¹ The respondent's operations were greatly distorted by World War II.

¹² Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351, 380 (1948).

Considerable difficulty was encountered with what are known as "off-scale" sales, i.e., a sale where the purchaser is given the price of a bracket to which his volume of purchases does not entitle him. For example, if a purchaser of 300 sets, who should fall in bracket 1 and be charged \$17.35 per set, were granted the price of bracket 2, \$16.45, that would constitute an off-scale purchase. Here, the respondent carried purchasers in its records under the classification of the price bracket offered. The Commission accountant protested so vigorously to that method that the study was recast with the customers placed in the price brackets to which their purchases would have entitled them.

The Commission took a generally negative view toward this off-scale selling. During 1941 there were approximately seventy-seven off-scale accounts which break down as follows:

- 1-erroneously included
- 6-Retroactive credit (*i.e.*, purchases exceeded estimates so the purchaser was given a credit)
- 40-Customers who did not live up to expected volume. The company did not consider it practical to increase the billing price at the end of the year.
- 4-Dual transactions. Burner manufacturing companies were given credit for the purchases from respondent by furnace manufacturers who purchased the burner companies' burner, but installed their own controls.
- 2-New customers. Customers whose rate per month would qualify them for a lower price bracket but who did not purchase from respondent until after the beginning of the year.
- 2-Customers went out of business or into war work, creating the inverse of the situation immediately above.
- 22-Customers' bracket prices were allegedly lowered to meet competition.¹³

None of the above were accepted as cost justified or acceptable under any other basis by the Commission. This raises two problems. First, the forty accounts of those not living up to expectations resulted from the respondent's business requirement that prices be set in advance of the calendar year. The only apparent solution would be for Minneapolis-Honeywell to charge the highest likely price and grant rebates at the end of the year, thus increasing the customers' risks and depriving them of capital, both of which might be injurious to respondent's competitive position.

The second problem involves the twenty-two accounts for which the bracket prices were allegedly lowered to meet competition. Although the Commission in fact rejected the allegation, suppose the Commission had found that these sales were made to meet competition and were, therefore, justified under section 2(b).¹⁴ What effect would that have on the remaining accounts under the 2(a) defense? Should all costs allocable to those sales justified by 2(b) be removed? It would seem so, but must they? If so, real difficulties could ensue. The Commission has not yet answered this question, but the Commis-

¹³ Record, pp. 2660-62, Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948).

¹⁴ *Provided, however*, that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . . 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1957).

sion's accountant testified, in effect, that the allocable costs should be removed, if possible, from the study, intimating that they could be left in if allocation were extremely difficult.¹⁵

The accountants employed by Minneapolis-Honeywell concluded that the lowest price brackets, 4, 4A, 5 and 6 could not be cost justified, so only justification of the first five was argued. The results for 1941, in effect accepted by the Commission, were as follows:

Bracket	Price Scale	Distribution Costs	Cost Differentials	Price Differentials
Discount	\$20.25	\$11.72		
1	17.35	4.12	\$7.10	\$2.90
2	16.45	1.80	2.32	.90
3	15.90	.91	.89	.55
3A	15.35	.38	.53	.55
4	14.90	.21	.17	.45
4A	14.25			.65
5	13.75			.50 ¹⁶

The cost justifications were as follows:

Discount	Discount	1	2	3
1	\$4.20			
2	5.62	\$1.42		
3	5.96	1.76	\$.34	
3A	5.94	1.74	.32	(\$.02) ¹⁷

The two cent failure of justification between brackets 3 and 3A was considered *de minimis* and the latter bracket accepted by the Commission.

In *United States Rubber Co.*,¹⁸ the first of two cases involving the sales of canvas and waterproof footwear, cost studies again were presented in an attempt to justify discount brackets. The brackets were based on quantity, time of order, and type of goods sold as follows:

- (1) List price. Any size order, any time, sold by a branch office for immediate delivery.
- (2) Less 3%. Sales of advertised brands of less than 144 pairs or less than case lots, sold by branches between January 1st and June 30th for shipment between April 1st and October 25th, payment by December 1st.
- (3) Less 5%. Case lots 144-479 pairs, dates as in (2), advertised brands.
- (4) Less 8%. Case lots 480 or more pairs, advertised brands, dates as in (2); or any order of 480 or more pairs in case lots (sufficient to allow independent manufacture) providing

15 Q. "[W]hen you make a preferred price in order to meet competition . . . you cannot use the figures applicable?"

A. "No, I wouldn't say that. I would say you would remove it if you could, but you can't always do it. . . ." Record, p. 2518, Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948).

16 TAGGART, COST JUSTIFICATION 264 (1959) [Hereinafter cited as TAGGART] (an excellent presentation of the accounting data of selected cases).

17 *Ibid.*

18 46 F.T.C. 998 (1950).

sufficient time is allowed for orderly manufacture and delivery.¹⁹

- (5) Less 13%. Makeup orders of 480 or more pairs solicited and handled by branch sales personnel.
- (6) Less 13% & 5%.²⁰ Same as (5) for unadvertised brands.
- (7) Less 18% & 5%. Any order accepted from a national chain or mail order company, which is sold by the wholesale division (located at the factory) for private brand unadvertised footwear.²¹

The discount brackets for canvas footwear were substantially the same as for waterproof footwear except that the dates in (2), (3) and (4) were adjusted to the seasonal demands in that type of footwear.²²

The Commission found all but a few of the differentials justified. Those not justified were as follows:²³

