

IN THE MATTER OF
THE KROGER COMPANY

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED
VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9102. Complaint, July 1, 1977—Final Order, Sept. 25, 1981

This order requires, among other things, a Cincinnati, Ohio, operator of a major retail food chain to cease advertising survey-based food price comparisons which refer to any geographic area or competitor unless the survey that forms the basis for such claims is designed and executed in a competent and reliable manner. The company is required to ensure that employees responsible for pricing merchandise are not aware of the items selected for the survey prior to its completion, and that items to be surveyed be selected either randomly or using a representative sample of the products to be covered by the ad claims.

Appearances

For the Commission: *Eddie Correia, Paul Eyre, William Jacobs, Noble Jones, and Willie L. Greene.*

For the respondent: *Stuart J. Land, Melvin Spaeth, Kenneth A. Letzler, Robert S. Thorpe, James A. Beat, Jerold M. Block, and Vicki J. Divoll, Arnold & Porter, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Kroger Company, a corporation, respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, and that a proceeding by it in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. Respondent is an Ohio corporation with its principal office at 1014 Vine St., Cincinnati, Ohio.

PAR. 2. Respondent, through its wholly-owned subsidiaries, is engaged in the operation of approximately 1,250 retail food stores in 20 states. In 1975, respondent ranked third in terms of sales in the United States among companies operating retail food stores. In the operation of these stores, respondent sells an extensive line of items, including food, groceries, and other merchandise. Respondent causes said items to be transported from its places of business in various States of the United States to its stores located in various other States of the United States. [2]

PAR. 3. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in the production,

processing, distribution, advertising, and sale of the aforesaid items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent has been, and is now, conducting an advertising program known as the Kroger Price Patrol in or affecting commerce, as commerce is defined in the Federal Trade Commission Act.

PAR. 4. As part of its advertising program, respondent is, and has been, engaged in advertising results of price surveys generally represented to the consumer as the "Kroger Price Patrol." The Price Patrol compares, on a weekly basis, the prices of the products of respondent's competitors with respondent's stated prices for approximately one hundred fifty (150) items. The results of this comparison are advertised in the format of tables reflecting the number of respondent's prices which are "lower than," "higher than," or "the same as" the competitors' prices.

Typical of the substance of these tables is the following: [3]

STORE	"Kroger" was Lower on "Big many Items"	"Kroger" was Higher on "Big many Items"	"Kroger" was the same on "Big many Items"
A	100	0	0
B	82	0	0
C	103	0	0
D	85	0	0
E	87	0	0
F	125	0	0
G	111	0	0
H	117	0	0

PAR. 5. Through the use of Price Patrol advertisements, respondent has made, and is now making, statements with regard to the Price Patrol Survey and the Survey results which accompany the tables described in Paragraph Four. Among said statements are the following:

Kroger is the Low Price Leader! The Price Patrol Proves It.

The Price Patrol Proves You Save More at Kroger. [4]

Documented Proof: Kroger Leads in Lower Prices!

Price Patrol Proof, Kroger Leads with Low Prices.

Shopping at Kroger will enable you to spend less for your food than at any other store.

PAR. 6. By the use of the tables described in Paragraph Four and the statements described in Paragraph Five, and others of similar meaning, respondent has represented, directly or by implication, that:

- A. The Price Patrol Survey is a methodologically sound survey.
- B. The results of the Price Patrol Survey prove that most items in respondent's stores are priced lower than in competitors' stores.
- C. The results of the Price Patrol Survey prove that shopping at Kroger, rather than at competitors' stores, will result in lower overall expenditures.
- D. The results of the Price Patrol Survey prove that the amount of savings in overall expenditures by shopping at Kroger is directly related to Kroger's relative performance on the Survey. [5]

PAR. 7. In fact:

- A. The Price Patrol Survey is not a methodologically sound survey.
- B. The results of the Price Patrol Survey do not prove that most items in respondent's stores are priced lower than in competitors' stores.
- C. The results of the Price Patrol Survey do not prove that shopping at Kroger rather than at competitors' stores will result in lower overall expenditures.
- D. The results of the Price Patrol Survey do not prove that the amount of savings in overall expenditures by shopping at Kroger is directly related to Kroger's relative performance on the Survey.

Therefore, the tables, statements and representations set forth in Paragraphs Four, Five and Six were, and are, unfair and deceptive practices.

PAR. 8. The advertising statements described in Paragraph Five, and the tables described in Paragraph Four, and others of similar meaning, represent, directly or by implication, that shopping at Kroger, rather than at competitors' stores, will result in lower overall expenditures.

PAR. 9. At the time respondent made the representations alleged in Paragraph Eight, it did not possess and rely on a reasonable basis for the representations. Therefore, the said advertisements are deceptive or unfair. [6]

PAR. 10. The advertising statements described in Paragraph Five, and the tables described in Paragraph Four, represent, directly or by implication, that at the time respondent made the representations alleged in Paragraph Eight, it possessed and relied on a reasonable basis for those representations, whereas in truth and in fact respondent did not possess and rely on a reasonable basis for said representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 11. In the course and conduct of its Price Patrol advertising program, respondent has engaged in the following additional unfair and deceptive practices: respondent's Price Patrol advertisements fail to disclose that meat, produce, and house brands are not included in respondent's Price Patrol Survey.

Thus, respondent has failed to disclose material facts which, if known to certain consumers, would be likely to affect their consideration to purchase respondent's items. Therefore, these practices were, and are, unfair and deceptive practices.

PAR. 12. The use by respondent of the aforesaid deceptive and unfair practices has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the purchase of substantial quantities of respondent's items. Therefore, these practices were and are to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

THE KROGER CO.

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Initial Decision

INITIAL DECISION BY

MONTGOMERY K. HYUN, ADMINISTRATIVE LAW JUDGE

JUNE 11, 1979

PRELIMINARY STATEMENT

On June 28, 1977, the Federal Trade Commission ("Commission") issued a Complaint, charging The Kroger Company ("Kroger" or "respondent") with unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) in connection with certain advertising claims made in the retail sales of food products (the so-called "Price Patrol" advertisements). By Answer dated August 24, 1977, as amended by Order Granting In Part Respondent's Motion For Leave To Amend And Denying Respondent's Application For A Determination Permitting Interlocutory Appeal, dated November 15, 1977, respondent denied that it had violated the Federal Trade Commission Act as charged and interposed certain affirmative defenses. By Order Ruling On Complaint Counsel's Motion For [2]Summary Decision, dated May 17, 1978 (hereinafter sometimes referred to as "the Summary Decision Order"), and issued after oral argument, the administrative law judge determined that respondent had made certain representations in its Price Patrol advertisements as alleged in Paragraph Six A, B and C and Paragraph Eight of the Complaint. The parties were allowed extensive pretrial discovery. Prehearing conferences were held from time to time in order to simplify the issues, to resolve disputes related to discovery and generally to expedite the trial preparation of the parties. Two separate attempts at reaching a mutually acceptable consent order agreement undertaken in 1978 under my urging were unsuccessful. Evidentiary hearings were held from July 17 to July 25, 1978, in Washington, D.C., for complaint counsel's case-in-chief with respect to the remaining issues, including the issues of reasonable basis, disclosure of material facts and relief. Defense hearings were held from February 5 to February 15, 1979 in Washington, D.C. The parties filed proposed findings, conclusions of fact and law, and proposed order, together with supporting briefs, on April 10, 1979 and answers on April 25, 1979.

