

respondent's competitors. It cannot reasonably be inferred from the evidence of record that these instances of off-list pricing have the adverse competitive effect proscribed by the statute. In addition, the evidence does not sustain an inference of predatory intent on the part of respondent in its sales at less than list price, as urged by counsel supporting the complaint. Moreover, with respect to evidence of general price concessions by respondent, we agree with the examiner's holding that "the mere fact of price concessions obviously is meaningless unless such concessions are related to specific transactions" and that such evidence is lacking in this record.

In our review of this record, we have noted that the evidence relates to sales made by respondent between the years 1955 and 1958, principally in 1955 and 1956. Under these circumstances, the Commission is of the opinion that remand of this proceeding for reception of additional evidence is not warranted.

It is, therefore, ordered, That the appeal of counsel supporting the complaint be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated and set aside.

It is further ordered, That the complaint be, and it hereby is, dismissed.

Commissioner MacIntyre not concurring and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

PONCA WHOLESALE MERCANTILE COMPANY

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

Docket 7864. Complaint, Apr. 18, 1960—Decision, Feb. 24, 1964

Order dismissing—for the reason that respondent wholesaler's challenged cigarette sales in the Roswell and Albuquerque, N. Mex., markets were within the "meeting competition" sanction of Sec. 2(b) of the Clayton Act—complaint charging discrimination in price among competing retailer purchasers, in violation of Sec. 2(a) of the Act.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated the provisions of subsection (a) of Section 2 of the Clayton Act (U.S.C.A.

Complaint

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Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Ponca Wholesale Mercantile Company, sometimes hereinafter referred to as Ponca, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 400 South Lincoln Street, Amarillo, Texas.

PAR. 2. Ponca is a wholesale house which sells and distributes a line of cigarettes, cigars, tobacco, candy, school supplies and sundry items to various types of retail business concerns. In 1958 its total sales amounted to approximately \$30,000,000.

PAR. 3. During the period from January 1, 1958, to the present, respondent, from its main office located in Amarillo, Texas, directed and controlled the operations of its approximately 30 wholesale branches located in various cities in the western part of the State of Texas and in the States of New Mexico, Colorado and Arizona. In the course of its business, as aforesaid, Ponca purchased products from sellers located throughout the United States and resold such products to its customers. After purchasing products from various sellers, respondent caused such products to be transported from the places of business of said sellers to respondent's own various places of business, or to the places of business of respondent's customers, which were located in States other than the States in which the shipments of such products originated. In many instances where deliveries of such products were made to respondent's own places of business, respondent, from its main office in Amarillo, Texas, sold, or caused such products to be sold, to customers located in the States of Texas, New Mexico, Colorado, and Arizona. In many additional instances where deliveries of such shipments were made to respondent's own places of business, respondent sold and transported such products, or caused such products, when sold, to be transported from its places of business located in various States to the places of business of its customers located in various other States of the United States. In the aforesaid manner and method, respondent is now, and has been at all times referred to herein, engaged in a constant stream of trade and commerce, as "commerce" is defined in the amended Clayton Act, in said products between and among the various States of the United States.

Such products are, and have been, sold by Ponca to its customers, including chain grocery stores, independent grocery stores and drug stores, for use or resale in the various States of the United States.

PAR. 4. Ponca, in the course and conduct of its business, is now, and has been at all times referred to herein, in substantial competition with other wholesalers engaged in the sale and distribution of products of like grade and quality.

PAR. 5. In the course and conduct of its business, since January 1, 1958, and continuing to the present, Ponca has discriminated in price between different purchasers of its products of like grade and quality by selling such products to some of its customers at higher prices than to other of its customers.

A typical example of such discriminations occurred during the month of March 1958. During that month, Ponca sold cigarettes to a substantial number of non-preferred purchasers at the following invoice prices, plus tax:

<i>Cigarette type</i>	<i>Invoice price (per carton)</i>
Regular size—non-filter.....	\$2. 26
Large size—non-filter.....	2. 35
Large size—filter.....	2. 37

During the same period, respondent sold cigarettes of like grade and quality to a preferred customer, Safeway Stores, Inc., on the basis of the following invoice prices, plus tax:

<i>Cigarette type</i>	<i>Invoice price (per carton)</i>
Regular size—non-filter.....	\$2. 19
Large size—non-filter.....	2. 29
Large size—filter.....	2. 31

PAR. 6. The effect of such discriminations in price, as alleged in paragraph Five herein, may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which Ponca and its wholesale competitors are engaged, or in the line of commerce in which the retail customers of Ponca are engaged, or to injure, destroy or prevent competition with Ponca or with the customers of Ponca receiving the preferred prices.

PAR. 7. The foregoing alleged discriminations in price by respondent Ponca Wholesale Mercantile Company are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. Ross D. Young and *Mr. Ernest D. Oakland*, supporting the complaint.

Mr. W. M. Sutton and *Mr. H. A. Berry* of *Underwood, Wilson, Sutton, Heare & Berry*, Amarillo, Tex., for respondent.

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INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

MARCH 29, 1963

Introductory Statement

Ponca Wholesale Mercantile Company, a corporation, hereinafter called Ponca or respondent, as the case may be, is charged with violating the provisions of subsection (a) of Section 2 of the Clayton Act, (U.S.C.A. Title 15, Sec. 13) as amended by the Robinson-Patman Act, by discriminating in price between different purchasers of products sold by it.

Respondent filed an answer, including a plea to the jurisdiction of the Commission, denying that the acts and practices complained of were "in commerce", as required by the Act, and denied generally the material allegations of the complaint. In the alternative, respondent pleaded that, should it be found that respondent unlawfully discriminated in price, as alleged, that the lower prices charged by respondent to any of its customers were made in good faith to meet an equally low price of a competitor as provided by subsection (b) of Section 2 of said Act.

At the close of the Commission's case-in-chief, respondent renewed its motion to dismiss on the grounds of lack of jurisdiction of the Commission. The motion was denied. Respondent then offered evidence in its own behalf and, following the close of all of the evidence, renewed its motion to dismiss on the grounds that the proof affirmatively showed lack of jurisdiction of the Federal Trade Commission. Specifically, respondent says that, since the proof offered by Commission counsel to support the allegations of the complaint was limited to sales and delivery of merchandise by Ponca to customers solely within the State of New Mexico, no jurisdiction of the Commission has been shown; that, under the Act, one or more sales at the alleged discriminatory prices must be made in interstate commerce before there can be a violation of the Clayton Act, as amended by the Robinson-Patman Act, regardless of whether respondent might otherwise be engaged in interstate commerce.