	Brackets compared	Price differential	Cost differential	Excess of price differential over cost differential
<i>Canvas</i>	3 and 5	\$0.0800	\$0.0361	\$0.0439
<i>Canvas</i>	4 and 5	0.0500	0.0050	0.0450
<i>Waterproof</i>	2 and 5	0.1000	0.0936	0.0064
<i>Waterproof</i>	3 and 5	0.0800	0.0376	0.0424
<i>Waterproof</i>	4 and 5	0.0500	0.0020	0.0480
<i>Waterproof</i>	4 and 6	0.0935	0.0888	0.0047

There was also a failure of \$0.0092 between brackets (3) and (4) at the Mishawaka plant.²⁴ The Commission stated that the three differences of less than \$0.0100 would have been *de minimis* but that the other failures necessitated a cease and desist order. The order forbade discrimination of more than two per cent of the higher price, but provided that due allowance might be proved in any action for alleged violation.²⁵ It should be noted that only in one instance of failure was bracket (5) not involved. The compliance report filed by U.S. Rubber with the Commission merely deleted that bracket,²⁶ so the defense must be called a success.

The second footwear case, *The B. F. Goodrich Co.*,²⁷ had a very similar fact situation. Goodrich employed an additional discount bracket in which were classified, roughly, the purchasers who would fall in bracket (7) in the *U.S. Rubber* case but who were served by the branch offices. Such service incurred a charge of 5% so this extra bracket was given a discount of 18% plus 5% less 5%.²⁸ The complexity of accounting in this type of apparently simple case is

19 Such orders are known as "make-up" orders.

20 i.e. List price less 13%, then the balance less 5% which is not the same as 18%.

21 46 F.T.C. 998, 1008-09 (1950). All figures are exclusive of cash discounts.

22 Purchases between August 1st and December 31st for shipment between December 1st and April 25th, payment by June 1st.

23 46 F.T.C. 998, 1012 (1950). Differences are per dollar of gross sales. Figures are from the Naugatuck plant.

24 46 F.T.C. 998, 1012 (1950).

25 *Id.* at 1013.

26 TAGGART 337.

27 50 F.T.C. 622 (1954).

28 TAGGART 344.

shown by the fact that the defense of these eight categories had to be shown with data that concerns some 607 varieties of footwear,²⁹ the cost of each variety presumably being different.

At the conclusion of the hearing it was stipulated that Goodrich's cost of manufacturing unadvertised brands was at least 2.5 cents per list sales dollar less than that of advertised brands of waterproof footwear. This amount resulted in a cost justification of all differences save those between bracket (5) and those with greater discount. Since sales in bracket (5) amounted to less than one-half of one per cent of total sales of waterproof footwear in 1949, the respondent's unopposed motion to dismiss was granted and the Commission dismissed the complaint.³⁰

Perhaps the most important cost justification case is *Sylvania Electric Products, Inc.*,³¹ Sylvania manufactures about 600 types of radio tubes. Tubes used for replacement purposes were distributed through two primary channels, Sylvania distributors and Philco. Philco was given a lower price than the distributors, but apparently the reduction on a given tube was reached in a haphazard manner. Of the forty-four tubes: twenty-two high priced, twenty-two low priced — stipulated as typical for purposes of analysis — Taggart presents twenty-four examples wherein the discount rate in 1948 varied from 8.2 to 48.4 per cent.³² Fortunately for the respondent the Commission allowed the prices to be averaged, even though the ratios of tubes purchased by the distributors and Philco varied from tube to tube.³³ The averaging reduced any possible failure of justification to *de minimis*. The averaging here was in a rather special circumstance since the demand for replacement tubes depends on which older tubes break or wear out. The result is that the type of tube purchased by distributors is more or less out of their control.

National Lead Co.,³⁴ is an example of simpler attempts at justification. Here the respondent attempted to justify higher prices for less than carload orders of oxides by showing that the difference reflected freight charges only. The data simply did not support the argument. The difference for deliveries in Detroit, for example, was ninety cents per hundredweight while the freight differential was only two cents, leaving eighty-eight cents out of ninety unjustified.³⁵

Respondent then tried to defend its zone pricing³⁶ by showing that the average cost of serving customers in a zone equalled the differential for that zone. The Commission did not accept that argument, holding that such a grouping of

29 *Id.* at 361.

30 *Id.* at 364.

31 51 F.T.C. 282 (1954).

32 TAGGART 366.

33 Note the impact of allowing the averaging. Costing 600 tubes in a production plant would be almost impossible, as would determining other costs per tube. As a practical matter, cost justification would have been impossible. Also, since the average justification was very close, about half of the discounts, which varied greatly, would have failed.

34 49 F.T.C. 791 (1953).

35 *Id.* at 864.

36 Zone pricing is the practice of determining the price charged a particular customer by the geographical area into which it falls, notwithstanding the actual cost of serving that customer.

customers ignored the effect of the zone pricing on customers near the edges of the higher priced zones.³⁷

The accepted defenses permitted a one-quarter cent per pound difference on white dry lead orders of twenty tons or more if the order was actually shipped;³⁸ and a one-quarter cent per pound difference on orders of five hundred or more pounds of white lead-in-oil. The latter was found to be "... no more than the allowable differences in costs of the containers. . . ."³⁹

In the final case, *Thompson Products, Inc.*,⁴⁰ the respondent attempted to justify two practices. The first was the giving of nonretroactive volume rebates⁴¹ to distributors. The rebate schedule for 1953 was found cost justified.

