IN THE MATTER OF

GENERAL FOODS CORPORATION

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC.5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT

Docket 9085. Complaint, July 14, 1976—Final Order, April 6, 1984

In this Final Order, the Commission denied complaint counsel's appeal against an ALJ's Initial Decision dated Jan. 25, 1982, sustained the ID for reasons set forth in its accompanying Opinion, and dismissed the Complaint charging a leading processed food manufacturer with violating Section 5 of the Federal Trade Commission Act and Section 2(a) of the Clayton Act, in connection with the marketing of Regular Maxwell House Coffee.

Appearances

For the Commission: *Edward J. Carnot, Michael Goldenberg, Jane Seymour, Wayne Kaplan* and *Richard F. Silvestri.*

For the respondent: *Paul C. Warnke, John F. Kovin, John G. Calender, Robert P. Reznick* and *Don Scott DeAmicis, Clifford & Warnke,* Washington, D.C. and *Robert Y. Fox,* in-house counsel, White Plains, N.Y.

COMPLAINT

The Federal Trade Commission, having reason to believe that General Foods Corporation is in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues its Complaint charging as follows:

DEFINITIONS

1. For the purpose of this Complaint, the following definitions shall apply:

(a) *Regular coffee* is coffee processed from unroasted coffee beans by means of blending, roasting, and grinding into varying granular sizes and which must be heated and steeped in water before being consumed. It is generally packed and sold in vacuum tin containers and paper bags. It is to be distinguished from soluble (instant) coffee.

(b) *Consumer promotions* are discounts or other offerings to the consumer to encourage him to purchase the brand promoted.

(c) *Trade promotions* are discounts or other financial incentives to the grocer or wholesaler. [2]

RESPONDENT

2. General Foods Corporation (hereinafter "General Foods") is a Delaware corporation with its executive office located at 250 North Street, White Plains, New York.

3. Coffee is one of General Foods' principal product lines. Coffee sales make up approximately 29% of the total revenues of General Foods and regular coffee constitutes a substantial portion of such coffee sales.

4. In fiscal year 1975 General Foods had total sales of approximately $3.7 billion, in fiscal year 1974, $3.0 billion, in fiscal year 1973, $2.6 billion, in fiscal year 1972, $2.4 billion and in fiscal year 1971, $2.3 billion.

5. The Maxwell House Division of General Foods is principally responsible for the manufacture, distribution and sale of coffee. Sales volume for the Maxwell House Division approximated $900 million in fiscal year 1974, $763 million in fiscal year 1973, $703 million in fiscal year 1972 and $662 million in fiscal year 1971.

6. The relevant market is the production, distribution and sale of regular coffee packaged for sale at retail in Maxwell House Division's eastern region. Relevant geographic submarkets include the Cleveland and Pittsburgh market areas of Maxwell House Division's Youngstown, Ohio District, the Wilkes Barre and Philadelphia market areas of Maxwell House Division's Philadelphia, Pennsylvania District and each market area of Maxwell House Division's Syracuse, New York District.

7. Concentration of sales for regular coffee packaged for sale at retail in the United States has increased from approximately 66% for the four largest producers in 1971 to approximately 72% in 1974.

8. General Foods, through its Maxwell House Division, is the largest seller of regular coffee packaged for sale at retail in the United States. It accounted for approximately 31% of such sales in the United States in 1972, 34% in 1973, and 35% in 1974. [3]

9. The Maxwell House Division of General Foods was the dominant seller of regular coffee packaged for sale at retail in the relevant market and each relevant submarket during the years 1971 through 1975, accounting, in each year, for approximately 45% or more of sales of regular coffee packaged for sale at retail in the relevant market and approximately 50% or more of such sales in the relevant submarkets.

OFFENSES ALLEGED

10. General Foods, through its Maxwell House Division, has used and is using its dominant position, size and economic power to frustrate the growth of smaller regular coffee producers and to frustrate entry of other regular coffee producers into the relevant market and submarkets and to prevent, hinder or lessen competition in the production, distribution or sale of regular coffee packaged for sale at retail in the relevant market and submarkets.

More particularly, General Foods, through its Maxwell House Division, since at least October, 1971, has adopted and placed into effect and carried out various policies, acts, practices, or methods of competition to foreclose entry and to lessen, restrain, eliminate or prevent the production, distribution or sale of regular coffee packaged for sale at retail by others engaged in the production, distribution or sale of such product in each market and submarket identified and alleged herein. Among such policies, acts, practices or methods of competition, General Foods, through its Maxwell House Division, has engaged in one or more of the following:

(a) Selling regular coffee packaged for sale at retail below cost or at unreasonably low prices;

(b) Using extensive consumer and trade promotions and advertising to forestall or foreclose market entry or to lessen competition; [4]

(c) Engaging in geographically discriminatory pricing and promotional and advertising practices to forestall or foreclose entry or lessen competition;

(d) Foreclosing and deterring new entry by increasing advertising and promotional expenditures in previously established marketing areas of the new entrant in retaliation for entry into the relevant market and submarkets.