Counsel have filed proposed findings of fact, conclusions of law, order, briefs, and oral argument had thereon. Subsequently, the record was reopened to receive into the record certain material evidence which occurred since the original closing of the record herein. By stipulation, this new evidence was in affidavit form and the record again closed. The matter is now before the hearing examiner for Initial Decision. All proposed findings of fact and conclusions of law not found or concluded herein are rejected. Upon the basis of the

entire record, the hearing examiner makes the following findings of fact and conclusions of law and issues the order hereinafter set forth:

FINDINGS OF FACT

1. Ponca Wholesale Mercantile Company,¹ respondent herein, is a corporation, incorporated under the laws of the State of Texas, with its office and principal place of business located at 400 South Lincoln Street, Amarillo, Texas. Ponca is now and for several years previous to the issuance of the complaint herein has been engaged in the sale and distribution, at the wholesale level, of cigarettes, cigars, tobacco, candy, school supplies and sundry items to retail business concerns, including individually owned and operated retail stores, such as the corner grocery or drug store, as well as large chain retail grocery and drug stores. In addition to its main office and warehouse in Amarillo, Ponca also maintains separate branch warehouses in various cities in west Texas and New Mexico from which it sells and distributes merchandise at wholesale, including cigarettes and candy, to retail stores in the cities and towns where such branch warehouses of Ponca are located and to other retail stores and establishments within an approximate 50-mile radius of the particular branch warehouse. In New Mexico, Ponca maintains branch warehouses in the following ten cities and towns: Alamogordo, Albuquerque, Carlsbad, Clovis, Farmington, Gallup, Hobbs, Las Cruces, Roswell and Tucumcari.

2. The principal books and records of Ponca are maintained in its main office in Amarillo, Texas. Inventory records of the various branch warehouses of Ponca are sent from such branches to the main office in Amarillo at regular intervals. The branch warehouses mail to the principal office in Amarillo daily reports showing the sales receipts and the amount of money that is deposited by the branch warehouse in the local bank. A list of accounts receivable are mailed regularly by the branch warehouses to the main office in Amarillo.

3. Ponca's over-all total sales for 1960 exceeded \$41,000,000. Sales in 1959 were approximately \$37,000,000, and in 1958, approximately \$32,000,000. Thus, Ponca's total sales are substantial.

4. The complaint alleges, among other things, that, a typical example of Ponca's price discriminations occurred during the month of March, 1958. During that month, the complaint alleges, Ponca sold

¹ Ponca Wholesale Mercantile Company of Arizona and Ponca Wholesale Mercantile Company of Colorado are separate corporations, 100 per cent owned by Ponca, each maintaining its own separate warehouses and branches in Arizona and Colorado, respectively. Each sells cigarettes, cigars, tobacco, and other merchandise to retail stores within the trade area of their respective warehouses, but neither is involved in this proceeding.

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cigarettes to a substantial number of non-preferred purchasers at the following invoice prices, plus tax:

<i>Cigarette type</i>	<i>Invoice price (per carton)</i>
Regular size—non-filter	\$2.26
Large size—non-filter	2.35
Large size—filter	2.37

During the same period, respondent sold cigarettes of like grade and quality to a preferred customer, Safeway Stores, Inc., on the basis of the following invoice price, plus tax:

<i>Cigarette type</i>	<i>Invoice price (per carton)</i>
Regular size—non-filter	\$2.19
Large size—non-filter	2.29
Large size—filter	2.31

The complaint further alleged that: "the effect of such discriminations in price * * * may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which the retail customers of Ponca are engaged, or to injure, destroy or prevent competition with Ponca or with the customers of Ponca receiving the preferred prices."

5. The testimony offered by counsel supporting the complaint with respect to the prices charged by Ponca for any product sold by it to different customers was limited solely to cigarettes and five-cent candy bars. These were sales by Ponca within the State of New Mexico. The evidence with respect to differentials in price on candy bars was further limited to sales to customers located in the City of Albuquerque and immediately adjacent thereto. Thus, all of the evidence offered to substantiate alleged discriminatory prices related to sales of cigarettes and candy to Ponca customers within the State of New Mexico.

6. The record contains many statements and references by various witnesses to "direct" buyers of cigarettes and candy. A "direct" buyer of cigarettes or candy is one who purchases cigarettes or candy direct from the manufacturer as opposed to one who purchases from a source other than the manufacturer, such as from a wholesale distributor or jobber. According to the evidence, the principal customers of cigarette manufacturers are wholesale tobacco distributors, wholesale grocers, cooperatives, retail grocery chains, retail drug chains and Government accounts. The cigarette manufacturers do not sell to the individually owned and operated corner drugstore or grocery store. These stores generally obtain their stock of cigarettes from a wholesale tobacco distributor, such as Ponca. Each cigarette manufacturer sells its particular brand or brands of cigarettes at a uniform price to both the wholesale tobacco distributor and the retail chain purchaser. This means that the wholesale tobacco distrib-

utor and the "direct" retail chain purchaser pay the same price for cigarettes from the manufacturer. Ponca purchases cigarettes and candy direct from the manufacturer. All cigarettes and candy involved in this proceeding were shipped by the manufacturer in case lot and larger quantities to Ponca's various warehouses located in the State of New Mexico, where they were stored pending their sale. Later, they were removed from the warehouse and placed in Ponca trucks in which they were delivered and sold to Ponca's customers in the State of New Mexico, by Ponca route salesmen or delivery men. Neither cigarettes nor candy were shipped direct from the manufacturer to any Ponca customer in the State of New Mexico. All sales and deliveries of cigarettes and candy by Ponca to customers in New Mexico involved in this proceeding were made from stocks on hand in the local Ponca warehouse in the State of New Mexico. Neither cigarettes nor candy were transported from Ponca warehouses in states other than the State of New Mexico to its warehouses in the State of New Mexico.

7. At the time of hearings, Ponca employed approximately 150 salesmen, of which approximately 140 were salesmen who loaded merchandise, including cigarettes and candy, on trucks and delivered it to customers on their respective routes within the trade territory of the particular warehouse which normally includes an area of approximately 50 miles from the city or town in which the warehouse is located. Merchandise is sold and delivered off the trucks by these route salesmen for cash or on credit to customers who have established a credit rating. No cash discounts were allowed for cash payment or for payment within a specified period of time. The remaining 10 salesmen solicited orders in cities or metropolitan areas where the traffic is heavy. In such case, the merchandise is delivered in Ponca trucks from the Ponca warehouse in such city to the customer.

Jurisdiction

8. Before proceeding to a discussion of the alleged price discriminations, respondent's motion to dismiss on jurisdictional grounds will first be disposed of. Respondent's motion to dismiss raises some interesting questions, more especially since the evidence shows that each of the transactions involving the discriminations in price complained about were sales made by Ponca in the State of New Mexico to customers in the State of New Mexico. Respondent claims that, under such circumstances, the sales complained about were intrastate and the Federal Trade Commission is without jurisdiction as to these transactions. In determining jurisdiction of the Commission

under Section 2(a)² of the Clayton Act, should these particular transactions be isolated and considered alone and separate, for jurisdictional purposes, from Ponca's other general business activities, which unquestionably are in interstate commerce?