The proposed findings, conclusions and orders of the parties and their arguments in support thereof have been given careful consideration and to the extent not adopted by this Initial Decision, in the form proposed or in substance, are rejected as not supported by the evidence, irrelevant or as immaterial. Any motion appearing on the

record not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied.

Upon consideration of the entire record in this proceeding and having observed the demeanor of the witnesses, I make the following findings of fact and conclusions of law and order, based on the record considered as a whole:¹ [3]

FINDINGS OF FACT

I. Introduction

A. *Identity of Respondent and the Nature of Its Business*

1. The Kroger Company ("Kroger") is an Ohio corporation with its principal office at 1014 Vine St., Cincinnati, Ohio (Comp. ¶ 1, Ans. ¶ 1).

2. Kroger is engaged in the operation of approximately 1,170 retail food stores in 20 states. Kroger sells items commonly sold in such stores. Some of these items have been transported from Kroger's places of business in various States to some of Kroger's stores located in various other States of the United States. Kroger has been ranked third in terms of sales in the United States among companies operating retail food stores (Ans. ¶ 2).

3. Kroger maintains, and at all times relevant to this proceeding has maintained, a substantial course of trade in the production, processing, distribution, advertising, and sale of items commonly sold in retail food stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (Comp. ¶ 3; Ans. ¶ 2; Ans. ¶ 3).

4. Kroger divides its retail food operations into Kroger Market-

¹ For the purposes of this Initial Decision, the following abbreviations were used:

F.	- Findings of Fact in this Initial Decision.
CPF	- Complaint counsel's Proposed Findings.
CPRF	- Complaint counsel's Proposed Reply Findings.
RPF	- Respondent's Proposed Findings.
Tr.	- Transcript of hearings, sometimes preceded by the name of the witness.
CX	- Complaint counsel's documentary exhibit.
RX	- Respondent's documentary exhibit.
JX	- Joint exhibit.
Comp.	- Complaint.
Ans.	- Respondent's Answer to the Complaint.
Summary	Decision - Order Ruling On Complaint Counsel's Motion For Summary Decision, dated May 17, 1978 (hereinafter sometimes referred to as "the Summary Decision Order").

ing Areas ("KMAs"). There are 13 KMAs across the country: Central, Cincinnati, Columbus, Dallas, Delta, Erie, Gateway, Houston, Los Angeles, Louisville, Michigan, Mid-Atlantic, and Southland (CX 1-1; JX 1: Pellin, p. 4; JX 1: Crague, pp. 3-4).

5. [See *In Camera* Findings]

6. Kroger has conducted an advertising program, known as the Price Patrol, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act (Ans. ¶ 3).

B. *Expert Witnesses*

7. Dr. Frank Kohout testified as complaint counsel's expert on survey methodology. Dr. Kohout is an Associate [4]Professor at the Department of Sociology, University of Iowa. Dr. Kohout holds a Ph.D. in sociology from Case Western Reserve University, Cleveland, Ohio. Dr. Kohout has published numerous articles in learned journals and has presented papers before recognized professional societies regarding survey design and statistical methodology (CX 707). He has published a book on introductory statistics, entitled *Statistics for Social Scientists*, designed to be used for either advanced undergraduates or for beginning graduate students (CX 707-3; Tr. 1002). In addition, he has written three chapters on statistics for a book called *Statistical Package for the Social Science* (Tr. 1001-02). Dr. Kohout also serves as a reviewer of articles published in recognized professional journals, including the *American Sociological Review*, *Sociological Quarterly*, and *Sociological Focus*, and in a specialized journal called *Symbolic Interaction*. From time to time, Dr. Kohout has reviewed books for publishers (Tr. 997; CX 707). Dr. Kohout has performed consulting duties on research design, measurement, and statistics for a research firm, and has consulted for a number of manufacturers, state and federal agencies, and for a federally funded research project (CX 707; Tr. 998). In his current position, Dr. Kohout teaches graduate-level courses in statistics and research methods (CX 707). He is a member of M.A. and Ph.D. review boards at the Department of Sociology, University of Iowa, and is responsible for advising advanced-degree candidates with regard to survey design and statistical methodology (Tr. 997). Dr. Kohout was qualified, without objection, as an expert witness in the areas of research methodology, including survey design and applied statistics (Tr. 1002).

8. Dr. Robert Kleyle testified as complaint counsel's expert on statistical methods and their application. Dr. Kleyle is an Associate Professor of Mathematics and Statistics at Indiana Purdue University in Indianapolis. He has held that position for five years. Prior to

his appointment at Purdue, Dr. Kleyle was employed for 6 years as an Assistant Professor at the University of Massachusetts in Amherst, Massachusetts. Prior thereto, he was employed at Simmons College in Boston as a part-time instructor (Tr. 582). Dr. Kleyle holds his Ph.D. degree from Harvard University in statistics. The subject of his doctoral dissertation was the area and foundation of statistical inference (Tr. 583). Dr. Kleyle's current duties at Indiana Purdue University are primarily teaching. He is involved in [5] research in statistical methodology and, to a large extent, is involved in consulting, both within and outside of the University. He also teaches courses in mathematics, probability, and advanced statistics (Tr. 583-84). Dr. Kleyle has three publications in the general area of foundations of statistical inference. The first two publications appeared in the *Annals of Mathematics Statistics*, and the third in the *Annals of Statistics*. He has published a paper on statistical inference for census data in *Communications in Statistics*, another paper in the *Journal of Quality Technology*, dealing with a maintainability test plan, and still another paper in the *I.E.E.E. Transactions on Reliability* (Institute of Electrical and Electronic Engineers), a reliability theory journal (Tr. 585). Dr. Kleyle was qualified as an expert witness in the application of statistical techniques to analysis of data, including the use of Chi-square analysis and the use of general statistical inferences in research methodology (Tr. 586-87).

9. Mr. Lloyd Oliver testified as respondent's expert on survey methodology and certain effects of price advertising. Mr. Oliver is Vice President of Glassman-Oliver Economic Consultants, Inc., Washington, D.C. (Tr. 2486). Mr. Oliver has a B.A. degree, with a major in economics (Tr. 2490-91). Mr. Oliver completed graduate courses for an M.A. in economics in 1972, but has not completed his thesis and has not received his master's degree (Tr. 2491, 2540). Mr. Oliver received a law degree from American University in 1975 (Tr. 2491). Mr. Oliver was employed, for more than five and one-half years, by the Federal Trade Commission as a staff economist in the Bureau of Economics. Mr. Oliver served as Deputy Assistant Director of that Bureau for approximately one year, and left the Commission in 1976 (Tr. 2493). While at the Commission, Mr. Oliver also worked as lead staff economist in matters involving survey methodology and design and matters involving the economic effect of trade restraints (Tr. 2527-33). Mr. Oliver has no publication in any recognized professional economic journal requiring peer review (see, respondent's Pretrial Memorandum, dated December 22, 1978). Mr. Oliver has not served in an editorial capacity, or as an official referee or reviewer of articles submitted for publication, for any professional

economic journal (Tr. 2539). His statistical course work is limited to three statistics courses at the undergraduate level [6](Tr. 2542). Mr. Oliver has not taught any courses in statistics or survey design (Tr. 2541), and has not designed any retail food price survey (Tr. 2547). Mr. Oliver has not conducted any studies of the relationship between substantiation requirements and the behavior of firms (Tr. 2552). Mr. Oliver was not involved in any matters, while employed at the Federal Trade Commission, in which retail food advertising was the primary issue (Tr. 2547-49). Mr. Oliver was qualified as an expert witness with regard to survey methodology and the effects of advertising in the retail food industry (Tr. 2555).