Annual Purchases		Nonretroactive Rates	
Connecting Rods, Engine Bearings and Shims			
\$ 0	to \$ 750	0	%
750	2,000	3½	
2,000	5,000	5	
5,000	10,000	7½	
	Over 10,000	10	
All other products			
\$ 0	to \$ 5,000	0	%
5,000	7,000	2	
7,000	12,000	3	
12,000	18,000	4	
18,000	24,000	5	
24,000	30,000	6	
30,000	36,000	7	
36,000	48,000	8	
48,000	60,000	9	
	Over 60,000	10 ⁴²	

An attempt was also made to justify differentials given to original equipment manufacturers such as Ford, General Motors and Studebaker. Respondent attempted to treat all such manufacturers as a group. Had this been done the discount would have averaged 39.28 per cent, while the cost difference would

37 [T]he fact that the average cost of shipping to customers over an area of a dozen or more States amounts to some arbitrary figure does not justify the discriminations which result in particular transactions with individual customers located in border territories. 49 F.T.C. 791, 868 (1953).

38 49 F.T.C. 791, 868 (1953).

39 49 F.T.C. 791, 872 (1953).

40 55 F.T.C. 1252 (1959).

41 A discount is retroactive if the rate of the highest bracket applies to all purchases. It is nonretroactive if the rate applies only to the purchases within the bracket. For example:

Annual purchase brackets	Discount rate	Annual purchases	Nonretroactive discount	Retroactive discount
\$ - 999	0%			
1,000 2,999	1	\$ 2,000	\$ 10	\$ 20
3,000 9,999	2	4,000	40	80
10,000 & over	3	12,000	220	360

from Taylor, *Accounting Under the Robinson-Patman Act*, 3 ANTITRUST BULL. 188, 195 (1958).

42 TAGGART 443.

have been 38.15 per cent, according to the prosecution's own proposed findings.⁴³ Had such an average been allowed the complaint may well have been dismissed. The Commission, however, refused to allow the averaging on the grounds that, since parts for individual makes of automobiles are not competitive, each price to manufacturers should be treated separately. This part of the defense then failed and a cease and desist order was issued.

It was in this case that the Commission strongly stated that return on capital is not an allowable cost. Thompson had attempted to show that the capital invested in its distributor organization yielded less return than that invested in other areas of the corporation. The respondent then tried to charge the difference to distributors' costs. The Commission thought that technique to be an attempt to spread savings experienced in sales to the favored customers to those discriminated-against's costs, and wholly outside the costs allowable under 2(a).⁴⁴

II

PROBLEMS ENCOUNTERED IN ESTABLISHING COST JUSTIFICATIONS

Having examined the backgrounds of several justification attempts it is now possible to proceed to a more detailed treatment of specific problems and the accounting techniques employed to deal with them.

Price.—The price justified should be the actual price paid, not the billed price or initially quoted price.⁴⁵ There is, however, some uncertainty as to how to treat cash discounts. Three approaches are possible: (1) the prices can be compared before discount; (2) the discounted prices can be compared; or (3) the prices can be discounted to the extent that the discounts are in fact taken.⁴⁶ The Commission has accepted justification of prices figured net of discounts,⁴⁷ but the Commission's accounting staff has been pressing for a requirement that the prices offered be justified.⁴⁸ When the issue was squarely presented in *Sylvania Electric Products, Inc.*, the Commission avoided it by deciding on other grounds.⁴⁹ It would seem that where the same discount is offered to both parties, the most equitable result would come from comparing prices after the discount has been taken. The report of the Advisory Committee on Cost Justification so recommends.⁵⁰ An exception to this general approach might have to be made in instances where the cash discount is used merely as a device of differentiation, such as when the seller knows the smaller purchasers cannot make cash payments. But such a case can be dealt with when en-

⁴³ *Id.* at 435.

⁴⁴ The return rate factor or element here claimed is thus entirely outside the sphere of actual cost differences. . . . 55 F.T.C. 1252, 1276 (1950).

⁴⁵ *Fruitvale Canning Co.*, 52 F.T.C. 1504 (1956).

⁴⁶ These approaches lead to three different amounts. For example, assume billing prices of \$1.50 and \$2.00 and a 2/10 cash discount. The discount is taken by all of the \$1.50 customers and one-half of the \$2.00 customers. If the billed prices are used, 50 cents (\$2.00-\$1.50) must be justified. If the discounts actually taken are removed, 51 cents (\$1.98-\$1.47) must be justified. If discounts offered are used, 49 cents must be justified (\$1.96-\$1.47).

⁴⁷ *Bird & Son, Inc.*, 25 F.T.C. 548 (1937).

⁴⁸ *Sylvania Electric Products, Inc.*, 51 F.T.C. 282 (1954). TAGGART, 384.

⁴⁹ *Sylvania Electric Products, Inc.*, 51 F.T.C. 282 (1954).

⁵⁰ Advisory Committee on Cost Justification, *Report to the Federal Trade Commission* ¶ IIB3 F.T.C. Mimeo (1956).

countered. An indication of the opinion of the Commission in this matter may be found from its regular inclusion of a definition of price in its cease and desist orders as being net of all discounts.⁵¹

In certain situations, it may be necessary to adjust prices in order to make a fair comparison. These situations are usually encountered when the prices being compared are for goods similar enough to be of like nature and quality but dissimilar in actual production costs. The resultant difference can be justified as a difference in manufacturing cost but such a difference is not technically due to a difference in the manner or quantity of sale. When the difference is really one of quality, such a difference should not have to be justified. In the *Goodrich* case,⁵² the Commission allowed the difference as a cost of manufacture,⁵³ but, from the standpoint of accounting principles, the situation is better handled by means of a price adjustment.