9. In order to limit the length of this decision, all of the cases on this question will not be discussed. One of the leading cases where the jurisdiction of the Commission under Section 2(a) of the Clayton Act was involved is *Standard Oil Company v. Federal Trade Commission*, 340, U. S. 231, decided January 8, 1951. In that case, Standard was charged with selling gasoline to four large jobber customers in Detroit at a lesser price per gallon than it sold like gasoline to many comparatively small service station customers in the same area, in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The defenses interposed in that case were identical with those here. With respect to the defense as to jurisdiction, that the sales here involved were not in interstate commerce as required by Section 2(a) of the Act, the pertinent facts in the *Standard* case were as follows: The gasoline was refined at Standard's refinery at Whiting, Indiana, from crude oil obtained from fields in Texas, Oklahoma, Kansas and Wyoming. Standard distributed its products in fourteen Middle Western states, including Michigan. The gasoline was transported from the refinery at Whiting in tankers via the Great Lakes from Indiana to Standard's marine terminal at River Rouge, Michigan. The gasoline remained for varying periods at the terminal or in nearby bulk storage stations until it was delivered to Standard's customers in the Detroit area. The Court held that the gasoline delivered to customers in Detroit, upon individual orders for it, was taken from the gasoline at the terminal in interstate commerce enroute for delivery in that area. The Court further stated: "Such sales are well within the jurisdictional requirements of the Act. Any other conclusion would fall short of the recognized purpose of the Robinson-Patman Act to reach the operations of large interstate businesses in competition with small local concerns. Such temporary storage of the gasoline as

² Section 2(a) reads in part as follows: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly received the benefit of such discrimination, or with customers of either of them * * *"

occurs within the Detroit area does not deprive the gasoline of its interstate character." *Stafford v. Wallace*, 258 U. S. 495. Compare *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570, U. S. 257, 268.

10. Applying the doctrine announced in the *Standard Oil* case to the matter here under consideration, it is seen that in many of its business activities, Ponca is engaged in "commerce", as prescribed by the Clayton Act, 15 U.S.C. Section 12. Ponca operates and does business in several States of the United States. It has offices and warehouses in several states. Ponca purchases products, including cigarettes and candy, from various manufacturers located in different parts of the United States, and these products are transported to Ponca's warehouses located in other states for later resale to Ponca's customers. Unquestionably, these business activities in which Ponca is engaged are in "commerce". The circumstance that the cigarettes and candy after purchase, delivery and receipt from the manufacturer at Ponca's warehouses are removed from the case or container in which the cigarettes or candy were shipped and then left in the warehouse until loaded into Ponca's trucks for sale and delivery to a purchaser in the State of New Mexico does not cause the cigarettes or candy to lose their interstate character. During the last few decades, the Courts have broadened their views as to what constitutes interstate commerce. The observation of the Supreme Court in the *Standard Oil* case that "Such temporary storage of the gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character" may be applied here with respect to Ponca's cigarettes and candy transactions. Such temporary storage of the cigarettes and candy as occurs in Ponca's warehouses within the State of New Mexico before delivery and sale to Ponca's customers in New Mexico does not deprive the cigarettes and candy of their interstate character. Accordingly, respondent's motion to dismiss on jurisdictional grounds is denied.

Price Discriminations

11. Ponca carries a complete line of cigarettes and candy. It purchases cigarettes direct from the following manufacturers, among others, American Tobacco Company, Philip Morris, Incorporated, Liggett & Myers Tobacco Company, P. Lorillard Company, R. J. Reynolds Tobacco Company, and Brown & Williamson Tobacco Company.

12. For some period of time prior to June or July of 1957, the above-named manufacturers of cigarettes sold and delivered popular

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priced cigarettes to the various Ponca warehouses in New Mexico and elsewhere at the following prices:

Regular cigarettes, \$8.10 per thousand or \$1.62 per carton; Long unfiltered cigarettes (King size), \$8.55 per thousand or \$1.71 per carton; Filter cigarettes, \$9.00 per thousand or \$1.80 per carton.

In June of 1957, the manufacturers increased their prices of regular and long unfiltered cigarettes, and after such date sold and delivered popular priced cigarettes to the various establishments of Ponca in New Mexico and elsewhere, at the following prices:

Regular cigarettes, \$8.45 per thousand or \$1.65 per carton; Long unfiltered cigarettes (King size), \$8.90 per thousand or \$1.78 per carton; Filter cigarettes, \$9.00 per thousand or \$1.80 per carton.

Each manufacturer allowed to Ponca the usual and customary 2% discount on the amount of the invoice if paid within the time specified by the manufacturer. Ponca took advantage of such discount as well as the discount on stamps purchased by it from the State of New Mexico.

13. During all of the time material herein, there was in effect within the State of New Mexico a so-called cigarette "fair trade" law entitled New Mexico Cigarette Fair Trade Practices Act (Sections 49-2-1 through 49-3-13 New Mexico Statutes Annotated, 1953 compilation) and the Cigarette and Tobacco Tax statutes (Article 14, Sections 72-14-1 through 72-14-17, New Mexico Statutes Annotated, 1953 compilation),³ which, among other things, fixed a minimum price at which a wholesale distributor of cigarettes, such as Ponca, should sell cigarettes to retail establishments. However, these statutes do not prescribe any minimum price at which a manufacturer may sell cigarettes to a wholesale distributor or retail store. The minimum price at which a wholesale distributor, such as Ponca, may sell cigarettes to a retailer is the cost to such wholesaler, as defined by the statute, plus 2% of such cost, and $\frac{3}{4}$ of 1% of the basic cost for cartage charges, where delivered.

14. For a number of years prior to July 1, 1961, the New Mexico Cigarette and Tobacco Tax statutes, above referred to (Sec. 72-14-2), required a five-cent tax stamp to be affixed to each package of cigarettes, aggregating fifty cents per carton. Effective July 1, 1961, the New Mexico cigarette stamp tax was increased to eight cents per package or eighty cents per carton, by amendment to such statute. Section 72-14-6 of the New Mexico statutes, 1953 compilation, placed the duty of affixing the cigarette stamps upon the distributor and direct retail purchaser of cigarettes. The statute also required that

³ Pursuant to the request of counsel, the hearing examiner takes judicial notice of these statutes of the State of New Mexico.

the cigarette stamps were to be sold by the Director of the Luxury Tax Division of the Bureau of Revenue to licensed cigarette distributors and direct buying retailers at the face amount thereof less a discount of 4%. This 4% discount was only allowable on stamp purchases of \$1,000 or more. As a licensed distributor of cigarettes in the State of New Mexico, Ponca was authorized to purchase and did purchase cigarette stamps in amounts of \$1,000 or more, and was qualified to receive and did receive the 4% discount and did affix the required stamps in the State of New Mexico to all cigarettes sold and distributed by Ponca in the State of New Mexico. During all of the times material herein, all cigarettes sold by Ponca to retail stores in the State of New Mexico were at the so-called "fair trade" minimum wholesale price as prescribed by the New Mexico Cigarette Fair Trade Practices Act, except to Safeway Stores, Inc., Food Mart, Inc., Furr's, Inc., and Skaggs Drug Stores, all in the State of New Mexico. Ponca does not deny that it sold cigarettes to these chain stores at lower prices than it charged to other retail stores in the State of New Mexico, but says that it lowered its prices to these four retail chain stores in good faith to meet an equally low price of its competitors as authorized by Sec. 2(b) of the Clayton Act, as amended by the Robinson-Patman Act.