10. Dr. Lee Benham testified extensively as respondent's expert on survey methodology and likely economic effect of the relief sought by complaint counsel. Dr. Benham is an Associate Professor of Economics, Washington University, St. Louis, Missouri and holds a Ph.D. in economics from Stanford University (Tr. 2797-98). He currently teaches courses in labor economics, basic price theory, medical economics, and industrial organization (Tr. 2798-99). Dr. Benham has published 12 to 15 articles in recognized professional journals in the area of economics (Tr. 2799), and has served as a reviewer of articles for professional journals (Tr. 2801). Dr. Benham has been employed as an economic consultant in a number of governmental and private industry matters (Tr. 2801). In particular, he has served as a consultant and expert witness for the Federal Trade Commission in the eyeglass advertising proceeding which resulted in a trade regulation rule limiting the extent to which trade associations and state legislatures may restrict the flow of commercial information in the retail eyeglass industry. The Rule also places limits on disclosure requirements for eyeglass advertisements (Tr. 2803-08). Dr. Benham's work has been relied upon by the FTC in its regulation on eyeglass advertising, 43 FR 23992, 23995 (1978), and in public statements (Tr. 2808-10). Dr. Benham's work has also been cited with approval by the Supreme Court. *Bates v. State Bar of Arizona*, 433 U.S. 350, 377 (1977); *Friedman v. Rogers*, 47 U.S.L.W. 4151, 4157 (1979) (Blackmun, J. dissenting). Dr. Benham, however, has never undertaken any study of any aspect of the retail food industry (Tr. 2815), nor of comparative price advertising (Tr. 2817-18).

C. Certain Kroger Personnel

11. Thomas M. Vaughn is Kroger's Director of Meat Procurement. He was employed by Kroger on a part-time basis in the early 1950's and continued on a part-time basis until [7]completion of his

formal education in the early 1960's, when he was hired on a full-time basis for various assignments in stores, store management work. Sometime in the early 1960's, he was assigned to Kroger's Cincinnati Division Office as Meat Sales Promoter (Tr. 1882-85).

12. Dr. Richard Bere is the Vice President of the Columbus Marketing Area. Dr. Bere was employed by Kroger in 1957 as store manager, and became assistant buyer in the produce department. He later became a field specialist in fruits and vegetables, working with various stores, with the produce managers or running the departments. He was appointed Produce Merchandiser, Minnesota Division, in 1962, where he remained until 1965. He was then transferred to the Grand Rapids Division. From Grand Rapids, Dr. Bere was transferred to the Cleveland Division as Produce Merchandiser for 86 or 88 stores. While in the Cleveland Division, he became Director of Merchandising and held that position for two years. Dr. Bere was then transferred to Kroger's General Office as a consultant, reporting to the Vice President, Produce Merchandising for Kroger. He remained in that position for a year until he was appointed Vice President of Produce Merchandising in 1972. In the fall of 1977, Dr. Bere was transferred to the Columbus Marketing Area as Vice President of the Columbus Marketing Area (Tr. 1961-65).

13. Charles L. Thomas, Jr. is a Group Vice President of the Kroger Company, responsible for the supervision of 7 of the 14 KMAs. Mr. Thomas has been employed by Kroger for 28 years. Prior to his current position, which he has occupied for approximately one year and two months, Mr. Thomas was the Vice President of the Southland Marketing Area, headquartered in Nashville, Tennessee, for approximately two years. Prior to that, he was Vice President of the Atlanta Division, and held that position for about four years. Prior to that time, he was Vice President of Grocery Merchandising and Procurement for Kroger. He also had held the positions of Grocery Merchandiser for the Atlanta Division; Grocery Sales Manager; Assistant Buyer; and Floor Manager of the Cincinnati Division (Tr. 2093-A, 2093-B).

14. Dean A. Hicks is the Vice President of Marketing Administration for Kroger. He is responsible for the review of policies and procedures and for recommending and implementing changes for those policies and procedures that tend to cross the lines of authority of the four merchandising departments. Mr. Hicks is responsible for monitoring Kroger's compliance with the Federal Trade Commission order regarding advertised product availability and pricing. He is responsible for merchandising research and development, [8]packag-

ing research and development, and the design and implementation of the Universal Product Code (Tr. 2306-07). Mr. Hicks was directly involved in developing and writing the Everyday Low Price Policy ("EDLP") for Kroger (Tr. 2312). He also has the primary responsibility for the Burgoyne Checks (Tr. 2426).

15. Kenton A. Gast is a Director of Grocery Procurement at Kroger, and has held that position for 6 ½ years. He has been employed by Kroger for just under 29 years. He started at Kroger in 1954 as a management trainee. He then became a store company manager for about a year and a half. His next positions were produce trainee, produce field representative, field representative, and buyer trainee. These positions covered a period of about three or four years. Then he was a produce buyer for two years, and served as Assistant Merchandiser in Grocery, Grocery Buyer-Merchandiser for two years. Mr. Gast was then transferred to Cincinnati as a field manager, and, about three years later, went to the General Office, Grocery Merchandising, where he worked for about five years (Tr. 2173-74).

16. Ted R. Hoover is the Vice President of Sales and Operations for Rabold Brokerage Company, Incorporated. Prior to his current employment, Mr. Hoover was employed by Kroger for 23 years, from 1953 to September 1977. At Kroger, Mr. Hoover's last position was Grocery Merchandiser, from 1970 until 1977. The Grocery Merchandising Department is responsible for buying grocery products, designing sales programs for grocery items, and setting retail grocery prices (JX 2: Hoover, pp. 113-14). Prior to that, in 1970, Mr. Hoover was Grocery Merchandiser in Grand Rapids for Kroger for about a year and a half. Mr. Hoover has also held positions as Grocery Merchandiser in Minneapolis, Assistant Merchandiser in Little Rock, merchandising representative, store manager, head stock clerk, store manager trainee, and a clerk in the store (Tr. 1560-62).