In adjusting the price, the factory, or manufacturing, cost is first determined. Then the cost of the article sold to the favored customer is compared to the selling price to determine the gross markup. That markup percentage is then applied to the factory cost of the article sold to the disfavored customer to obtain the adjusted price.⁵⁴ This is the price which it is expected that the respondent would have charged the favored customer had the products been identical. This price adjustment method, i.e., assuming an identical gross margin percentage, seems a more accurate method of determining the hypothetical price difference than does adding on the cost difference, and this method was found acceptable by the Advisory Committee.⁵⁵

Price averaging has been allowed in several instances. It should be noted that a form of averaging often appears in price bracket justifications. If the brackets are in terms of quantities purchased and goods are sold at slightly different prices, a justification based on units purchased creates an averaging of dollar discounts. Averaging also occurs, in effect, when the Commission considers a pricing system that has had numerous recent price changes.⁵⁶

But the most important averaging is found in *Minneapolis-Honeywell*⁵⁷ and *Sylvania*.⁵⁸ These cases indicate that when prices for individual items are somewhat arbitrary because the items are thought of in a group, or when they are considered part of an assortment by the manufacturer and demand within the product line is rather independent of price, the prices may be averaged. This enables respondent to allow what would otherwise be an overjustification

51 *E.g.*, *Fruitvale Canning Co.*, 52 F.T.C. 1504 (1956); *International Salt Co.*, 49 F.T.C. 138 (1952).

52 50 F.T.C. 622 (1954).

53 TAGGART 355.

54 For example, assume the product sold the favored company costs 20 cents at the factory and is sold for 24 cents. The comparable product costs 21 cents and is sold for 30. The preferred customer's markup is four-twentieths or 20 per cent. The adjusted price would be 21 plus 20 per cent of 21 making 25.2. The difference would be 30 less 25.2 or 4.8. The unadjusted price difference would be 6 cents, and if the factory cost differential is allowed 5 cents still must be justified. (Figures are from TAGGART 432).

55 Advisory Committee of Cost Justification, *Report to the Federal Trade Commission* ¶ IIB6 F.T.C. Mimeo (1956).

56 *E.g.*, *Fruitvale Canning Co.*, 52 F.T.C. 1504 (1956).

57 44 F.T.C. 351 (1948) (Burner control sets of thermostats, limit controls, and primary controls).

58 51 F.T.C. 282 (1954) (radio tubes).

of one item to carry over to another item and aid the second item's justification. This may be very important if management has in fact first determined what the price of the set should be, and then divided the total into individual prices as an afterthought. Allocation of costs is also much simpler, reducing the complexity and expense of the study necessary for justification. Averaging was allowed even though customers bought the members of the sets in different ratios.

Customer grouping.—A strict reading of the statute would not permit any customer grouping. A reasonable interpretation of the statute does permit such grouping, however, and the Commission has permitted it from the first.⁵⁹ Such grouping is necessary both for managerial convenience and for simplification of the preparation of reports.

Justifying quantity or volume brackets presents the additional difficulty that there must be an unjustifiable differential between the top customer in one bracket and the bottom customer in the next. The Commission has held that such differences, if the brackets are reasonable, are permissible, provided that there is no showing of actual competitive injury between such borderline cases:

. . . Any annual quantity system of pricing is vulnerable to this argument and it may be controlling when it has practical aspects. Where it is purely theoretical, however, it does not constitute a satisfactory basis for disallowing the whole effort at cost justification.⁵⁹

One of the tests of such bracketing would be that the brackets be sufficiently small to allow the increments to be of a relatively small dollar amount. In no case has the Commission struck down a bracketing system for having too extensive brackets, but an analogous situation was presented by the zone pricing system which was not accepted in *National Lead*.⁶¹ Some of the zones in that case constituted areas of a dozen or more states.⁶²

If the justification is attempted for sales to different classes of customers care must be taken to assure that the customers within each class are relatively homogeneous. The relative number of purchasers in a class should not matter; in *Sylvania*⁶³ respondent was allowed to compare the costs of serving approximately 380 distributors with the cost of serving Philco. But a comparison between a large and small group may open the study to criticism for lack of homogeneity. If certain expenses should be allocated more to one member of the class than another the result may be that splitting the class might result in one member's being justified and the other not. This objection was accepted when respondent attempted to compare the costs of serving 485 customers of varying sizes and types with Atlas and Socony.⁶⁴ If preferential prices are given to several customers the study must not justify the sale to just one of them without a showing

59 *Bird & Son, Inc.*, 25 F.T.C. 548 (1937).

60 *Record*, p. 1339, *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948).

61 49 F.T.C. 791 (1953).

62 *Id.* at 868.

63 51 F.T.C. 282 (1954).

64 Such a grouping fails to take into consideration the fact that among the 485 distributors in one of the groups there are those upon whom respondent expended a comparatively small amount of sales effort. *Champion Spark Plug Co.*, 50 F.T.C. 30, 42 (1952).

that the one selected is typical.⁶⁵ If the preferred customers are grouped it must be shown that they are homogeneous.⁶⁶

Sampling.—Cost studies typically cover one year, with the year selected being the last normal business or calendar year before the issuance of the complaint.⁶⁷ Although the Commission will consider data covering several years before the cost study, emphasis is placed on the year of the study.⁶⁸ Consideration of the previous years seems to go primarily to testing whether or not the year studied is a normal year.

Since the year studied is before the issuance of the complaint, data sufficient to make a proper study may not be available. Thus allocation percentages based on time studies may have to be derived from analysis of similar activities on a later date.⁶⁹ Some evidence that techniques have not changed between the year studied and the time at which the allocation ratios were determined should be introduced.