(e) Using a fighting brand of regular coffee to forestall or foreclose entry or lessen competition.

EFFECTS

11. The aforesaid policies, acts, or practices have or may have the following effects in one or more of the relevant market and submarkets alleged herein, among other things:

(a) Monopolizing the production, distribution or sale of regular coffee packaged for sale at retail;

(b) Increasing entry barriers in the production, distribution or sale of regular coffee packaged for sale at retail;

(c) Preserving, maintaining, or furthering highly concentrated market structures;

(d) Hindering, restraining, foreclosing or frustrating competition in the production, distribution or sale of regular coffee packaged for sale at retail;

(e) Depriving consumers of the benefits of free and open competition.

JURISDICTION

12. The policies, acts and practices of General Foods' Maxwell House Division as alleged herein at all times relevant hereto have been in or have affected commerce within the meaning of the Federal Trade Commission Act. [5]

13. In the course and conduct of its business, General Foods' Maxwell House Division is now, and for many years past has been, engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has sold and distributed, and is now selling and distributing, regular coffee packaged for sale at retail to purchasers thereof located in States other than the State of origin of shipments and has, either directly or indirectly, caused such products, when sold, to be shipped and transported from the State of origin to purchasers located in other States, as part of a constant course and flow of trade and commerce in such products between General Foods' Maxwell House Division in the State of origin and purchasers thereof located in other States and the District of Columbia.

General Foods, through its Maxwell House Division, has shipped and sold regular coffee packaged for sale at retail to purchasers with places of business located throughout the several States of the United States and the District of Columbia for resale to customers within the United States.

VIOLATIONS

14. In the relevant market and in one or more of the relevant submarkets, General Foods, through its Maxwell House Division, has maintained monopoly power over the production, distribution or sale of regular coffee packaged for sale at retail through all or some of the policies, acts and practices set out and alleged in Paragraph 10 in violation of Section 5 of the Federal Trade Commission Act.

15. In the relevant market and in one or more of the relevant submarkets, General Foods, through its Maxwell House Division, has attempted to monopolize the production, distribution or sale of regular coffee packaged for sale at retail through all or some of the policies, acts and practices set out and alleged in Paragraph 10 in violation of Section 5 of the Federal Trade Commission Act.

16. General Foods, through its Maxwell House Division, has engaged in a course and pattern of conduct which constitutes unfair

methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act. [6]

17. In the course and conduct of its business in commerce, General Foods, through its Maxwell House Division, has since October 1971 discriminated and is now discriminating in price in the sale of regular coffee packaged for sale at retail by selling such products of like grade and quality at different prices to different purchasers.

Included in, but not limited to, the discriminations in price as above alleged, respondent has discriminated in price in the sale of said products to retailers and other purchasers in the Cleveland and Pittsburgh market areas of its Youngstown, Ohio District and in the Wilkes Barre and Philadelphia market areas of its Philadelphia, Pennsylvania District, and in each market area of its Syracuse, New York District by charging said retailers and other purchasers substantially lower prices than charged by said respondent for the sale of said products of like grade and quality to retailers and other purchasers located in other of respondent's trading areas throughout the nation, including at times other of the market areas described herein.

The effect of such discriminations in price by respondent in the sale of regular coffee packaged for sale at retail has been or may be substantially to lessen competition or to tend to create a monopoly in the line of commerce in which said respondent is engaged, or to injure, destroy or prevent competition between respondent and its competitors in the production, distribution or sale of such products.

The discrimination in price as herein alleged violate subsection 2(a) of the Clayton Act, as amended.

Initial Decision by

Lewis F. Parker, Administrative Law Judge

January 25, 1982

I. History of the Proceeding

The Commission issued its complaint in this case on July 14, 1976. It charges General Foods Corporation with violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 and Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a).

The complaint alleges that General Foods, through its Maxwell House Division, has used and is using its dominant position in regular coffee and its size and economic power to frustrate the growth of smaller regular coffee producers, to frustrate the entry of other regular coffee producers into certain relevant markets, and to prevent, hinder or lessen competition in the production, distribution or sale of regular coffee packaged for sale at retail in the relevant markets. The complaint claims that General Foods achieved these results by selling regular coffee below cost or at unreasonably low prices, [2] by using extensive consumer and trade promotions and advertising to forestall or foreclose market entry or to lessen competition, by engaging in geographically discriminatory pricing, promotional and advertising practices, by increasing advertising and promotional expenditures in previously established marketing areas of a new entrant to deter its entry into the relevant markets, and by using a fighting brand to forestall or foreclose entry or lessen competition.

According to the complaint, the effects of these practices have been the monopolization of the production, distribution or sale of ground coffee packaged for sale at retail, the increase of entry barriers, the preservation of highly concentrated market structures, the hindering of competition and the deprivation to consumers of the benefits of free and open competition.