17. Alan Joseph Stec is Advertising and Sales Promotion Manager for Kroger in the Southland Marketing Area. He has been employed by Kroger for 13 years. Mr. Stec has held the positions of Advertising Manager for the Little Rock Division, Advertising Assistant Manager for the Atlanta Area, Advertising Assistant in Grand Rapids, Advertising Assistant in the Chicago Division, Relief Store Manager in the Chicago Division, co-manager, and trainee (Tr. 1692-93). In his present position, Mr. Stec is responsible for all the advertising in the Southland KMA, except to the extent that certain responsibilities have been delegated to Campbell-Mithun, Inc., an advertising agency (CXs 4-5, 5-6). He evaluates all advertising and

recommends to the management group advertising procedures and techniques (Tr. 1692-94). [9]

18. Robert Pellin is a Grocery Merchandiser for Kroger in the Central Marketing Area. His duties are to generate the sales and the necessary gross profits according to Kroger's Marketing Area objectives, and to direct these operations. Prior to his current position, Mr. Pellin was the Assistant Grocery Merchandiser for the Central Marketing Area. He had also worked in the Central Marketing Area, in the Peoria Division, at Market Basket, and before that at Kroger's St. Louis Division, now called the Gateway Marketing Area (JX 1: Pellin, pp. 3-5).

19. Harry McDaniels is the Advertising Manager for the Central Marketing Area. He has held that position for about eight years. He has been employed by Kroger for 27 years. As Advertising Manager, Mr. McDaniels is responsible for all advertising, including newspaper advertising and radio and television commercials. He supervises the activities of the advertising programs (JX 1: McDaniels, pp. 2-3; CXs 4-5, 5-6).

20. Charles R. Crague is a Director of Merchandising for the Gateway Marketing Area. He has worked for Kroger for 25 years. Mr. Crague started out as a trainee, co-manager, store manager, zone manager, produce merchandising representative, assistant grocery buyer, grocery buyer, grocery sales promoter, and grocery merchandiser. He has also worked as Manager of Operations, Merchandise Manager, Director of Sales for Grocery, and Director of Merchandising of the Gateway Marketing Area. As Director of Merchandising for the Gateway Marketing Area, Mr. Crague is responsible for the supervision of five departments within the region. These departments are: Advertising, Grocery, Produce, Meat, and Delicatessen (JX 1: Crague, pp. 3-5).

21. David Charles Ticeson is a Senior Analyst in the Marketing and Administration Office in Kroger's General Offices and was responsible for the scheduling, coordination, and tabulation of the Burgoyne Checks (JX 2: Ticeson, p. 60).

22. Arthur L. Ferguson, Esq. is in-house counsel for Kroger (Tr. 739). G. Leonard, Esq. is a member of Kroger's Legal Department (Tr. 739-40). F. Leland Davis is the Vice President of Advertising for Kroger's General Headquarters Office (CX 2-1). C. Ohlinger is the Manager of Consumer Research in Kroger's Headquarters Office (CX 2-1). James A. LeRoy is the Vice President of the Delta Marketing Area (CX 2-2). James M. Boswell is the Director of Merchandising for the Delta Marketing Area (CX 2-2). Edwin A. Schuler is the Grocery Merchandiser for the Delta Marketing Area (CX 2-2). [10]

W. Robert Knight is the Advertising Manager for the Delta Marketing Area (CX 2-2). B. G. Beaty is the KMA Vice President for the Central Marketing Area (CX 2-2). A. Wayne Smith was the Director of Merchandising until February 16, 1976 (CX 2-2). Newton Briggs is the KMA Vice President for the Dallas Marketing Area (CX 2-4; Tr. 745). Jack Davis was the KMA Vice President for the Southland Marketing Area until June 1, 1975 (CX 2-5).

23. L. Hollin was employed by Kroger's General Office in the Advertising Department (Tr. 740). Tom Brand was a Kroger store manager in Dallas during July 1975 to June 1976 (Tr. 740). George Robinson is employed in Advertising at Kroger's General Office Headquarters in Cincinnati, Ohio (Tr. 741). Leland Carawan was an Assistant Advertising Manager at Kroger in Nashville (Tr. 742-43).

24. Bob Crow was first a Grocery Merchandiser, and became Director of Operations in Dallas (Tr. 743). Bennett Hudson was Regional Vice President for the Dallas Marketing Area (Tr. 743-44). Larry Turney was the Public Relations Manager for Kroger in the Dallas Marketing Area (Tr. 744). Earl Blackshire was the Assistant Grocery Merchandiser for Kroger in the Dallas Marketing Area (Tr. 744). Russ Thorburn was the Assistant Advertising Manager for Kroger in the Central Marketing Area (Tr. 744). Bob Bachleda is the Grocery Buyer for the Central Marketing Area (Tr. 745-46). Tom Robins, also known as "Robbie" was the Assistant Grocery Merchandiser for the Central Marketing Area (Tr. 746).

D. Certain Employees of Campbell-Mithun, Inc.

25. Marvin Goldsmith is the Vice President of Campbell-Mithun, Inc., and advertising agency (Tr. 740). John Kroenig is an account executive at Campbell-Mithun (Tr. 740). Gordie Krimstein is employed by Campbell-Mithun in the Creative Department (Tr. 741). Dave Carter is Kroger Account Executive (Tr. 741-42). Marty Chasen was a Kroger Account Executive (Tr. 742). Bill Stein was a Campbell-Mithun employee (Tr. 742).

E. Miscellaneous General Findings

26. CX 16, entitled "Managing A Kroger Price Patrol Program," dated April 14, 1975, is a document written by Mr. Al Stec, Advertising Manager of the Southland Marketing Area, in conjunction with two advertising consultants in Kroger's headquarters (Tr. 1815). It was disseminated [11] to the KMAs as an information guide should the KMAs decide to enter a Price Patrol Program (Tr. 1814-15; CXs 5-5, 73). The document sets forth the details of how to put

together, run and manage a Price Patrol campaign (Tr. 760). CX 16 was disseminated through Kroger's advertising agency, Campbell-Mithun (JX 1: Pellin, p. 11).

27. CX 15 is a document entitled "The Price Patrol" (JX 1: Pellin, p. 11). It was sent to all operating divisions by the Kroger headquarters, explaining to them how the Price Patrol works and what the Price Patrol Program was (Tr. 1674-75; JX 1: Pellin, pp. 10-11). CX 15 contained such materials and information from other Kroger regions as sales charts, and how they progressed as they got into the program itself. CX 15 was put together by the Merchandising Department under the supervision of Charles Crague (JX 1: Pellin, p. 11). The document was written to be used as a means of communicating with merchandisers in the field on the basic merchandising philosophy of Kroger (JX 1: Crague, pp. 11-12). It was put together for the purpose of setting down and discussing face-to-face with individuals the merchandising philosophy of the company and how the Price Patrol fit in with Kroger's total merchandising philosophy (JX 1: Crague, p. 21). (References in Mr. Crague's testimony to Commission Exhibit 1 relate to CX 15. See, Tr. 305-08.)