15. Safeway Stores, Inc., is a national retail grocery chain operating more than 2200 stores in approximately 28 or 29 States. Safeway operates 27 retail stores in the State of New Mexico from its El Paso, Texas, division. These 27 New Mexico stores, together with 23 stores in west Texas, are served by a warehouse of Safeway Stores maintained in its El Paso Division headquarters. Merchandise is transported by Safeway trucks from Safeway's warehouse in El Paso to Safeway Stores in New Mexico and also to its stores in west Texas served by the El Paso warehouse. Ponca sold and delivered cigarettes in the State of New Mexico to Safeway stores located in the following towns in New Mexico: Roswell, Albuquerque, Taos, Santa Fe, Las Vegas, Las Alamos, Belen, Cocomero, Carlsbad, Artesia, Deming, Silver City, Las Cruces, Alamogordo and Hobbs.

16. Food Mart, Inc., operates a chain of retail grocery stores in west Texas from El Paso east to Dallas and Fort Worth and also in the following towns in New Mexico: Roswell, Alamogordo, Carrizzo, Truth or Consequences, Silver City, Carlsbad and Las Cruces. Food Mart operates approximately 74 retail grocery stores in Texas and New Mexico. Food Mart maintains a warehouse in El Paso, Texas, and its stores in New Mexico and a portion of its stores in west Texas are supplied with merchandise from its El Paso, warehouse.

17. Prior to 1955, Safeway and Food Mart were purchasing cigarettes for use in all of their stores "direct" from the manufacturer. This included stores operated by them in both Texas and New Mexico. With respect to those cigarettes offered for sale in their New Mexico stores, they were affixing the required New Mexico tax stamps to each package of cigarettes at their respective warehouse in El Paso, Texas, and then transporting the stamped cigarettes in their own trucks to their respective stores in New Mexico as they were doing for their Texas stores served by their respective El Paso warehouse. (Furr's has never affixed New Mexico cigarette tax stamps to cigarettes sold by its retail stores in New Mexico, but has obtained its supply of cigarettes from wholesale cigarette distributors in the State of New Mexico.) However, in 1955, Sec. 72-14-6 of the New Mexico statutes, 1953 compilation, was amended effective in 1956, which required that all cigarette stamps for cigarettes sold in the State of New Mexico should be affixed to the packages within the boundaries of the State of New Mexico. This law made it impossible for Safeway and Food Mart to continue affixing New Mexico tax stamps to cigarettes in their respective El Paso warehouse for later sale in their New Mexico stores and still comply with this New Mexico cigarette tax statute. So, between the time of the amendment to this statute and its effective date, Safeway and Food Mart began making plans to affix the New Mexico tax stamps to cigarettes within the boundaries of New Mexico on cigarettes to be sold in their New Mexico stores, as required by the amendment to the law.

18. Before Safeway and Food Mart completed their respective plans and arrangements for affixing the New Mexico Tax Stamps on cigarettes within the boundaries of the State of New Mexico, representatives of Ponca offered to sell and deliver to the New Mexico stores of such companies,⁴ respectively, cigarettes at a discount of six cents per carton below the New Mexico so-called "fair trade" minimum wholesale price. This price for cigarettes offered by Ponca was slightly higher than the price at which such stores could buy the same cigarettes direct from the respective manufacturer, but by buying from Ponca, Safeway and Food Mart would be relieved of setting up facilities and personnel for affixing the stamps to the cigarettes and also avoid large monetary investments in stocks of cigarettes and stamps. Accordingly, Safeway and Food Mart, respectively, accepted the offers. These pricing arrangements between Ponca and Safeway and Food Mart, respectively, were negotiated and

⁴No representative of a cigarette wholesaler other than Ponca made such an offer to Safeway, but a representative of a competing cigarette wholesaler, Carter Wholesale Tobacco Company, made a similar offer to Food Mart. However, Food Mart chose to deal with Ponca.

arranged separately and began on cigarette sales in early 1956, when the amendment to the New Mexico law became effective, and were continued until there was an increase in the manufacturers' prices for regular and long unfiltered cigarettes. Safeway and Food Mart continued to buy cigarettes direct from the manufacturer for their Texas stores.

19. In June, 1957, the cigarette manufacturers increased the prices of regular and long unfiltered cigarettes. The price of filtered cigarettes was not increased. This increase in price by the manufacturer automatically increased the so-called New Mexico "fair trade" minimum wholesale price of regular and king-size unfiltered cigarettes. These prices remained in effect for approximately four years, July 1, 1957, to July 1, 1961. It was during this period that most of the sales complained about were made by Ponca. The minimum wholesale "fair trade" price for cigarettes in the State of New Mexico during this four-year period was \$2.26 per carton for regular cigarettes, \$2.35 for king-size or long unfiltered cigarettes, and \$2.37 for filtered cigarettes. These prices include a New Mexico State cigarette stamp tax of fifty cents per carton. Prior to the manufacturers' increase in prices of cigarettes in 1957, the discount on cigarettes allowed by Ponca to Safeway and Food Mart was six cents per carton below the so-called New Mexico "fair trade" minimum wholesale price. When the manufacturers increased their prices, Ponca revised the discount on regulars to seven cents per carton. These prices were not less than the prices at which Safeway and Food Mart could have bought the same cigarettes direct from the manufacturer. Thereafter, on July 1, 1961, the cigarette tax in New Mexico was increased from five cents per package or fifty cents per carton to eight cents per package or eighty cents per carton. This operated to increase the New Mexico "fair trade" minimum wholesale price of cigarettes in proportion to the amount of increase in tax and a like increase in prices charged by Ponca to Safeway and Food Mart for stamped cigarettes, delivered to the New Mexico stores for such companies. After this increase in the cigarette tax, Ponca's discount to Safeway and Food Mart remained the same, seven cents per carton below the New Mexico so-called "fair trade" price for regular cigarettes and six cents below the "fair trade" price for long unfiltered and filtered cigarettes. The long unfiltered cigarettes are commonly referred to as "king" size.