It may develop that, in the best judgment of the accountants employed, the normal year studied has some elements which are not normal, and for those elements different periods may be used. Two examples of this occurred in *B. F. Goodrich*.⁷⁰ The salesmen's calls studied were those made between July 1, 1948 and June 30, 1949. That period was selected because most of the orders filled during calendar 1949, the time period of the study, were solicited between those dates.⁷¹ The bad debt account was taken on the basis of the 1936 to 1942 average rather than as the amount actually lost in 1949. The accountants felt that the immediate postwar period did not give a fair statement of average bad debts.⁷²

When compiling data of sales by the home office or of national accounts all of the accounts should be considered. When considering branch offices, sales, or warehouses, however, some sampling techniques are usually applied. In *U.S. Rubber*,⁷³ for example, branches in Pittsburgh, Buffalo and St. Louis were studied. The latter two were included on the recommendation of the Commission staff to assure that the results were typical.⁷⁴

The study in *Goodrich*⁷⁵ covered branches in Pittsburgh and Chicago. Since some of the products handled by the company were not processed in those areas, time studies of some product handling in New York and Minneapolis were also included. In *Morton Salt*,⁷⁶ invoicing costs were determined from only

65 *International Salt Co.*, 49 F.T.C. 138, 154-55 (1952).

66 *Thompson Products, Inc.*, 55 F.T.C. 1252 (1959). (Respondent failed in an attempt to group automobile manufacturers because they were purchasing parts that were not interchangeable.)

67 *E.g.*, *Sylvania Electric Products, Inc.*, 51 F.T.C. 282 (1954); *B. F. Goodrich Co.*, F.T.C. 622 (1954).

68 Because respondent's cost study was based on its price schedule for 1941 and because that is the most recent year covered by the evidence, our consideration has been directed primarily to that schedule. Record, p. 1338, *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948).

69 *E.g.*, *Sylvania Electric Products, Inc.*, 51 F.T.C. 282 (1954). TAGGART, 370.

70 50 F.T.C. 622 (1954).

71 TAGGART, 345.

72 *Id.* at 353.

73 46 F.T.C. 998 (1950). See TAGGART, 284-339.

74 TAGGART, 290.

75 50 F.T.C. 622 (1954). See TAGGART, 345.

76 39 F.T.C. 35 (1944). See TAGGART, 173.

one area (Chicago), but that area handled about 70 per cent of the invoices issued.

Care must be taken that all of the costs incurred by an area office and included in the study are applicable to the area studied. A strong objection in *Morton Salt*⁷⁷ was that some of the invoicing expense charged to the Chicago office was actually allocable to Dallas, Kansas City and San Francisco.

A similar problem is created if costs vary from area to area. If that is the case, the area sampled to determine the costs allocable to the preferred customers should be the same as that sampled to determine the costs of the nonpreferred customers.⁷⁸

Selection of one or more plants as typical in order to simplify proof of manufacturing cost differentials is acceptable. Some attempt should be made, however, to show that there was no bias in the selection of particular plants. The choice should probably be made by some outside body, by a random device, or be based on sound reasoning. Selection by company officials of a single plant as typical without any survey or other basis to support the selection was one of the objections to the study in *Morton Salt*.⁷⁹

Once the marketing areas or plants have been determined even further selection may be employed. The study in *U. S. Rubber*⁸⁰ was for one year. Transportation costs were taken from data for April and September only,⁸¹ however. It also appeared from the study that the time and expense of filling orders were about the same regardless of the size of the order. The expectation was sustained for the Pittsburgh branch by a time study of three salesmen from March until June during the following year.⁸²

Salesmen were also time studied in *Goodrich*.⁸³ Eight salesmen from Pittsburgh and twenty-one from Chicago were selected. They kept detailed daily reports for a year. The amount of time spent per call was determined by especially detailed reports which were made for an average of twenty-two days. The accuracy of the reports was verified by having time-study men accompany eight of the salesmen for a period of from one to three days.

If certain items are selected for analysis the respondent should make the theory upon which the selection is based clear to the examiner. Failure to do this resulted in confusion in *Niehoff*.⁸⁴ Respondent was trying to justify a volume discount schedule by showing, in part, a cost saving in processing and filling orders. Seventeen orders were selected by an industrial engineer and the sales manager as typical of the types of orders received by the company. The orders were then time studied through processing and filling to give the following results:

77 TAGGART, 182.

78 Standard Oil Co., 41 F.T.C. 263, 280 (1945).

79 39 F.T.C. 35 (1944). There was also an undertone of suspicion on the part of the Commission's staff when it was brought out that certain allocations were made on the recommendations of employees who were not accountants. See TAGGART, 184.

80 46 F.T.C. 998 (1950).

81 i.e., one month from the busy season of both canvas and waterproof footwear.

82 Waterproof footwear only, the canvas footwear sales having been distorted by the war.

83 50 F.T.C. 622 (1954). TAGGART, 347.