II. Some Salient Aspects Of Kroger Retail Food Stores And Their Operation

A. *Composition of Kroger Retail Food Stores*

28. Kroger divides the items sold in its retail food stores into four general product categories: Grocery, Meat, Produce, and Delicatessen (JX 1: Pellin, p. 41; CXs 4-3, 8-2). A "grocery" or "commodity" item includes every item in the store that is not meat, produce, or delicatessen (JX 1: Pellin, p. 41; Tr. 737). "Produce" includes everything sold in the Produce Department, primarily fresh fruits and vegetables (Tr. 1965). "Fresh meat" includes meat items which have neither been frozen nor processed by curing or smoking, or some further process, such as fresh beef, fresh pork, fresh poultry, fresh lamb, and fresh veal (Tr. 1886). "Private label" is defined by Kroger as a brand which can only be sold within a company. For example, a Kroger label on an item is a Kroger private label item (Tr. 2175). The technical or trade use of the word "grocery" interchangeably with "commodity" to exclude meat and produce is not in accord [12] with the common sense understanding of "grocery," which includes food items generally sold in a grocery store including meat and produce (Tr. 1117-18. Also see "grocer" and "grocery" in *Webster's Third International Dictionary of the English Language, Unabridged* (1961)).

29. The evidence shows that meat items comprise about 21% of Kroger's retail food store sales, produce items 7%, delicatessen items about 2%, grocery items 69%. Private label items comprise 28% of Kroger's grocery item sales (CXs 4-3, 8-2).

30. In the Southland marketing area, meat items comprised about 21½% of Kroger's retail food store sales during 1976, fresh produce items about 7%, delicatessen items about 2%, grocery items about 69%, and private label items about 28.3% (CXs 4-2, 5-2).

31. The reports published by *Supermarketing Magazine* in September 1977 on food expenditures generally parallel Kroger's sales, in that about 22% of all items in an average shopping basket for a family of four are meat items (28% of food items), and 11% produce items (14% of food items) (CX 810; Tr. 1013-28). These percentages are generally confirmed by the results of a Bureau of Labor Statistics Study published May 15, 1975 (CX 801). Seventeen percent to eighteen percent of Kroger's dollar volume of grocery items are direct-store-delivered (DSD) and are not distributed through Kroger's warehouses (JX 1: Pellin, p. 64). Meat and produce account for a significant portion of Kroger's dollar volume business (JX 1: Hoover, p. 56). Meat and produce also comprise a significant portion of consumer expenditures for food (Tr. 2985).

32. A typical Kroger store will stock approximately 10,000 to 15,000 items (JX 1: Hoover, p. 18; JX 1: Pellin, p. 23).

B. Pricing of Kroger's Food Products

33. The grocery merchandiser for each KMA has the responsibility for setting retail prices on all Kroger grocery items in the KMA (CXs 4-4, 5-4, 24-1, 25-1; Tr. 761; JX 2: Hoover, pp. 134, 177; JX 2: Stec, p. 103; JX 1: Pellin, pp. 21, 41-43; Tr. 748, 1658). Food prices change frequently (CX 22-1), and each week approximately 500 to 700 grocery items may change in price in a Kroger store (Tr. 1659-60). [13]

34. During the period the Price Patrol Program was operated in the various KMAs, Kroger also conducted a "roller" program (CXs 15, 16, 30-3, 41-1, 42-1). A "roller" is an item sold at a price reduced from regular retail price, yet producing better-than-average mark-up for the item or subgroup it represents (Tr. 2093-K; CX 15-4). Kroger instructed the KMA Grocery Merchandisers to price "rolled" items below competitors' prices, saying "It does no good to 'roll' an item down 4¢ and still be 2¢ higher than a major competitor" (CX 15-9). The "roller" price reflects a manufacturer's allowance or discount to Kroger (Tr. 1590, 2093-K), which was generally "passed through," in whole or in part, to the consumer (CX 41-1). The reduced retail or

"roller" generally lasts from 3 to 12 weeks (JX 1: Pellin, p. 40; Tr. 1591, 2093-K, 2093-L). At any given time, about 150 to 350 items will be "rolled" in a Kroger store (Tr. 735, 1595; JX 1: Pellin, p. 65). Fresh meat and produce generally have not been included in manufacturers' allowance programs (Tr. 674-75), and meat, produce, and delicatessen items were not included in Kroger's roller program (JX 1: Crague, p. 25). Items which were selected for inclusion in the roller program were considered higher-volume items and items recognizable to the consumer (Tr. 1675; JX 1: Crague, p. 27). The use of "rollers" by Kroger replaced in large part the offering of specials or deepcut features (CX 15-4; Tr. 2093-L, 2093-N to 2093-O). The grocery merchandiser for each KMA had the responsibility for deciding which items should be rolled, and for what period of time (JX 1: Pellin, pp. 40, 43). Roller items were advertised more frequently than items which were not rollers (CXs 40-1, 36-7, 15-7; Tr. 2148). Roller items were designed to attract consumers into the store (Tr. 2148).

35. Since the criteria for selecting rollers and Price Patrol items are generally the same (Tr. 1675-76), there would be a higher percentage of roller items on the Price Patrol list than the percentage of roller items throughout the store (Tr. 2735).

36. Kroger, through Mr. Hicks, attempted to show that placing rollers on the Price Patrol Survey had no effect on the Price Patrol Survey results (RX 980; Tr. 2360). However, RX 980, reflecting information for the last four weeks of 1977 for Dallas, Texas (Tr. 2414-15, 2418), cannot be generalized for all periods in all areas. Furthermore, using the same assumptions Mr. Hicks used in preparing RX 980, the inclusion of rollers in the Price Patrol Program in other areas supports an inference that inclusion of roller items in the Price Patrol Survey significantly affected the outcome of the Survey (Tr. 2415-18). [14]

37. Prices of fresh meat change rapidly at Kroger stores, but quality of meat does not change nearly as quickly as does price (Tr. 1947).

C. *Adoption of an Everyday Low Price Policy and Its Operation*

38. In 1971 and the early part of 1972, Kroger stores were "relatively high priced on . . . regular shelf prices throughout the entire store" and relied on heavy feature advertising on the weekends to attract customers (Thomas, Tr. 2093-E; Hicks, Tr. 2315). During this time period, consumers considered Kroger to be a high-priced store (Thomas, Tr. 2093-D).

39. In May of 1972 the decision was made that, in order to foster long-term growth, Kroger would become an "everyday low price" ("EDLP") merchant (Thomas, Tr. 2093-E, 2099; Hoover, Tr. 1566). Under the EDLP policy as initially envisioned, Kroger stores were to be as low as or lower in price than their competitors in each geographic market (Thomas, Tr. 2099; Hoover, Tr. 1564; Helmsing, Tr. 771-73, 800-02; CX 36-2; CX 47-2). Kroger stores in each market would "target" their prices on the lowest priced competitor in the market offering comparable merchandising services (Hoover, Tr. 1638; Helmsing, Tr. 800-01; CX 15-2).

40. The EDLP policy was meant to apply "across the board on all items that were carried in the [Kroger] store" (Thomas, Tr. 2093-E), including fresh meat and produce items (Thomas, Tr. 2104; Bere, Tr. 2002-05; Vaughn, Tr. 1929-34; CX 47-1). Respondent's witnesses stated that as the EDLP policy was implemented in many areas, Kroger stores, on a "total mix" of goods throughout the store, sought to be and were lower in price than their competitors (Thomas, Tr. 2099; Hoover, Tr. 1690; JX 2: Hoover, p. 156; JX 1: McDaniels, p. 25; CX 47-2). However, Kroger's internal price checks showed that Kroger more often than not had higher prices for meat and produce items (F. 145-167, *infra*).