After extensive discovery, hearings began on August 20, 1979. They ended on June 19, 1981. Over twelve thousand pages of testimony were recorded and several thousand pages of documents were received in evidence. The record was closed on June 26, 1981. Complaint counsel filed their proposed findings of fact and conclusions of law on August 27, 1981. General Foods filed its answer to the findings on October 26, 1981 and complaint counsel filed their reply on December 2, 1981. At my request, the Commission granted me an extension of time to January 26, 1982 to file this initial decision.

This decision is based on the transcript of testimony, the exhibits which I received in evidence, and the proposed findings of fact and answers thereto filed by the parties. I have adopted verbatim several findings proposed by complaint counsel and counsel for General Foods. Others have been adopted in substance. All other findings are rejected either because they are not supported by the record or because they are irrelevant.

II. Findings of Fact

A. *General Foods Corporation*

1. General Foods Corporation is a Delaware corporation with its principal executive offices located at 250 North Street, White Plains, New York (Complaint ¶2, Answer ¶3). It is one of the world's leading processors of packaged grocery products and [3] markets a variety of these products in the United States under more than thirty major

brand names (CX 438B).[1]

2. In fiscal year 1972 (year ending April 1, 1972),[2] General Foods had net world-wide sales of over $2.5 billion and net earnings (from continuing operations) of approximately $113 million. In fiscal year 1976, General Foods had net world-wide sales of approximately $4 billion and net earnings of over $150 million (CX 438F).

3. Coffee is one of General Foods' principal product lines (Complaint ¶3; Answer ¶4). From April 1971 through April 3, 1976, General Foods' domestic coffee sales made up from 26% to 30% of its consolidated net sales (CX 438B). Regular coffee (coffee processed from unroasted coffee beans, as distinguished from soluble (instant) coffee) (Complaint ¶11(a); Answer ¶2) constituted a substantial portion of such coffee sales (Complaint ¶3; Answer ¶4). The sales volume of the regular coffee products sold by General Foods' Maxwell House Division approximated $380 million in fiscal year 1971, $386 million in fiscal year 1972, $433 million in fiscal year 1973, $504 million in fiscal year 1974, $529 million in fiscal year 1975, $567 million in fiscal year 1976, and $900 million in fiscal year 1977. In these years, earnings before taxes for all ground coffee products approximated: $26 million in 1971, $24 million in 1972, $13 million in 1973, $17 million in 1974, $5 million in 1975, $25 million in 1976, and $51 million in 1977 (CX 991A–N).

4. General Foods' largest selling regular coffee brand during the relevant time period was Regular Maxwell House. For the following fiscal years, the sales volume and earnings before taxes (in parentheses) for that brand approximated: $303 [4] million ($21 million) in 1971, $293 million ($19 million) in 1972, $300 million ($9 million) in 1973, $351 million ($4 million) in 1974, $369 million (loss of over $1 million) in 1975, $395 million ($22 million) in 1976, and $654 million ($35 million) in 1977 (CX 991A–N).

B. *Interstate Commerce*

5. In the conduct of its business, General Foods' Maxwell House Division distributes regular coffee packaged for sale at retail to purchasers located in states other than the state in which the shipments originated as part of a constant course of trade and commerce in

[1] The following abbreviations are used in this decision:

CX	–	Commission Exhibit
RX	–	Respondent's Exhibit
Tr.	–	Transcript of testimony
CPF	–	Complaint counsel's proposed findings
CLA	–	Complaint counsel's legal argument
RPF	–	Respondent's proposed findings
RLA	–	Respondent's legal argument
CRF	–	Complaint counsel's reply findings
CRLA	–	Complaint counsel's reply legal argument

[2] General Foods' fiscal years run from April through March of the following year (CX 438B).

regular coffee between the state of origin and purchasers located in other states and the District of Columbia (Complaint ¶13; Answer ¶14).

6. General Foods produces its regular coffee products in four plants in the United States: Hoboken, New Jersey; Jacksonville, Florida; Houston, Texas; and San Leandro, California. Its products are shipped from these plants to locations throughout the United States (CX's 387–94; Tr. 5123–25).

C. *Regular Coffee Producers*

7. Green coffee beans constitute the principal cost component in the production of regular coffee packaged for sale at retail (CX 438B). These beans are all imported into the United States (Tr. 4772).

8. Regular coffee is manufactured by roasting the green beans, grinding and blending different types of roasted beans to achieve certain taste characteristics, and then packing the product in vacuum packed cans or in bags for distribution (Tr. 4828). The manufacture of ground coffee is not a capital intensive industry (Tr. 129).

9. Regular coffee is marketed in three pack sizes—one pound, two pound and three pound (Tr. 1627) and comes in different grinds—regular, drip, fine, and all purpose, as well as grind or blend variations suited for use in electric percolators and in automatic drip coffee makers. There are decaffeinated regular coffee products, coffee products that contain chicory or other extenders, coffees that are "premium blends," and expresso coffees. Coffee is also marketed in premeasured filter rings or pouches. Recently, manufacturers **[5]** have introduced increased cup yield coffees which deliver increased cup extraction as a result of different roasting and grinding processes (Tr. 4837–49).