84 G. E. Niehoff & Co., 51 F.T.C. 1114 (1955).

[No.]	Sales order number	Net billing	Number of packages	Number of items	Processing cost per dollar of net invoice
1	44524	\$12.00	2	1	\$0.0992
2	44525	37.66	23	6	.0349
3	44576	45.14	29	20	.0431
4	44575	56.51	49	8	.0366
5	45968	125.20	69	33	.0211
6	44572	134.47	116	25	.0233
7	46162	206.79	171	37	.0174
8	44577	208.64	86	36	.0159
9	44573	223.76	163	63	.0211
10	45969	259.80	110	49	.0147
11	45945	305.01	163	56	.0177
12	46161	341.79	236	49	.0130
13	44991	496.98	391	68	.0144
14	45078	523.22	334	81	.0166
15	45301	785.80	623	101	.0136
16	45079	811.57	598	94	.0141
17	44993	846.66	469	89	.0123 ⁸⁵

Respondent then plotted on a graph the total net processing costs per order as a function of net billing price. Then the proportion of the price differential cost justified was computed for sample customers. Total net billings of the customer were divided by the number of orders to obtain the average order size. The average order size was used to determine the average cost per order and that was multiplied by the number of orders to obtain total processing and filling costs. Then the same procedure was used to compute what would have been the cost of serving a preferred customer had the preferred customer purchased the same total dollar amount but with average orders of the size that the preferred customer in fact used. The difference of the two resultant figures yields the cost difference. Then from the net amount paid by the injured customer was subtracted the amount that would have been paid by the preferred customer had he purchased the same volume but at the price per item he in fact paid. That yields the price difference. The difference in cost was then divided by the difference in price to obtain the percentage of the price differential that was cost justified by differences in the cost of filling and processing orders.⁸⁶

⁸⁵ *Id.* at 1134.

⁸⁶ *E.g.*

	Net Billing	Number of Shipments	Billings per Shipment	Cost per Billing Dollar
Greiner	\$11,230	32	\$351	\$0.0152
Automotive Wholesalers	1,140	8	142	.0280
Actual cost of filling A. W. orders			\$1,140	× .0280 \$31.92
Cost at Greiner rate			1,140	× .0152 17.33
Cost difference				\$14.59
Net amount A. W. should have paid (93.1% bracket, \$1,266.67 sales at list price)				\$1,179.27
Net amount for same volume at Greiner price (82.6% bracket)				1,046.27
Price difference				\$ 133.00
Proportion of price difference justified by savings in order processing costs (14.59 divided by 133) 11.0%. TAGGART, 411 (footnotes omitted).				

The prosecution attacked this approach by presenting the purchase habits of the customers who had placed the seventeen sales orders that had been analyzed. The dollar values of the mean purchases of those customers were not related to the dollar values of the orders studied, and purchase sizes of each customer ranged widely:

Customer	Net Billing of the order studied	Customer's average 1949 purchase	Customer's purchase range in 1949	Number of 1949 shipments
1	\$ 12.00	\$123	\$3 -537	22
2	37.66	105	1 -322	17
3	45.14	41	3 -114	38
4	56.51	150	17 -325	4
5	125.20	45	1 -512	90
6	134.47	58	0.22-211	24
7	206.79	13	1 - 36	9
8	208.64	54	2 -160	7
9	223.76	128	87 -218	4
10	259.80	210	1 -847	30
11	305.01	183	17 -311	6
12	341.79	163	2 -648	18
13	496.98	99	1 -772	99
14	523.22	12	12	1
15	785.80	145	4 -660	49
16	811.57	292	1 -3,199	83
17	846.66	178	2 -934	62 ⁸⁷

This exhibit suggested to the examiner that the seventeen customers were somehow selected as typical and that the orders selected were intended to be representative of the orders placed by those purchasers. That of course is not the case. The orders were selected as fair samples of different sizes of orders and the customers placing the orders were not considered. The reason for the selections should have been made perfectly clear to the examiner.

The examiner was also concerned with the problem of averaging. There was no evidence offered to demonstrate that respondent's method of computing the cost was accurate. Put in other terms: does the cost of the mean order equal the mean of the costs of the component orders?⁸⁸ This latter defect may have been determinative since the examiner did not feel that the burden of averaging the costs of the separate orders would have been too great.⁸⁹

⁸⁷ TAGGART, 418.

⁸⁸ For example, assume a purchaser places five one-hundred-dollar orders and one seven-hundred-dollar order. His actual costs would then be

$$\begin{array}{r} 5 \times \$3.40 = \$17.00 \\ 1 \times 7.35 = 7.35 \\ \hline \end{array}$$

\$24.35

The total orders amount to twelve hundred dollars in six orders, a mean of two hundred dollars per order. Six orders of two hundred dollars each would cost

$$6 \times \$4.50 = \$27.00.$$

Respondent's approach is, then, \$2.65 from the actual cost. Computations from the table in *C. E. Niehoff*, 51 F.T.C. 1114, 1135 (1955).

⁸⁹ Respondent's actual records could have shown the exact processing cost of each and all orders from the 17 selected customers . . . but this was not done. *C. E. Niehoff*, 51 F.T.C. 1114, 1136 (1955).

Advertising.—Allocation of advertising expense is extremely difficult. The effect of institutional advertising on the sales of particular products is at best conjectural. Since the burden of proof is on the respondent, it cannot expect to be able to show a difference. The normal practice is to include institutional advertising for the sake of study completeness and then to allocate the expense on the basis of dollars of sales, thus providing no cost difference.⁹⁰

Some differences can be proved if the price differential complained of is between trademarked items and private brands. In that case consumer oriented advertising of trademarked items can be charged directly to the trademarked item as a sales expense.

Since respondent in *Sylvania*⁹¹ was allowed to consider all products as a whole, nearly all advertising expenses could be charged directly to Sylvania distributors. The only excepted items were general advertising expenses and trade paper advertising, which were treated as institutional advertising expenses.