20. The sale of "king" size and filtered cigarettes constitutes the largest part of Ponca's cigarette sales, volumewise. Ponca makes a profit of approximately six cents per carton on cigarettes even after granting an allowance or discount of six cents per carton. However,

out of the six cents left, Ponca must pay the cost of affixing the tax stamps to the cigarettes and their delivery. The cost of affixing tax stamps to cigarettes by hand is approximately $\frac{1}{2}$ cent per carton and considerably less if done by machine.

21. Furr's, Inc., is a retail grocery chain with approximately 60 retail grocery stores in Texas, New Mexico, and Colorado. Its headquarters are located in Lubbock, Texas. It maintains a warehouse in Lubbock from which it supplies its stores in Texas and New Mexico. Furr's stores in New Mexico are located at Albuquerque, Clovis, Hobbs, and Roswell. Furr's is a direct buyer of cigarettes from the manufacturer for all of its retail stores in Texas. Furr's opened its first retail store (No. 24) in the State of New Mexico at Albuquerque in 1952 or 1953. Furr's began purchasing cigarettes for this store from Ponca at the so-called New Mexico cigarette "fair trade" price. In 1954, Furr's opened a second store in Albuquerque, No. 25, and Ponca began to supply this store with cigarettes, in addition to No. 24, at the so-called New Mexico "fair trade" price. In June, 1956, Furr's decided to split its cigarette buying. It discontinued buying cigarettes from Ponca for its store No. 24 and began buying cigarettes from Rocky Mountain Wholesale Co., an Albuquerque, New Mexico, tobacco wholesaler, for its store No. 24 in Albuquerque, at the same price it had been paying Ponca. (The New Mexico so-called "fair trade" price.) Furr's continued to purchase cigarettes from Ponca for its Albuquerque store No. 25, at the so-called New Mexico "fair trade" price.

22. In the summer of 1956, Furr's began seriously considering the purchase of cigarettes direct from the manufacturer for their two stores in Albuquerque and a third which they were preparing to open in September, 1956. In such an event, Furr's would affix the state cigarette tax stamps to the cigarettes within the State of New Mexico. At this time, Mr. Hill, Division Manager for Ponca in Albuquerque, learned that Furr's was considering purchasing cigarettes direct from the manufacturer and stamping the cigarettes in New Mexico. Mr. Hill called at Furr's headquarters in Lubbock and inquired if Furr's would be interested in purchasing cigarettes from Ponca for their Albuquerque stores at a discount of 2 percent below the New Mexico so-called "fair trade" price. This would relieve Furr's of setting up facilities for stamping cigarettes in New Mexico and investing in stocks of cigarettes and stamps. Mr. Sparks, at that time Supervisor in the General Merchandise Department of Furr's Lubbock headquarters, told Hill that Furr's might be interested and would consider it. After considering the offer, Furr's decided to accept the 2 percent discount offered by Ponca and not buy their cigarettes "direct" and stamp them in New Mexico even though

it might cost Furr's less money to buy direct and stamp the cigarettes in New Mexico. Furr's accepted the offer and Ponca began serving two of its stores in Albuquerque in September, 1956. For a while, until June, 1957, Furr's continued to purchase cigarettes for its No. 24 store in Albuquerque from Rocky Mountain Wholesale Co. At that time, June, 1957, Furr's stopped buying cigarettes for its store No. 24 in Albuquerque from Rocky Mountain Wholesale and began buying from Ponca. Mr. Sparks testified that Furr's did this for two reasons: First, because of the 2 percent discount; and second, Ponca gave Furr's a little better service than Rocky Mountain. In April, 1959, Ponca voluntarily increased the discount to Furr's from 2 percent to 7 cents per carton on regular cigarettes and 6 cents per carton on king size non-filter and filter cigarettes. This was to equalize the discount to that which Ponca was granting Safeway and Food Mart. Of course, this price was above the price the manufacturer was then charging for cigarettes. Mr. Sparks further testified, and it is found, that if Furr's should not be able to continue purchasing cigarettes from Ponca at the discount price and have to begin paying the so-called New Mexico "fair trade" price from a New Mexico cigarette distributor, Furr's would begin buying cigarettes direct from the manufacturer and stamping them in New Mexico for its New Mexico stores.

23. Skaggs Drug Stores, Inc., is a retail drug chain, which operates 29 retail drug stores in Utah, Montana, Idaho, Nevada, Arizona, Colorado, New Mexico, and Texas. Its headquarters are in Salt Lake City, Utah. Its store managers do the buying and operate each store as an individual unit. Skaggs opened its store No. 15 in Albuquerque in August, 1953. The Skaggs stores buy candy direct from the manufacturer. However, the Skaggs store No. 15 in Albuquerque began buying cigarettes from Ponca when it was opened in 1953 at a discount of six cents per carton below the New Mexico so-called "fair trade" price. Mr. E. L. Elwell, Merchandise Manager for Skaggs, among other things, testified that Skaggs has considered buying cigarettes direct from the manufacturer from time to time; if Skaggs could not purchase cigarettes from Ponca or some other distributor at the same discount they are now receiving from Ponca, they will begin buying cigarettes direct from the manufacturer for their Albuquerque store. They have discussed with the representatives of several cigarette manufacturers the purchase of cigarettes direct.

24. The Skaggs store No. 15 in Albuquerque buys some candy direct from the manufacturer, such as Mars and Hershey 24-count boxes of five-cent candy bars, for eighty cents per box, less a 2%

discount if paid in 10 days. They can buy some candy at seventy-five cents per box. Skaggs also purchases some candy from Ponca for its store No. 15 in Albuquerque at eighty cents per box, plus 2%. Ponca receives a 2% discount from the manufacturer if paid within 10 days. If Skaggs bought the same candy direct from the manufacturer, the price would be eighty cents, less 2%. If Skaggs could not buy candy from Ponca at eighty cents per box less 2%, it would buy direct from the manufacturer at eighty cents per box, less a 2% discount if paid in 10 days.