10. There are several large firms currently operating in the regular coffee industry in the United States: General Foods Corporation; The Procter & Gamble Co., which markets the Folger's and High Point brands; The Coca-Cola Co., which markets the Maryland Club and Butternut brands; Nabisco Brands, formerly Standard Brands, which markets the Chase & Sanborn brand; The Hills Bros. Coffee Co., Inc., a wholly-owned subsidiary of Copersucar, a Brazilian conglomerate; and The MJB Coffee Co. (Tr. 2122, 3224, 4496, 10,541).

11. Many major retail chain grocery stores produce or have produced for them their private brands of coffee which are sold in their stores in competition with brands sold by independent coffee manufacturers (CX 437F; Tr. 12,335). Some of the larger chains selling their own brands of coffee are The Kroger Co., the Great Atlantic and Pacific Tea Company ("A&P"), Safeway, and First National/Pick 'N Pay (Tr. 1641, 6276, 9538).

12. There are also a substantial number of smaller roasters, many of whom are significant factors in their areas of distribution: Chock Full O'Nuts Co.; American Maize Co., which markets the Savarin brand; J. Lyons & Co., which markets the Martinson's brand; and the JFG Coffee Co. (Tr. 4278–82, 8338, 10,527).

D. *The Consumption Of Regular Coffee*

1. The Use Of Regular Coffee As A Traffic Builder

13. During an average three-month period, 80% of households in the United States purchase regular coffee at least once. During a 13-week period, these households purchase, on average, 7 1/2 pounds of coffee (CX 190B).

14. Retailers who sell ground coffee recognize that their customers are very sensitive to its retail price. Mr. Theodore Engel of the Kroger Co. testified that it regards regular coffee as a "board item," a term used to identify "the basic items we feel from experience are the most price-sensitive items that we carry . . ." (Tr. 1707).

15. Maxwell House Division documents also disclose the importance of price to regular coffee consumers: **[6]**

> Consumers have been educated to buy ground coffee on price. Ground coffee shares are dramatically responsive to changes in price levels vs. competition. Many people buy every week or two (CX 20Z–38).

> Retail price is an extremely important factor in the ground coffee industry affecting both coffee market trend and shares of individual brands within it (CX's 38Z–30, 39Z–17, 40S).

16. This sentiment was echoed in a May 1973, Procter & Gamble memorandum:

> [a]ll our experience in the coffee business tells us that it is extremely responsive to pricing; and pricing equity is regarded as a necessity even in areas where we have a strong leadership share position (CX 524).

17. Because of this consumer attitude toward regular coffee, it has "historically been an actively merchandised category by the Grocery Trade—promoted as a 'traffic builder' or a 'loss leader' " (CX 190B), and this attitude has "led to the use by retail grocers, of coffee as a trade building item" (CX 205A).

18. Louis Epstein, president of Golden Dawn Foods, Inc., a company that wholesales groceries to a voluntary group of supermarkets in western Pennsylvania and eastern Ohio, has purchased ground coffee from manufacturers since 1970 (Tr. 12,157–60). According to Mr. Ep-

stein, it is a "common practice" in the grocery business to sell a highly desirable item such as coffee at a reduced price to attract consumers:

> [T]he assumption being that if a consumer walks into the store for the reason of buying that product at a very low price, she will buy the rest of the order there and then you will balance out and make money on the balance of the order. That is loss leader selling and it's a common practice in the industry (Tr. 12,187; *see also* Tr. 2881, 5753, 5818, 5938, 6611). **[7]**

19. David Graham, who had extensive experience first in the marketing of ground coffee brands produced by General Foods, and was thereafter vice president and general manager of the Martinson Division of the Squibb Corporation, responsible for the marketing of Martinson's and Beechnut coffee brands, and who later participated at Standard Brands in major management decisions affecting the Chase & Sanborn brand of coffee, testified that coffee is an "extremely competitive" industry. Certain characteristics make it particularly competitive. It is a large category in terms of physical volume and dollar sales, and represents a "very meaningful part" of the total revenue of grocery store sales. It is a product which is widely consumed and purchased frequently, and it is used by grocers to draw people into their stores (Tr. 10,536–37).

2. The Trend In Regular Coffee Sales And The Increase In Competitive Activity

20. In fiscal 1968, the consumption of regular coffee in the United States peaked at 122.4 million units, or 1.468 billion pounds (RX 1105B). In the next ten years, regular coffee consumption declined by almost one-third (Tr. 4335–36).

21. This decline in consumption has caused manufacturers of ground coffee to intensify their promotional activity in order to maintain their business (Tr. 5722). Any coffee company seeking business in new areas of distribution would have only one source for this business, from the other brands existing in that area (Tr. 4336). Hills Bros. recognized that Procter & Gamble's expansion of Folger coffee did not expand the ground coffee market, but that Folger's obtained its share by taking it from other brands (Tr. 2196).