It is doubtful that general expenses need be handled quite so conservatively. Advertising expenses in *U.S. Rubber*⁹² were divided into five categories: three separate types of footwear, institutional advertising, and expenses incurred in administering the other four. The last item was distributed to the direct expenses pro rata. Of the four direct charges remaining, one concerned a line of footwear not covered by the pleadings so it was disregarded. The remaining three were then expressed as percentages of the gross sales of the line or lines applicable. The amount chargeable to the preferred or nonpreferred customers was then determined by multiplying the percentage thus obtained by the total gross sales of the appropriate line or lines made to each customer group.

A similar approach was used in *B.F. Goodrich*.⁹³ Allocation of general advertising overhead between waterproof and canvas footwear was on the basis of advertising space used for each.⁹⁴ Allocation to brackets was by list sales.⁹⁵

Any final allocation by other than sales or sales dollars is likely to meet stiff resistance from the Commission.⁹⁶ In *Niehoff*⁹⁷ the examiner allowed the portion of advertising expense representing catalogue costs to be equally divided among the customers regardless of their size. There was some testimony that the smaller customers received as many or more catalogues per customer than the larger customers. The Commission, however, found that evidence equivocal and was much impressed by a showing that some of the larger customers had more

90 United States Rubber Co., 46 F.T.C. 998 (1950); Sylvania Electric Products, Inc., 51 F.T.C. 282 (1954).

91 54 F.T.C. 282 (1954). TAGGART, 373.

92 46 F.T.C. 998 (1950). TAGGART, 310.

93 50 F.T.C. 622 (1954). TAGGART, 352.

94 This would be the equivalent of *U.S. Rubber*, 46 F.T.C. 998 (1950), only if the media expenses per unit of space were constant. Seasonal rate changes might affect the ratio used as might a possible proclivity toward a different size of advertisement during the summer than the winter. Why space purchased rather than money spent to purchase space was used is unclear.

95 *Accord*, International Salt Co., 49 F.T.C. 138 (1952).

96 Respondent's president admitted that averaging this total expense on a per customer basis was arbitrary. It can only be allocated on a per dollar of sales basis which, of course, furnishes no cost justification. . . . C. E. Niehoff & Co., 51 F.T.C. 1114, 1137 (1955) (Examiner's report).

97 51 F.T.C. 1114 (1955).

than one salesman so would require more than one catalogue. The Commission concluded that the burden upon respondent to show the allocation to be proper had not been met and the examiner was overruled.

Salesmen's salaries.—Salesmen's salaries are allocated by the amount of time spent with each class of customers.⁹⁸ The Commission staff has argued consistently that the only accurate way to determine the amount of time spent is by time studies.⁹⁹ Some accountants have disagreed, however. Respondent's accountant in *Minneapolis-Honeywell*¹⁰⁰ argued that in many instances a person's estimate of his own time allocation can be more accurate than a time study, particularly if the tasks performed are complex and interrelated. Similarly, in *International Salt*,¹⁰¹ a time-study attempt was abandoned. The accountant felt that the salt business was so seasonal that no fair sample could be taken and that a full year's study would be impracticable.

The Commission has allowed other methods of allocating salesmen's salaries when that method has appeared practical and accurate. The method used in *Minneapolis-Honeywell*¹⁰² appears to be the most detailed that has appeared without the use of time studies.¹⁰³ The unit respondent decided to work with was cost per call. Once cost per call was determined the cost of selling to any particular customer could be determined because a record of all salesmen's calls had been kept. First the number of calls that would ordinarily be made in a single day on a particular type of customer was determined. That was done by taking a salesman who made calls only on that type of customer, then dividing the number of calls made by that salesman in one year by the number

98 An exception would be the "inside salesmen" in *Bird & Son*, 25 F.T.C. 548 (1937), whose salaries were allocated on the basis of yardage sold.

An alternative method of allocation, often used in accounting for other purposes, would be by sales dollars. The Commission's objection to this approach is that it would be a form of bootstrapping. By that it is meant that preferential price to a customer in part justifies itself: a reduction in sales price reduces the cost of selling, which cost is determined by a percentage of the price.

The bootstrapping argument could be circumvented by allocating the cost on the basis of list price (*i.e.*, price before the preferential discount is taken). This would result, effectually, in a volume allocation of cost for particular items. The objection to list price allocation is that it does not reflect what the salesman does (*i.e.*, how he spends his time) or what he is supposed to do (a salesman is not ordinarily hired to maximize volume).

A third alternative would be to allocate sales costs on the basis of profits. Respondent would argue that the purpose of the sales force is to make sales that will maximize company net income, so that profit ratios are the proper bases for allocation. This approach has not yet been fully argued to the Commission.

Finally salesmen's time could be allocated on the basis of how much time a sale should take, rather than how much time it in fact did take. An efficiency expert would determine how much time a type of sale should ordinarily take and any excess would be termed waste time and would be allocated to general overhead. This general approach to cost accounting was presented by respondent in *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948), but was not seriously pursued and no findings on the technique were presented by the examiner or the Commission.

99 I have always contended in previous cases before the Commission that nothing short of time studies of selling activities should be considered as proper support for measuring factors to be used in separating those costs which are closely related to effort expended by the separate employees. . . . Warmack, Federal Trade Commission Accountant, Record, p. 2469, *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948).

100 44 F.T.C. 351 (1948).

101 49 F.T.C. 138 (1952).

102 44 F.T.C. 351 (1948).