25. Counsel supporting the complaint has also offered evidence showing sales of cigarettes by Ponca at prices below the so-called New Mexico "fair trade" price to H. O. Wooten Grocery Company, a wholesale grocery company, Odessa, Texas, but delivered to Cashway Supermarket, Inc., Hobbs, New Mexico, and to Ace Wholesale Mercantile Company, a wholesale grocery, operated by Bromberg's Inc., Albuquerque, New Mexico, which counsel contends are also in violation of Section 2(a) of the Act. The sales to these two wholesalers will be discussed separately. Cashway Supermarket, Inc., Hobbs, New Mexico, operates six grocery stores of the supermarket type, three in Hobbs, one in Lovington, one in Clovis, and one store in Carlsbad, New Mexico. Mr. Thomas B. Schnaubert, the owner and General Manager of Cashway, was called as a witness by counsel supporting the complaint. Mr. Schnaubert testified, among other things, the following: In 1957, Cashway discontinued buying groceries from Kimball Wholesale Grocery Company of Albuquerque, and began to buy from H. O. Wooten Grocery Company of Odessa, Texas, at a net price, including both groceries and cigarettes. Cashway had been buying its cigarettes from Rocky Mountain Wholesale Co., Inc., a wholesale tobacco distributor, of Albuquerque, New Mexico, with branches in Hobbs, Roswell, Santa Fe, and Farmington, New Mexico. After it switched to Wooten Grocery Company, it developed, however, that Wooten could not ship cigarettes from Texas into the State of New Mexico due to the requirements of the New Mexico Cigarette tax law that the tax stamps should be affixed to the packages of cigarettes within the boundaries of the State of New Mexico. Wooten Grocery Company then made an arrangement with Ponca to purchase cigarettes from Ponca for delivery to Cashway. Under the arrangement, Ponca delivered cigarettes direct to Cashway and billed H. O. Wooten Grocery Company for the cigarettes at the minimum New Mexico "fair trade" wholesale price and, in turn, Cashway paid Wooten for the cigarettes. Cashway was supposed to receive a three cents per carton discount from the so-called

New Mexico "fair trade" price from H. O. Wooten Grocery Company in cooperative advertising. This arrangement lasted for six or seven months. Mr. Schnaubert was unable to say whether Cashway actually received the three cents per carton discount on cigarettes because the checks received from H. O. Wooten Grocery Company for cooperative advertising were in lump-sum amounts and included a lot of items in the retail grocery business other than cigarettes.

26. Counsel supporting the complaint takes the position that the cigarette sales were from Ponca to Cashway and the interposition of Wooten Grocery Company was a subterfuge to hide the three cents per carton discount which Cashway was supposed to receive. Counsel urges that CX 99 is proof of this contention. CX 99 purports to be a letter from Mr. Schnaubert, the owner and General Manager of Cashway, to Rocky Mountain Wholesale Co. Mr. Schnaubert states in this letter that H. O. Wooten Grocery Company and Ponca had reached an agreement, the details of which Mr. Schnaubert was not familiar with, whereby Cashway would receive a three cents per carton discount from Wooten for advertising. Counsel supporting the complaint suggests that Mr. Schnaubert's testimony was "reluctant" and that Wooten Grocery Company was nothing but a "straw". To make such a finding, it would be necessary to disregard the testimony of Mr. Schnaubert. Mr. Schnaubert was called as a witness for the Commission, under subpoena, and, from his observation of the witness and his demeanor while testifying, this hearing examiner is of the opinion that Mr. Schnaubert was forthright and truthful in his testimony. Accordingly, this hearing examiner finds that the arrangement between Wooten Grocery Company and Ponca was, as testified to by Mr. Schnaubert. The discount, if any, was granted by H. O. Wooten Grocery Company. Cashway buys five-cent bar candy from the manufacturer at eighty cents per box, such as Hershey and Mars, and has bought the same candy from Ponca at the same price.

27. Ace Wholesale Mercantile Company is a wholesale grocery in Albuquerque. It is owned and operated by Bromberg's, Inc., Albuquerque, New Mexico. Bromberg's Inc., also operates a retail grocery under the name of El Cambio. The two stores are operated at the same address. Prior to the incorporation of Bromberg's Inc., in 1959, they were operated as a partnership by the same family for more than twenty-five years. Ace Wholesale's volume of business in recent years is not as large as formerly. At the time of the hearing, Ace had only about three wholesale customers for cigarettes. However, the circumstance that Ace's wholesale business has fallen off

in recent years does not destroy its identity as a wholesaler. Ace Wholesale Mercantile Company holds a wholesale tobacco license under the New Mexico cigarette and tobacco laws, and for this reason, is authorized to buy cigarettes at the wholesale or jobber's price under the New Mexico so-called "fair trade" cigarette laws. Ace Wholesale does not buy cigarettes direct from the manufacturer but buys cigarettes from Ponca at the wholesale or jobber's price, as it is authorized to do under the New Mexico laws, above stated. Ace has been buying cigarettes from Ponca for the past 13 years. Ace Wholesale buys most of its candy direct from the manufacturer, including Hershey and Mars five-cent candy bars, at eighty cents per box, less a 2% discount if paid within 10 days.

28. Although not urged in their proposed findings of fact, Commission counsel offered in evidence an invoice, CX 10G, which ostensibly represents a sale of cigarettes by Ponca to one Bruck at the New Mexico wholesale price, purportedly to support the charge of price discrimination in the sale of cigarettes. Testimony later offered by respondent (TR. 950-952) established the fact that Mr. Bruck was a sales representative for Liggett & Myers Tobacco Company, a cigarette manufacturer. Liggett & Myers holds a New Mexico State Wholesale Tobacco Dealers Permit and, as such, was entitled to purchase cigarettes from Ponca at the wholesale price. Representatives of tobacco manufacturers call on retail merchants and, if the retailer is in short supply of cigarettes of that manufacturer, the representative will purchase a few cartons from a local wholesale tobacco dealer as a fill-in for that retailer until the wholesale distributor makes his next call on that retailer. The sale represented by invoice CX 10G was a sale of cigarettes by Ponca to Liggett & Myers Tobacco Company at the New Mexico wholesale price and was not an unlawful discrimination in price.

29. Subsequent to the closing of hearings in this proceeding, Ponca discontinued granting the 6 cents and 7 cents per carton discount on cigarettes sold to Safeway, Food Mart and Furr's for delivery and subsequent resale in their New Mexico stores and raised its cigarette prices to Safeway, Food Mart and Furr's to the higher New Mexico "fair trade" cigarette prices. Thereafter, these stores ceased buying cigarettes from Ponca for sale in their New Mexico stores and began buying cigarettes direct from the manufacturer at the lesser prices charged by the manufacturer as they were then doing for their Texas stores.⁵ The requirement of the New Mexico cigarette tax law

⁵ Effective April 14, 1962, April 16, 1962, and December 3, 1962, respectively, Safeway, Food Mart, and Furr's discontinued the purchase of cigarettes from Ponca for delivery to their respective retail stores in New Mexico and began buying cigarettes direct from the manufacturer for later resale in these stores.

that, for cigarettes sold in retail stores in the State of New Mexico, the New Mexico cigarette tax stamps must be affixed to each package of cigarettes within the boundaries of the State of New Mexico was waived by the New Mexico cigarette tax authorities, and Safeway, Food Mart and Furr's were then enabled to affix the New Mexico cigarette stamps to the packages of cigarettes in their Texas warehouses and then transport the stamped cigarettes to their New Mexico stores. Since discontinuing their purchase of cigarettes from Ponca, Safeway, Food Mart and Furr's have been supplying their retail stores in New Mexico with cigarettes purchased directly from the manufacturer after same have been stamped by Safeway, Food Mart and Furr's in their Texas warehouses with the New Mexico cigarette tax stamps of 8 cents per package or 80 cents per carton. This evidence was in affidavit form and received into the record by stipulation.