22. Several Maxwell House Division documents indicate that as a result of this decline in consumption, producers have increased marketing expenditures in an attempt "to maintain volumes in a declining market" (CX 17T) and that trade promotion expenditures have increased because producers realized that it was necessary and more efficient to trade promote in order to utilize more capacity (CX 20Z–38). Local and regional roasters' reliance on trade dealing as their

single marketing tool is "reflective of incremental economies in an industry with idle capacity" (CX 190B).

23. The importance of this decline in consumption and attendant increased marketing expenditures was recognized within [8] the Division as a potential cause of increased competitive activity by roasters:

> Folger, in quest of "at least" static volumes in a declining ground market, will continue to grow in their established markets with accelerated trade spending.
>
> Hills, MJB and other competition will continue to lose share intensifying trade spending along the way.
>
> In the HFNI, Savarin, CFON, C&S and Martinson's will continue to spend to solidify share (CX 16H; *See also* CX's 13M, 15D, 16Z–36).

24. This increase in competitive activity has not been limited to just a few of the Maxwell House Division's sales districts but is a nationwide phenomenon (CX's 659B, 670A, 672C, F, 673D, 677A, C; RX 1207A–C, F).

E. *The Marketing Of Regular Coffee By The Maxwell House Division*

1. Introduction

25. During the 1960's, its Maxwell House Division accounted for approximately 35% of General Foods' profits (Tr. 4495). The Division's major regular coffee brand is Regular Maxwell House; other brands sold by the Division are Maxim, a freeze-dried coffee, Sanka, which is produced in freeze-dried, regular and soluble form, Yuban, a premium coffee, Brim, a decaffeinated ground and freeze-dried coffee, and Master Blend, Electra-Perk, ADC, Mellow-Roast and Max-Pax, which are regular coffees (Tr. 4492–93, 4836–37, 4847–48, 4858).

2. The Marketing Mix

26. Prior to fiscal 1972, the Division's coffees were sold in 27 sales districts. In fiscal 1972, the Division's national sales manager reduced the districts from 27 to 20 and extended [9] the boundaries of the remaining sales districts. The districts contain 52 marketing areas. The Division's coffees are sold direct to retail grocers and to wholesalers. Of the 200,000 retailers in the United States, some 30,000 are sold direct; the remaining 170,000 buy their Maxwell House Division coffees from wholesalers (Tr. 5723, 7130–31, 7159). The Maxwell House Division (and other roasters) promotes its coffee products through a so-called "marketing mix" which consists of advertising, trade dealing and consumer promotions (Tr. 7115).

27. Advertising, or "media," consists of television programming,

magazines, newspapers, Sunday supplements, radio, and outdoor billboards. Television advertising is either network or spot. Network advertising is bought from the major networks, CBS, NBC and ABC, in New York City. Spot advertising is purchased from local television stations (Tr. 7820).

28. Trade deals consist of non-performance and performance allowances which are offered to the Division's retail customers (when the Division sells to wholesalers, these allowances are passed on to the wholesalers' customers) (Tr. 7130–31).

29. Non-performance allowances such as buying allowances are discounts from the list price for each case of coffee. The retailer is not required to perform in order to receive the allowance (Tr. 1374–75, 5754).

30. A performance allowance is a discount from the list price for each case of coffee, with the requirement that the retailer engage in specified performance. Performance allowances include display allowances, advertising allowances, reduced price features and count and recount. A display allowance requires that the retailer display the coffee in a particular fashion. An advertising allowance requires that the retailer advertise the product in order to get credit for the allowance on all volume purchased. A reduced price feature requires the retailer to reduce the price of coffee to the consumer. A count and recount is an allowance based on cases moved from the trade's warehouse to the retail store serviced by that warehouse (Tr. 5846–47, 6655–56).

31. Consumer promotions take the form of coupons, of which there are two basic types: consumer coupons and retailer coupons (RECUs). Retailer coupons (RECUs) are coupons that a retailer runs in its newspaper advertisement which offer the consumer a discount on the purchase price of a particular brand. When the consumer buys the product and presents the coupon to the retailer, the consumer receives a price reduction equal to the face amount of the coupon. Upon submittal of the coupon to a manufacturer, the retailer receives an amount equal **[10]** to the price reduction from the manufacturer (Tr. 2009–10, 2505, 2747, 12,100–03, 12,183). Consumer coupons are redeemed like RECU's by the retailer, but they are either mailed direct to the consumer by the producer ("DMCU"), appear in newspapers or magazines ("NECU"), or are packed in the product ("PIC's") (Tr. 1601, 2013–14, 2505–06, 2725). RECU's are effective for a four-or-six-week period. During this period, a retailer can only participate once in the RECU offer and the RECU must expire within a week from the date of publication (Tr. 5846, 5998, 7123). Consumer coupons can be redeemed for an indefinite period (Tr. 4114).