41. In late 1972 Kroger's top management instituted a program to monitor compliance with the EDLP policy (Hicks, Tr. 2319). Mr. Dean Hicks was selected to administer this program at Kroger's headquarters and is responsible directly to the top management of Kroger for analyzing the monitoring surveys he administers and for ensuring full compliance with Kroger's EDLP policy (Hicks, Tr. 2310-13, 2319, 2335, 2348). [15]

42. After consulting with Kroger employees in the field and at headquarters as to the best means for monitoring Kroger's competitive position (Hicks, Tr. 2320-21), Mr. Hicks established a procedure whereby KMAs submit "full book checks" to him for selected markets on a quarterly basis for review and analysis (Hicks, Tr. 2342). Mr. Hicks also developed the "Burgoyne check," or "shopping basket survey," and selected Burgoyne, Inc., an independent marketing research company, to conduct these surveys under his general supervision (Hicks, Tr. 2320-21).

43. Kroger's EDLP policy was in effect in the four Kroger Marketing Areas relevant to this proceeding throughout the time the Price Patrol ran (Oliver, Tr. 2678-79, 2686-87; Benham, Tr. 2874-76). Of the 284 Kroger stores which participated in the Price Patrol Program in the four KMAs, 74% (210 stores) were subject to Burgoyne price checks and 70% (199 stores) were subject to

quarterly full book checks (RX 978; Tr. 2349-52). The evidence shows, however, that while the Price Patrol was being conducted in over 100 cities (CPF 48), full book checks were conducted in only 18 of these cities, and Burgoyne checks in only 22 cities (including the same 18 where full book checks were made) (RXs 947-964; RPF 117). Thus, in about 78% of the cities in which a Price Patrol survey was conducted, neither a full book check nor a Burgoyne check was made (CPRF 6).

44. With respect to those markets where Price Patrol surveys were conducted but Burgoyne surveys and full book checks were not, respondent's expert in survey design and methodology speculated that, had such price checks been conducted in those markets, the results would probably have been consistent with Price Patrol survey results, because of Kroger's adherence to its EDLP policy and because Price Patrol results were consistent with results of Burgoyne surveys and full book checks in other markets. However, the same witness admitted that he could not be sure whether the prices might be in fact lower, the same or higher (Tr. 2681-82).

45. During the Price Patrol period 306 Burgoyne surveys were conducted in 22 cities in the four KMAs involved in this case (RXs 925-946). Kroger had a lower dollar cost *total* on 1,419 of the 1,550 individual Burgoyne checks—91.5%. For the 306 dates the Burgoyne checks were conducted, Kroger had a lower dollar *total* than all competitors, or a lower dollar *total* than all but one competitor, 284 times—92.8% (RXs 925-946; RPF 115-116). [16]

46. Viewed in light of the results of each check (instead of dollar totals), in 1973, for the cities in the four KMAs involved in this case and running the Price Patrol at that time, Kroger conducted a total of 14 Burgoyne surveys. Of the 14 surveys, Kroger lost, or, in other words, did not have the lowest prices of those chains checked, 7 times or 50% of the total surveys. In 1974, there were 32 Burgoyne surveys. Kroger lost 11 of the 32, or 34% of the total surveys. In 1975, there were a total of 86 surveys. Kroger lost 29 of the 86, or 33% of the total surveys. In 1976, there were 86 Burgoyne surveys conducted. Of the 86 surveys Kroger lost 29, or 33% of the total surveys. For 1977, of a total of 57 Burgoyne surveys conducted that year, Kroger lost 19, or 33% of the total surveys. In 1978, there were a total of 11 Burgoyne surveys conducted, and of that total Kroger lost 2, or 18% of the total surveys. Thus, Kroger lost 33% of the Burgoyne surveys conducted from 1973 to 1978 (RXs 925-946; CPRF 7).

47. During the Price Patrol period, quarterly full book checks were conducted in 18 cities where Price Patrol was also conducted in

the four KMAs (RXs 947-964). A total of 189 quarterly full book checks were conducted in these 18 cities. Kroger had more *items* with lower prices than did the competitor on 608 of the 656 individual full book grocery checks—92.7% (RXs 947-964; RPF 117).

48. When viewed individually with respect to each full book check, in 1973, there were 8 full book checks conducted, and of that total Kroger lost 5, or 62.5% of the total checks. In 1974, there were 18 full book checks conducted, and of that total Kroger lost 5, or 33%. In 1975, there were 45 full book checks conducted, and of that total Kroger lost 6, or 13%. In 1976, there were 62 full book checks conducted, and of that total Kroger lost 11, or 17%. In 1977, there were 43 full book checks conducted, and of that total Kroger lost 8, or 18%. In 1978, there were 10 full book checks conducted, and of that total Kroger lost 1, or 10%. Thus, from 1973 to 1978, Kroger averaged a percentage loss of 25% of all full book checks conducted (RXs 947-964; CPRF 8-9).

49. For the 189 dates the quarterly full book check was conducted during the Price Patrol period, Kroger had more lower prices of items in the *grocery* department than competitors, except one, 183 times—96.8% (RXs 947-964; RPF 118). However, the evidence also shows that during the Price Patrol period, 1973-1978, Kroger lost on an average of 25% of the time in which full book checks were made (CPRF 9). [17]

50. The full book price check results for meat and produce items are submitted separately from the grocery department checks (Hicks, Tr. 2345; Oliver, Tr. 2672). Counts of items priced higher, lower, or the same for meat and/or produce items sometimes are not recorded on the recap sheet. During the Price Patrol period, 179 full book checks whose recap sheets included meat and/or produce were conducted in the relevant area. Totals of numbers of items, including meat and/or produce items, on which Kroger's prices were lower than, higher than or the same as a competitor were recorded for 523 separate checks against competitors. Kroger had more items with lower prices than did the competitor on 487 of these 523 full book checks—about 93.1% (RXs 947-964; RPF 119). However, the evidence also shows that of the 179 full book checks conducted between 1973 and 1978, which included meat and/or produce, Kroger lost on the surveys on an average of 32.8% (CPRF 10).

51. The results of most Price Patrol surveys generally showed that Kroger had more lower prices on surveyed items than any surveyed competitor (RXs 990-991, Nos. (4)-(5), (11); Hoover, Tr. 1601-02; JX 1: Pellin, p. 82; JX 1: Stec, pp. 102-03).

52. Two surveys of food prices in Atlanta conducted by the FTC

staff in June 1973 showed Kroger to be low overall (RX 225 *in camera*, pp. 11-12). The Burgoyne surveys conducted in Atlanta during the Price Patrol program showed Kroger with lower dollar totals than Big Apple, Big Star, Colonial, Winn-Dixie, Food Giant and K-Mart (RX 925). The full book checks showed Kroger with more lower prices, both for the grocery department and for all items, than Big Apple, Colonial, Winn-Dixie, Food Giant, and Richway (RX 947; RPF 129). However, the evidence also shows that during the same time period in Atlanta, Kroger lost to A&P 33% of the time Burgoyne surveys were conducted and lost to Treasure Island 50% of the time (CPRF 12).

53. A survey of food prices in Indianapolis conducted by a "public interest" group in December 1975 showed Kroger to be low overall (Sample, Tr. 484-86).