30. Under such circumstances, no prescribed injury could or may have resulted to competition at any level from the sale by Ponca to Safeway, Food Mart and Furr's at prices higher than the same cigarettes were available to these stores from the manufacturer. If any injury to competition would or may result from the facts established by the record herein, such injury or possible injury, if any, resulted or would have resulted from the fact that these stores could buy cigarettes and did buy cigarettes from the manufacturer, both before and after Ponca supplied them, at prices less than the prices charged by Ponca, and not from Ponca's acts, but from conditions and circumstances over which Ponca has no control, and with which it could not be charged with responsibility for causing.

31. Representatives of each of the cigarette manufacturers testified that there was no reason, from the standpoint of the cigarette manufacturers, why Safeway, Food Mart, Furr's and Skaggs Drug Stores could not have purchased cigarettes directly from the manufacturers for delivery and distribution in the State of New Mexico during all of the years 1958 through 1961, involved in this proceeding, had such companies desired to do so. It is not denied that the cigarette manufacturers would have sold and shipped cigarettes to Safeway, Food Mart, Furr's and Skaggs Drug Store to places designated by them in the State of New Mexico during 1958 through 1961, at the same prices charged by the cigarette manufacturers to Safeway, Food Mart, and Furr's for delivery at their warehouses in El Paso and Lubbock, Texas, and at the same prices charged to Ponca. Although Skaggs Drug Stores, Inc., was not actually buying cigarettes directly from the manufacturer at the time of hearings herein, the evidence shows that Skaggs could have bought direct if

it had desired to do so. Skaggs was qualified to buy direct and had made formal application to P. Lorillard Company to buy direct and had received the favorable recommendation of the field representatives of Lorillard, but no final action had been taken at the request of Skaggs because Skaggs was not then ready to receive shipments of cigarettes direct. Unquestionably, Skaggs could have bought cigarettes direct from the manufacturer instead of Ponca, had it desired to do so.

32. The evidence shows that if Safeway, Food Mart, Furr's and Skaggs had not been able to make the arrangements with Ponca for the purchase of cigarettes at the prices agreed upon, which were lower than the New Mexico "fair trade" price, these companies would have purchased cigarettes directly from the manufacturer and stamped the cigarettes in the State of New Mexico, and would have supplied their New Mexico stores with cigarettes so purchased and stamped, at lessser prices than they purchased stamped cigarettes from Ponca. The testimony of the witnesses to this effect is corroborated by actual events which have transpired since hearings herein were completed. These events were the following: (1) Subsequent to the close of hearings herein, Ponca discontinued granting the 6 cents and 7 cents discount on cigarettes sold to Safeway, Food Mart and Furr's and raised its price to the New Mexico "fair trade" price; (2) After Ponca raised its price, these stores ceased buying cigarettes from Ponca and began buying cigarettes direct from the manufacturer for use in their New Mexico stores. So, the evidence is conclusive that if Ponca had not sold the cigarettes to these stores at the prices which it negotiated with these stores, they would have bought the cigarettes for their New Mexico stores direct from the manufacturer.

33. All sales of cigarettes by Ponca to retail establishments in the State of New Mexico, other than to Safeway, Food Mart, Furr's and Skaggs, were at uniform prices without any discounts or allowances and in accordance with the prices established by the New Mexico cigarette "fair trade" law. There is no evidence of sales at other prices than to those four retail establishments above named. Furthermore, there is no evidence in the record that Safeway, Food Mart, Furr's or Skaggs have ever sold cigarettes in their New Mexico stores at less than the minimum prices established by the New Mexico so-called "fair trade" law. No injury to competition or to any competitor of Ponca or lessening of competition or creation of a monopoly resulted from the sale by Ponca to Safeway Stores, Inc., Food Mart, Inc., Furr's, Inc., and Skaggs Drug Stores of cigarettes at the prices same were sold since like cigarettes were available

to such stores from the cigarette manufacturers at the same or lower prices. As a wholesale distributor of cigarettes, Ponca is in direct competition with the cigarette manufacturers in selling cigarettes to chain stores and large volume buyers who buy or who can qualify to buy cigarettes direct from the manufacturers at the same price that Ponca can purchase cigarettes from the same cigarette manufacturer. In making the sales of cigarettes complained about to Safeway, Food Mart, Furr's, and Skaggs at prices less than the prices established by the New Mexico cigarette so-called "fair trade" law, but not less than the cigarette manufacturer's prices, Ponca was acting in good faith to meet an equally low or lower price of a competitor, namely, the cigarette manufacturer. The cigarette manufacturer's price was a then existing, available price, and was the same to all purchasers from the manufacturer.

34. Under the evidence of record, the cigarette manufacturers are competitors of Ponca in selling cigarettes to retail chain grocery and drug stores at the same prices at which the manufacturers sell the identical cigarettes to Ponca. Ponca did not reduce its price of cigarettes to Safeway, Food Mart, Furr's or Skaggs Drug Stores as part of a general pricing scheme, but did so on an individual and separately negotiated basis to meet the competition of the cigarette manufacturers. Contemporaneously with the time that Ponca was selling cigarettes to Safeway, Food Mart, Furr's and Skaggs Drug Stores at the discount prices complained about, like cigarettes were available to such chain stores from the cigarette manufacturers at lower prices than they were available to retail establishments who were not direct buyers of cigarettes from the cigarette manufacturers. The prices at which the cigarette manufacturers sold or offered to sell cigarettes to Safeway, Food Mart, Furr's and Skaggs Drug Stores in New Mexico and the prices at which cigarettes were available to the New Mexico stores of such companies from the cigarette manufacturers were not unlawful. Under the circumstances, a reasonably prudent person would believe that the lower prices of the cigarette manufacturers which Ponca was meeting in lowering its prices of cigarettes to the New Mexico stores of Safeway, Food Mart, Furr's and Skaggs Drug Stores were lawful prices.

35. With respect to the cigarette sales by Ponca to Ace Wholesale Company, H. O. Wooten Grocery Company, and Liggett & Myers Tobacco Company, it should be noted that these companies perform different economic functions than retail establishments in the sale and distribution of cigarettes. Ace, Wooten and Liggett & Myers do not compete with retail stores in the sale of cigarettes directly to the ultimate consumer. Contemporaneously with the times that Ace,

Wooten, and Liggett & Myers purchased cigarettes from Ponca, like cigarettes were available to Ace, Wooten and Liggett & Myers from other wholesale distributors of cigarettes under the so-called New Mexico "fair trade" law at prices less than the prices to be charged under said "fair trade" law to retail stores who were not direct buying retailers. In lowering the price for cigarettes charged by Ponca to Ace, Wooten and Liggett & Myers below that charged by Ponca to retail stores who were not direct buying retailers, Ponca was meeting but not beating an equally low price charged by other wholesale distributors or manufacturers of cigarettes and which they were entitled to charge under the so-called New Mexico "fair trade" price law. In lowering the prices charged to Ace, Wooten, and Liggett & Myers below those charged by Ponca to retailers who were not direct buyers, Ponca acted in good faith to meet an equally low price of a competitor, namely, other wholesale tobacco distributors. The prices at which cigarettes were available to Ace, Wooten and Liggett & Myers from other wholesale distributors were not unlawful. Under the facts and circumstances then existing, a reasonably prudent person would believe that the lower prices which Ponca was meeting by lowering its prices to Ace, Wooten, and Liggett & Myers for cigarettes were lawful prices.