F. *Folger's Entry Into The HFNI*

32. Although Regular Maxwell House is sold nationwide, the bulk of its volume has traditionally been sold in the "HFNI," an acroynm for "High Franchise Non-Infringement." The HFNI is the area of the United States east of the Mississippi River where Regular Maxwell House has been the leader in regular coffee sales. In the western part of the United States, the so-called "Low Franchise" area (CX 448A–C; Tr. 1398–99), Regular Maxwell House has been faced with competition from the leader in that area, the Folger Coffee Company (Tr. 2709–10, 4502).

33. The Maxwell House Division's major competitor has been and is the Folger Coffee Company. In 1963, Folger was acquired by the Procter & Gamble Company (Tr. 4506) and, until the fall of 1971, restricted its competitive activities, with minor exceptions (some sales in Indiana, Cincinnati, Ohio, and Florida), to the western United States (Tr. 2709–10, 4502).

34. In October 1971, Folger began selling its coffee in Cleveland, Ohio as a test market, with the intention, if its introduction into this market were successful, to expand into the balance of the eastern United States on an orderly schedule (Tr. 2710–11). After waiting for three months, the Maxwell House Division decided to respond to Folger's eastern thrust. It is this response to Folger's entry into Cleveland and other eastern areas and the consequent results which prompted the Commission to issue the present complaint.

G. *The Relevant Product Market*

35. The parties have agreed that the relevant product market is all regular coffee products packaged for sale at retail, including caffeinated, decaffeinated, and extended [11] ground coffee products (Prehearing Conference, April 12, 1978, Tr. 79–84).

H. *The Relevant Geographic Market*

1. Introduction

36. While Dr. Kenneth Elzinga, General Foods' major economic expert, agreed with few of the conclusions drawn from this record by Dr. H. Michael Mann, complaint counsel's main expert,[3] he and Dr. Mann agreed that a relevant market is an "area that encompasses the primary demand and supply forces which determine price" (Tr. 3528, 9415, 9456–57). However, as is not uncommon when economists (or lawyers) apply a simple principle to a concrete factual situation, the experts' conclusions differed: Dr. Elzinga testified that the relevant

[3] Dr. Elzinga is a professor of economics at the University of Virginia (Tr. 9401). Dr. Mann is a professor of economics at Boston College (Tr. 3515).

geographic market for coffee is probably nationwide (Tr. 9430), while Dr. Mann stated that the market is no larger than a General Foods sales district (Tr. 3527).

37. The following discussion analyzes the demand forces which are emphasized by Dr. Mann and complaint counsel and the supply forces which Dr. Elzinga and counsel for General Foods claim are the primary forces which define the relevant geographic market.

2. The Demand Forces

(a) *Industry Recognition*

(1) General Foods

38. General Foods recognizes in dealing with its customers that the demand for regular coffee is not uniform throughout the nation but that it differs from area to area. [12]

39. General Foods' fiscal 1971 marketing plan[4] for Maxwell House is an example of the way it views the demand for coffee:

> *Ground Coffee Market Structure - The National Markets vs. The Market Places.*
>
> - National shares are only an average of widely divergent market places, because RMH[5] and Folger are strongly regionalized and smaller brands have only local zones of influences. *National share relationships have little relevance to the structure within a marketplace.*
> - No *region, district, market area or dealing area even vaguely resembles the national profile!* (Emphasis in the original.)
>
> It is in each market place that consumers purchase coffee and the structure of the individual marketplace is the arena that defines the choices the consumer has. To influence her choice marketing efforts must be tailored to her marketplace (CX 20Z–37).

40. Other statements in General Foods documents reveal the less-than-national demand forces which it faces when it markets its coffee products:

> <u>BACKGROUND</u>
> <u>THE GROUND COFFEE MARKET STRUCTURE</u>
>
> *IMPLICATIONS*
>
> *Marketing Strategy*
>
> - In the ground coffee market, a flat national dealing/spending level is not a good fit of marketing strategy to market structure. [13]
> - Due to the responsiveness of ground coffee shares to changes in price, RMH must

[4] Marketing plans are statements of brand objectives and brand strategies and outline the strategies to accomplish those goals (Tr. 1521).

[5] Regular Maxwell House.

respond to market-by-market conditions to remain competitive to locally powerful brands.

The effectiveness of broad marketing programs like advertising and consumer promotion, depends on RMH's ability to neutralize the impact of on-shelf/feature differentials vs. competition as and where they occur (CX 20Z-39).

41. The fiscal 1976 marketing plan, under the heading "dealing principles" states: "Trade deal on [a] market by market basis to achieve Brand's overall objectives" (CX 19A, Z-26; *see also* CX 18Z-16). The fiscal 1976 media plan for Maxwell House describes planned media expenditures for that year and states: "the Brand's base budget was allocated by dollars by market according to the Brand's Development Index" (CX 457S).