54. The evidence shows that of the five full book checks conducted in Indianapolis during the Price Patrol period, Kroger had more lower item prices than Standard, Eisner, Thrift-T-Mart, and A&P (RX 958). Of the 10 Burgoyne surveys conducted in Indianapolis during the Price Patrol program, Kroger had lower *dollar* totals than Marsh, Eisner, Standard, and Thrift-T-Mart (RX 939; RPF 132). [18]However, of the same 5 full book checks, Kroger lost to Marsh 3 out of 5 times surveyed (RX 958). Of the 10 Burgoyne surveys conducted in Indianapolis during the Price Patrol program, Kroger lost 9 times, or 90% of the time for all surveys conducted (RX 939; CPRF 13).

55. The three principal elements of competition in the food retail business are price, product quality and service, and price may not necessarily be the determining factor. Respondent recognized the fact that consumers formed pragmatic judgments about quality or value on the basis of their shopping experience over time, taking into account not only price but product quality (Tr. 1926, 2002, 2211-13).

56. The EDLP policy was designed to insure that Kroger stores are not only competitive in terms of price on a "total mix" of goods throughout the store but also offered "good value" and sought to project Kroger's image as a "value leader." (Tr. 1690; 2099; CX 47-2, RX 901-2).

57. In contrast, the Price Patrol program focused on the *prices* of *selected* items for advertising purposes. The Price Patrol excluded fresh meat and produce categories and did not relate to the total mix of items throughout the store. The Price Patrol advertisements in evidence do not mention "value" but stress low *prices* and seek to project Kroger as a "low price leader."

III. Kroger's Price Patrol Program And Claims Contained In Certain Price Patrol Advertisements Challenged In The Complaint

A. *The Purpose of the Price Patrol Program*

58. In late 1972, Kroger instituted an "everyday low price policy" ("EDLP") (Tr. 2093-E, 2099). Mr. Dean Hicks, who was directly involved in developing and writing the "Everyday Low Price" policy for Kroger (Tr. 2312), testified that Kroger's everyday low price policy "will be such that over time the consumer can buy her supermarketing needs at as good as or better total value at Kroger as she can at any other comparable retailer" (Tr. 2313-14). He defined "total value" to include price and quality, considered over time (Tr. 2314-15).

59. Other Kroger officials confirmed that being "competitive" did not mean being the cheapest place to shop (Tr. 771-72, 1564). For example, Mr. Ted R. Hoover, who was [19]grocery merchandiser for Kroger's Southland Marketing Area from 1970 until 1977 when he resigned, agreed that "the policy . . . was not necessarily to be lower than everybody" (Tr. 1638-39). "That doesn't necessarily mean that you would be lower than every competitor in the market" (Tr. 1638). The Kroger manual explaining the Price Patrol (CX 15) also confirms that Kroger's policy was not to be the cheapest place to shop: "Kroger prices must be *as low as* the lowest merchant in town (offering the same services). . . . The key is 'offering the same services.'" (CX 15-2, emphasis added).

60. The Price Patrol surveys were not used nor relied upon by Kroger officials to determine Kroger's competitive price position (Tr. 1649, 2439). Mr. Hoover testified that "Price Patrol . . . was not used . . . to determine somebody's pricing posture." (Tr. 1649). Mr. Dean Hicks, whose responsibility included monitoring Kroger's "every day low price program" (Tr. 2306-07) testified:

Q. I understand that, but my question is more simple. Did you use the Price Patrol results to help you to monitor your "Everyday Low Price" posture?

A. No.

Q. In other words, you had checks done weekly in many KMAs, price checks done weekly in many KMAs, and you didn't use them to determine your competitive position; isn't that right?

A. That is correct. (Tr. 2439)

The record evidence clearly shows that Kroger officials, including those with responsibility for insuring Kroger's competitive posture, did not use the Price Patrol to monitor Kroger's prices.

61. There is evidence showing that Kroger, concerned about its

reputation as a high-priced store, conceived the Price Patrol campaign in part as a merchandising and advertising program which will change that reputation and effectively communicate Kroger's "every day low price policy" to the consumer (Tr. 761; CX 15, CX 30-2; JX 1: Crague, pp. 11-12; CX 75-17). However, the record also clearly shows that the Price Patrol was meant to do more. As the Price Patrol emerged, emphasis was increasingly placed on demonstrating or "proving" to the housewives that [20]Kroger had the lowest prices in town (Tr. 1695; F. 109-111, *infra*). Furthermore, Kroger clearly recognized the role of the Price Patrol as a means of preventing further erosion of its sales in certain areas and to increase its market shares and profitability in other areas (Tr. 760; CXs 15, 70-1, 75-17).

B. Price Patrol Survey Procedures

62. The Price Patrol program started in Atlanta, Georgia in 1972 (RX 900-3). The other Marketing Areas followed the pattern set by the Atlanta experience in running the program (Tr. 751, 756-57, 794, 1563, 1601). Although each KMA had responsibility for implementing and operating the Price Patrol program in its area, the Price Patrol procedures in any given KMA followed the manuals distributed by the General Office and further incorporated past experiences in other KMAs (Tr. 1773; JX 1: Crague, p. 7; *cf.*, CX 75 with CXs 15 and 16). For example, the program in Dallas was based on what had been developed in Atlanta, and the Price Patrol program in Indianapolis (Central Marketing Area) was based on what had been done in Atlanta and Dallas (Tr. 756-57; CX 36-1).

63. The control which Kroger's General Office exercised over the Price Patrol program in the KMAs was demonstrated by several events. The manuals describing the program (CXs 15 and 16) were distributed by the General Office. Each KMA utilizing the Price Patrol program followed the basic guidelines set forth in CXs 15 and 16, and conducted the program in substantially the same manner (CXs 15, 16, 36, 73, 75; Tr. 756-57, 794-95; JX 1: McDaniels, pp. 6-7; Tr. 1871). The General Office, including Mr. Lyle Everingham, Executive Vice President of Kroger (JX 1: Pellin, pp. 12-13), and Mr. Gene Hoffman, President of the Kroger Company (JX 1: Pellin, p. 13), was given a presentation regarding the Dallas Price Patrol program before the program was instituted in Dallas (CX 39-1). The General Office required that specific changes be made in Price Patrol advertising copy (CX 22), and, after August 1977, each KMA using the Price Patrol was required to submit copies of all advertising to Kroger's General Office (CX 23). Campbell-Mithun, Kroger's

advertising agency (JX 1: Pellin, p. 11), was largely responsible for the television commercials, and assisted with weekly television advertising copy and production in Dallas (Tr. 757). Campbell-Mithun also had input into the decision to commence the Price Patrol program in Dallas (Tr. 757). Campbell-Mithun informed the Kroger officials in Dallas about the results of the Atlanta program and provided examples of television advertisements used in Atlanta (Tr. 758). Finally, the [21]decision to terminate the program was a corporate decision (F. 107).