36. In addition to Ponca's alleged price discriminations in the sale of cigarettes hereinabove discussed, Commission counsel also offered evidence purporting to show discriminations in price by Ponca in sales of 24-count boxes of five-cent candy bars. During hearings held in Roswell and Albuquerque, New Mexico, for the presentation of evidence by Commission counsel to support its case-in-chief Commission counsel offered evidence as to prices charged by Ponca to different customers in those towns for 24-count boxes of five-cent candy as well as for cigarettes. However, at a subsequent hearing held in Roswell, during the presentation of evidence on behalf of respondent, after Commission counsel had concluded their case-in-chief, and while respondent's counsel was offering evidence and testimony to support its good faith meeting of competition defense under Section 2(b) of the Clayton Act with respect to sales of 24-count boxes of five-cent bar candy in the Roswell, New Mexico, area, Commission counsel objected to said testimony on the grounds that the evidence offered by Commission counsel at previous hearings did not prove any price discrimination in candy sales by Ponca in Roswell. Commission counsel stated that the only evidence in the record to support the allegation of discrimination in price of candy sales by Ponca were candy sales by Ponca to retail stores in Albuquerque, New Mexico (Tr. 724-725). The hearing examiner concurs

with Commission counsel's evaluation of the testimony in this respect. The evidence shows that Ponca's candy sales in the Roswell area were at a uniform, non-discriminatory price of 85 cents per box for 24-count five-cent bar candy. The Roswell trade area is a separate and different trade territory than Albuquerque, New Mexico. The City of Roswell is approximately 225 miles from Albuquerque. Therefore, only those sales by Ponca of 24-count boxes of five-cent candy bars to its customers in Albuquerque will be considered in determining whether Ponca discriminated in price as to five-cent candy bars, and if so, were the sales at the lower price made in good faith to meet an equally low price of a competitor, as recognized by subsection (b) of Section 2 of the Clayton Act, as amended.

37. Ponca buys 24-count boxes of five-cent bar candies direct from the manufacturer, including Hershey Chocolate Corporation, Mars, Inc., Sweets Company of America, Hollywood Brands, Inc., Planters Nut and Chocolate Company, James O. Welsh Sales Corp., and others, at prices ranging from 72 to 80 cents per box. The manufacturer generally allows a 2 percent discount from these prices if the account is paid within a certain period of time, ranging from 10 days to 30 days. These prices were in effect at the time of hearings in 1961. Each of the alleged discriminatory candy sales involved in this proceeding was sold and delivered by Ponca from Ponca's warehouse in Albuquerque or Roswell after the candy had been received from the manufacturer and stored in Ponca's Albuquerque or Roswell warehouse. The candy manufacturers last increased their prices approximately 10 years ago. Prior to that increase, Ponca attempted to sell its 24-count five-cent bar candy at 85 cents per box. To meet competition in some accounts, Ponca reduced the price accordingly. After the price increase by the manufacturers, Ponca, on the whole, has attempted to sell its 24-count five-cent bar candy in the Albuquerque trade area at 90 cents per box. However, with respect to numerous retail stores in Albuquerque, including Walgreen and Skaggs Drug Stores, Ponca has reduced its price of 24-count five-cent bar candy to these stores below the 90 cent price which it has charged other retail customers in order to meet a lower price of the candy manufacturer or a competitor wholesale candy distributor. Some of these sales will now be discussed.

38. The evidence shows that the sales of the popular brands of 24-count five-cent bar candy to retail stores in the Albuquerque area is highly competitive between candy wholesalers. Their prices to retail stores vary. In the Albuquerque area, the following wholesale grocery companies and wholesale candy distributors are competitors of Ponca in selling 24-count five-cent candy bars to retail stores:

Kimbell Albuquerque Company, Charles Ifeld Company, Associated Grocers, Rocky Mountain Wholesale Company, Inc., Valley Distributing Company, Allen Candy Company, and Gholson Brothers. These companies also purchase their candy direct from the manufacturer at the same price that Ponca pays and with the same 2 percent discount for prompt payment. These prices range from 72 cents per box for boxes of 24 bars to 80 cents per box for the more popular brands such as Hershey, Tootsie Roll, Milky Way, Snicker, 3 Muskateers, Butterfinger, and Baby Ruth.

39. Kimbell Albuquerque Company is a Wholesale grocery company, carrying a full line of groceries and candies. It maintains a warehouse in Albuquerque. Its customers are retail grocery stores, but it sells to other types of retail stores as well. In October, 1959, Kimbell purchased the Charles Ifeld Company, a wholesale grocery company then doing business in New Mexico. After Kimbell purchased the Charles Ifeld Company in October, 1959, it merged the Ifeld Company into its own business. Kimbell Albuquerque Company had been operating in Albuquerque prior to its purchase of the Charles Ifeld Company. During its operation, the Charles Ifeld Company made it a practice to distribute weekly price lists to its customers. These price lists were printed on its regular order forms. On this price list, all items of merchandise offered for sale, including candy, were listed at the "cost" price to Ifeld before allowance of the 2 per cent discount allowed by the manufacturer for prompt payment. This "cost" price was the price charged by the manufacturer to Ifeld for the candy or other merchandise before discount for prompt payment. When Kimbell Albuquerque Company purchased the business of Charles Ifeld Company in 1959, Kimbell continued this pricing practice and same was in effect at the time of hearings herein. The "cost" price shown on the price list and order form, plus an up-charge or mark-up added by Kimbell is the amount or price charged by Kimbell Albuquerque Company to its retail customers for candy and other merchandise sold to them. This price list is distributed weekly by Kimbell to its customer retail stores and lists the cost of 24-count boxes of five-cent candy bars at prices ranging from 72 cents to 80 cents per box for the more popular brands. These prices are the same prices charged by the manufacturer to Ponca for the same brands and types of bar candies. To such amount (72 cents to 80 cents per box of bar candy) and the cost of other merchandise, are added the up-charge, as listed on Kimbell's weekly price list (RX 3-3B), ranging from 3 percent on weekly purchases of \$1500 or less, down to 1½ percent on