42. The fiscal 1975 marketing plan contains a chart, "RMH Financial Summary Fiscal 1975," that shows differences in trade and consumer promotions between the sales districts of Youngstown, Philadelphia, Kansas City, and Dallas (CX 63S). Another chart contains a series of statements reflecting differences in trade dealing strategy for Maxwell House in each sales district (CX 63Z-15).

43. The fiscal 1974 marketing plan under the heading "Deal Strategy" states: "RMH uses case rates tailored to each market to achieve parity shelf pricing" (CX 15Z-8).

44. The fiscal 1972 marketing plan contains a section entitled "Consumer Promotion" (CX 13Z6). In this section, individual markets are broken down into four categories, with examples given of each: (1) "Shelf Market-Strong Franchise" (examples: Washington, Memphis); (2) "Feature Market-Strong Franchise" (examples: New York, Cincinnati); (3) "Shelf Market-Weak Franchise" (example: Los Angeles); and (4) "Feature Market-Weak Franchise" (examples: San Francisco, Dallas). Separate regular Maxwell House consumer promotion objectives and strategies are listed for each category of markets (CX 13Z8-9).

45. The fiscal 1971 marketing plan indicates that Regular Maxwell House media funding was allocated on a district-by-district basis according to several factors, including Folger's media spending (CX 12P; *see also* Tr. 1177). [14]

46. Still more General Foods documents contain statements and tables indicating that demand conditions differ between its sales districts:

a) The "State of the Business," contains a chart entitled "Trade Spending Analysis FY '75 AFP" that shows differences among Maxwell House Division sales districts in terms of Maxwell House trade dealing strategies (CX 17Z1).

b) The March 1, 1976, "Trade Promotion Review," states: "Overall, trade dealing provides a mechanism for implementing market-by-market pricing action, consistent with the nature of the industry and competitive circumstances" (CX 190C, CX 191C).

c) The August, 1976, "RMH Trade Dealing Principles Review" tracks Maxwell House share versus competition for each district, market area, and dealing area (CX 195A–Z8). Depending on the Maxwell House to competitor share ratio, Maxwell House dealt at a different level, keying only to certain competition (CX 1950). Under the heading "How Deal Levels Are Calculated," the document explains how General Foods calculates Maxwell House trade dealing levels separately for each market "depending on the RMH to competitive share ratio" with lower deal levels being designated for areas in which Maxwell House's market position is stronger (CX 195T; *see also* CX 194Q).

d) A 1975 "RMH Trade Dealing Principles" document states: *"The RMH trade principles are based on pack size franchise relationships to competition on an individual market basis"* (CX 188B, emphasis in original). This document also states that Maxwell House's "specific dealing programs are on an individual market basis" (CX 188B).

e) A "Regular Maxwell House Trade Dealing Review" analyzes on a sales district by sales district basis the different competitive factors in each sales district (CX 187R–Z1, CX 187Z3–14). **[15]**

f) In another "RMH Trade Dealing Principles Review," General Foods again recognized that it must deal with different demand forces from area to area:

Offers by RMH must be structured to appeal to each area's trade factors with an understanding of their merchandising policies, RMH's relative pack size strengths and competitive offer levels (CX 194D).

47. The marketing plans of other General Foods brands also reveal General Foods' perception that customer demands differ from area to area. The following are examples:

a) The Brim fiscal 1977 marketing plan states that Brim's trade promotion spending would be initiated to provide "[m]erchandising support for drive period promotions on a responsive district basis only." (CX 61N).

b) The fiscal 1976 marketing plan for Max-Pax contains an outline that shows separately for individual Maxwell House Division sales districts and market areas the estimated trade rates per unit for Max-Pax and the trade deal strategies to be followed by Max-Pax in fiscal 1976. The outline reveals differences among the Maxwell House Division sales districts and market areas in relation to these factors (CX 44Z17–20).

c) The fiscal 1974 Yuban marketing plan contains a chart entitled

"Trade Deals/Pricing Objectives" that shows differences among Maxwell House Division sales districts in terms of Yuban's trade deals and pricing objectives for fiscal 1974 (CX 35Z3).

d) The fiscal 1975 Yuban Marketing Plan under the heading "Spending Principles" discusses the concentration of advertising effort in particular sales districts and states:

Beginning in F' 74, Yuban's basic spending strategy will be to concentrate the Brand's advertising and [16] promotion expenditures in key markets only. This "concentration" strategy recognizes that the greatest areas for growth for Yuban lie in current areas of strength where the brand already possesses consumer/trade leverage. Seven districts (N.Y., Boston, Dallas, St. Louis, Portland, San Francisco, Los Angeles) which account for approximately 80% of Brand volume will receive all the Brand's media support and over 90% of its promotion expenditures (CX 35U–V).