103 The Second World War had so altered respondent's business that accurate time studies were not possible.

of sales days in the same year. The resultant figure¹⁰⁴ was then divided into the daily salary of the salesman whose cost per call on that type of customer was being determined. The quotient was the amount of that salesman's salary chargeable to the customers in that bracket per call in determining sales costs.¹⁰⁵ The Commission did not accept the study as completely accurate but found it within a reasonable margin of allowable error.¹⁰⁶

The easiest simplification of salesmen's salary allocations would be on the basis of the number of calls made by a salesman during the period studied. This approach was used successfully in *Bird & Son*.¹⁰⁷ Allocation by the number of calls requires, however, that the average length of time of the calls on the nonpreferred customers at least equals the duration of the average call on preferred customers.¹⁰⁸

The Commission will not ordinarily accept the assumption that the time per call is independent of the size of the order taken.¹⁰⁹ Respondent should present clear evidence that such is the case.¹¹⁰

In *Niehoff*¹¹¹ the opposite assumption was made. Respondent presented convincing testimony that because of the nature of the business salesmen actually spent a longer time with smaller customers than with the larger ones.¹¹² Respondent then proceeded as if the time spent on all customers were equal.¹¹³ Respondent then distributed salesmen's costs equally to all customers, claiming that salesmen called on all classes of customers the same number of times.

The actual records of salesmen's calls had been destroyed so the testimony of the president and sales manager of Niehoff was presented to show that all customers were called with approximately the same frequency. The Commission remained unconvinced, showing that the call record of the only salesman examined was contradictory to the general statement.¹¹⁴

The conclusion to be drawn from these cases is that time studies should be made if at all possible. If a time study cannot be undertaken detailed data

104 Some adjustments were made to compensate for the type of territory in which the salesman operated. A salesman in a more dense area may have less travel time and thus a higher call per day potentiality.

105 To this figure were added pro rata expenses and direct supervision costs. Indirect supervision costs were then added in. They were figured by taking the number of days the zone manager worked, less the number of days he was selling, to determine the number of days he was supervising. The ratio of number of days supervising to number of days working was applied to the zone manager's salary, and other costs directly charged to him. The result was divided by the total number of man-days of salesmen under him, which was in turn divided by the number of a particular type of call that could be made by the salesman in a day to get the amount chargeable to a particular call. The zone manager's superior was similarly treated. The sum of these charges gave the cost of a particular call. For a specific example see Record, pp. 2406-2417, Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948).

106 Cost studies of the sort presented . . . do not afford precise accuracy but must necessarily embrace a number of conjectural factors and allocations. There is inherent in them a reasonable margin of allowable error. Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight. . . . We have accordingly accepted the results of the cost study as fairly reflecting respondent's cost differentials within a reasonable margin of error. Record, p. 1338, Minneapolis-Honeywell Regulator Co., 44 F.T.C. 351 (1948).

107 25 F.T.C. 548 (1937) ("Outside" salesmen's salaries were distributed in the first instance by the number of calls, then further broken down on the basis of yardage).

108 This must be the case if the number-of-calls basis is to be in accord with the Commission approved time based allocation.

should be presented to approximate the same result as closely as possible.

Other Sales Expenses—Salaries of private secretaries are allocated in the same manner as are those of their superiors. General overhead, such as light, heat and rent, should be apportioned among departments on the basis of area used, then allocated as are direct department expenses.

Most items of expense in the sales distribution branches—such as sales accounting, stenographers, operating traveling expenses, etc.,—are allocated by the number of invoices and papers or the number of invoice lines.¹¹⁵ For most of these functions it appears that invoice lines would be a more accurate measurement, since it is not to be assumed that the handling of orders is independent of the number of types of items in the order. If respondent intends to use invoices as an allocation measure, then some evidence should be presented to show that the ratio of invoices to invoice lines is the same for all groups of customers.¹¹⁶

Some additional difficulty has been encountered in the allocation of telephone expenses. Time studies of telephone use are extremely difficult so respondents have allocated telephone expenses by the number of invoices and documents.¹¹⁷ The Commission staff excepts to this practice as baseless. The item is so small, however, that there is no Commission ruling on it.

III

CONCLUSION

It is apparent that a company faced with a price preference prosecution should prepare its cost justification defense with utmost care. The accountants should be prepared to explain the basis for each allocation employed in the study, and questionable items should be either omitted or allocated in a way that does not aid the justification. It should also be noted that respondent's chances for success are far greater, especially at the negotiation stage, if a study is made before governmental inquiry, and the company's discount structure is based on that study.

Hopefully, the Commission will, in the near future, either issue regulations as to permissible accounting techniques, or begin a series of decisions with more specific findings as to techniques used in particular cases. The probable success of a study could then be more accurately predicted and the needless expenditure of money on exhaustive, but unaccepted, studies avoided.

109 The orders of preferred customers must be larger in the average instance, allowing the salesmen's costs to be more widely distributed, for respondent to obtain partial cost justification through sales costs.

110 [T]he allocation of merchandise expenses was made on the assumption that the cost of each call by a salesman was of equal duration regardless of the purchaser. There is no record basis for such an assumption. *International Salt Co.*, 49 F.T.C. 138, 155 (1952).

111 51 F.T.C. 1114 (1955).

112 Smaller purchasers had less efficient inventory control so their needs could not be so easily determined.

113 The Commission could not except this treatment was injurious to the respondent.

114 *C. E. Niehoff & Co.*, 51 F.T.C. 1114, 1140 (1955).

115 *E.g.*, *Bird & Son, Inc.*, 25 F.T.C. 548 (1937); *United States Rubber Co.*, 46 F.T.C. 998 (1950).

116 *United States Rubber Co.*, 46 F.T.C. 998 (1950) (number of orders).

117 *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948).