64. Items to be included on the Price Patrol check lists were selected by the grocery merchandiser in each KMA (Hoover, Tr. 1573; JX 1: Crague, p. 41; JX 1: Pellin, p. 52). The grocery merchandisers utilized three criteria to select Price Patrol items:

(1) items had to be "high-volume," high-recognition items, meaning items which were readily recognizable to the consumer and likely to be purchased frequently by consumers (Thomas, Tr. 2100; Hoover, Tr. 1574, 1581; JX 2: Hoover, p. 114; JX 1: Pellin, pp. 54-56; JX 1: Crague, pp. 39, 42);

(2) items had to be taken from "commodity" areas throughout the store (Hoover, Tr. 1576; Thomas, Tr. 2100-01; Oliver, Tr. 2609-13, 2634; RXs 920-924; JX 2, Hoover, pp. 114-16; JX 1: Pellin, pp. 54-55; JX 1: Crague, pp. 39, 42; Stec, Tr. 1699). "Commodity" in this context means "grocery" category (F. 28);

(3) items had to be commonly available on the shelves to be checked at competing stores (JX 2: Stec, p. 86; JX 1: Pellin, pp. 53-54; JX 2: Hoover, p. 128; Hoover, Tr. 1575; Thomas, Tr. 2101; CX 15-12; CX 16-5).

65. Items in fresh meat and produce categories were not included in the Price Patrol because of Kroger's belief that the quality on these items varied among different stores so as to make these items not comparable (Thomas, Tr. 2101; Hoover, Tr. 1574-76; JX 1: Hoover, pp. 55-56; JX 1: Pellin, pp. 68-69; JX 2: Stec, pp. 85-86, 88-90).

66. Similarly, private label items generally were not included in the Price Patrol because of Kroger's belief that the quality of private label products varied among different stores (Hoover, Tr. 1575; JX 1: Hoover, p. 55; JX 2: Hoover, p. 128; JX 1: Pellin, pp. 53-54). However, such private label items as milk and eggs were included on Price Patrol because the quality of these items was thought to be essentially the same from store to store (Hoover, Tr. 1575-76; JX 1: Pellin, p. 54; JX 2: Stec, pp. 86-87; Morgan, Tr. 714).

67. The selection criteria requiring that items be high volume

items and representative of the "commodity" areas of the store were designed to obtain a mix of commodity items [22]one would normally find in a customer's shopping basket (JX 1: Pellin, p. 56). In order to identify items which fit these two criteria, Kroger personnel used a quarterly Kroger computer printout report, which detailed the unit movement of commodity items through each Kroger warehouse (Hoover, Tr. 1574; Thomas, Tr. 2100; JX 1: Hoover, pp. 8-10; JX 1: Crague, pp. 42-43; JX 1: Pellin, pp. 61-62, 67). These computer reports divide goods into commodity categories, listing the unit movement of all items which fall into each commodity grouping (Hoover, Tr. 1574).

68. Kroger personnel reviewed the computer printouts and selected the highest volume items, excluding private label items, from the various commodity categories (Hoover, Tr. 1574, 1665-66; JX 1: Hoover, p. 10). Items which were not the "top mover," or highest volume item in a commodity category, but which were, in the grocery merchandiser's judgment, highly recognizable to consumers, were also included in the Price Patrol (JX 2: Hoover, pp. 123, 126; JX 1: Hoover, pp. 12-13, 20-21, 55; JX 1: Pellin, pp. 55-56; Hoover, Tr. 1666-67; Helmsing, Tr. 773).

69. Kroger personnel utilized separate documents on movement of commodity items shipped directly by the vendor to the store (direct store delivery, or "DSD," items) which were not included on the computer printout (JX 1: Pellin, p. 67). Between 15 and 20 of the items on each Price Patrol check list were DSD items (JX 1: Hoover, pp. 9-10, 19-20).

70. Use of the computer printouts and other documents, as well as the experience of the personnel selecting the Price Patrol items, helped ensure that the Price Patrol lists were tailored to the commodity purchasing patterns of each marketing area (JX 1: Hoover, p. 4; Hoover, Tr. 1576-77; JX 1: Crague, p. 43). The Vice President of each KMA reviewed the list of items selected by the grocery merchandiser to ensure that the criteria for selection had been followed (Thomas, Tr. 2101).

71. Each grocery merchandiser compiled a list of about 600 commodity items (Thomas, Tr. 2100-01; Hoover, Tr. 1579; JX 1: Pellin, p. 57). The Advertising Manager of the KMA then divided the 600 items into four smaller lists of 150 items each, one of which was used for Price Patrol each week. Items from the various commodity groups were apportioned evenly among the four smaller lists (Stec, Tr. 1699; JX 2: Stec, pp. 84-85).

72. The Price Patrol lists were reviewed by the grocery merchandiser and his assistants approximately once [23]a quarter (JX 1:

Hoover, pp. 23-24). Changes were made in Price Patrol lists approximately twice a year, most frequently because an item was dropped by Kroger or by a number of its competitors, so that comparison was impossible (Thomas, Tr. 2127; Hoover, Tr. 1578-79; Stec, Tr. 1699-1700; JX 1: Crague, pp. 43-44; JX 1: Hoover, p. 22; JX 1: Stec, pp. 73-74, 119). Other reasons for changing items were the introduction of new items into the market, changes in popularity of items, and seasonality of some items (Thomas, Tr. 2127-28; JX 1: Hoover, p. 22; JX 1: Crague, pp. 43-44).

73. Respondent's employees Mr. Hoover and Mr. Hicks testified that the representativeness of the Price Patrol lists is significantly increased by the fact that there are direct pricing relationships, known as "parity" relationships, among many similar retail food store items (Hoover, Tr. 1584-85, 1641; Hicks, Tr. 2353-58). To the extent that this principle is put into practice by Kroger, a change in the price of a Price Patrol item may be accompanied by similar price changes in a number of related items which are not on the Price Patrol lists (JX 2: Hoover, p. 159). However, the parity pricing relationship discussed by Mr. Hoover and Mr. Hicks does not say anything about the prices of items at any competitor stores (Tr. 1640, 1642, 1648-49) and does not even apply consistently at Kroger, as shown by several examples taken directly from Kroger's own representative Price Patrol lists. Mr. Hoover, testified that knowing the price of one size of an item at Kroger and at a competitor's store would give you "some idea" about Kroger's price relationship to its competitor on another size of the same item, but ". . . it would depend on whether or not all competitors use parity pricing, which in fact they did not" (Tr. 1640). Thus, the "parity" concept did not allow Kroger to assume that, if one size product appears on the Price Patrol list, a competitive posture to a larger or smaller size product not on the Price Patrol list could be determined (Tr. 1646-47). For example, Mr. Hoover testified that RXs 905, 906, and 907 were typical Price Patrol lists (Tr. 1639). He further testified that on these typical Price Patrol lists (RXs 905, 906, 907), Kroger's price competitive position on certain like items of different sizes was different (Tr. 1644-52), *i.e.*, Kroger was lower priced on a quart of Purex bleach and higher priced on a gallon of Purex bleach (Tr. 1644).

74. One example of "parity pricing" involves different flavors of the same name-brand product—*e.g.*, different flavors of Betty Crocker cake mix, or different flavors of [24]Hi-C fruit drink—which are generally priced the same. Thus the price of one Betty Crocker cake mix or one flavor of Hi-C fruit drink represents the price of all