48. As would be expected from the above statements, General Foods' marketing strategies are tailored, in many cases, to individual Maxwell House sales districts or market areas. Maxwell House's assistant product manager, who was responsible for selling volumes and deals, allocated deals to individual sales districts with the objective of delivering certain volume or share levels in a sales district (Tr. 1373, 1376–78).

49. The Maxwell House Division regional sales managers set volume targets for each of the districts (Tr. 6457, 6501, 6603). They also reviewed the regular coffee pricing situation in their regions on a district-by-district basis (Tr. 6658, 6663). Each of the district managers was assigned certain volume objectives, and based on these objectives, certain deals were authorized for those areas in order for the district managers to accomplish the objectives (Tr. 1378).

50. Trade deals were cut for each sales district separately. The same trade deal was never cut for the entire country (Tr. 1377–78), and trade deal rates generally differed among sales districts (Tr. 1660, 1963, 5815–16, 5828).

51. Advertising levels for the Regular Maxwell House brand also varied among sales districts (CX's 12P, 457S, 794A–D).

52. The reason that the Maxwell House Division offered varying deals in different districts is that levels of competition differed between the areas (Tr. 7159). By way of illustration, Mr. Keller, Division's southern region sales manager, testified:

. . . I would love to have one deal that I could run the entire region. But there are too many local competitors and too many [17] different competitors and different competitive situations in each of the markets that doesn't allow me to do that. It doesn't allow me to be—to run one deal—and as a result I need to have different deals in different districts (Tr. 6675).

53. In some cases, the Maxwell House Division even offered trade deals in an area smaller than a sales district (Tr. 5815). For example, before Folger entered Cleveland, the Maxwell House Division dealt the Youngstown sales district as an entity (Tr. 7161). After Folger entered Cleveland, the Division responded to Folger's entry only in Cleveland instead of the entire Youngstown sales district (Tr. 4554, 7161–62). The Division's increases in its trade rates, consumer promotions, and advertising in response to Folger's entry in Cleveland were limited to the Cleveland area because the need for them only arose in that area (Tr. 5833–34).

54. When the Maxwell House Division responded to Folger's entry into Pittsburgh, it limited its response to the Pittsburgh market area (Tr. 4554–55, 7161–62), and its increases in trade promotions, consumer promotions, and advertising in response to Folger's entry into Syracuse did not extend beyond the Syracuse sales district (Tr. 5836, 5997–98, 6022–23, 6103, 7162).

55. When the Maxwell House Division responded to Folger's entries into the Philadelphia and Syracuse sales districts, part of its response was the introduction of a new regular coffee brand, Horizon. Horizon's introduction was limited to the Wilkes-Barre/Scranton market area of the Philadelphia sales district and to the Albany market area of the Syracuse sales district. Its entry was timed to coincide with Folger's entry into these areas (Findings 424–27).

56. When Maxwell House Division responded to Folger's entries into Cleveland and Pittsburgh, part of its response involved increased advertising and deal rates in two of Folger's largest and most profitable areas, Kansas City and Dallas (Findings 428–30).

57. The same area-by-area response by the Maxwell House Division occurred when a competitor, Hills Bros., expanded eastward in the late 1960's (Tr. 4555, 5837, 6097–99).

58. The Maxwell House Division also maintains records of certain business activities on a district, or smaller, basis: "district profitability" statements show the following categories of information with respect to Regular Maxwell House [18] for each Maxwell House Division sales district: (1) "Volume Units"; (2) "P/S/S" (pack size split); (3) "C.M." (contribution margin); (4) "G.P." (gross profit); (5) "Trade Deals"; (6) "Consumer Deals"; (7) "Total Deals"; (8) "Advertising"; (9) "All Other"; and (10) "PBIT" (profit) (CX 424A–B). The Division also maintains records of sales volumes for its regular coffee products on a market area and sales district basis (Tr. 5830), and generally calculates volume objectives for Regular Maxwell House sales promotion plans by sales district or marketing area (Tr. 10,610).

59. In addition, the Maxwell House Division maintains history data on the amount of trade rates in various eastern markets (Tr. 1587),

develops "deal close" documents which show deal rates in each sales district (CX 136A–G; Tr. 1404–05), and in its weekly deal control documents, records deals on a market area by market area basis (CX's 1061, 1064).

60. The Division also gathered Nielsen data showing the market share for each of its regular coffee brands and for its competitors on a sales district basis and sometimes on a market area basis (RX's 1106–07; Tr. 4328–30), and one of its advertising agencies, Ogilvy & Mather, prepared summaries of Regular Maxwell House's advertising expenditures by sales district (Tr. 1177). In addition, Ogilvy & Mather prepared summaries of advertising expenditures by Regular Maxwell House and Folger in various local markets (Tr. 1543).

(2) The Maxwell House Division's Competitors

61. The Maxwell House Division's competitors also recognize that demand forces for regular coffee differ from region to region and take these differences into account when they market their coffee.

62. Mr. Allen Toy, vice-president of corporate development of Hills Bros. (Tr. 1991), testified that his company's sales promotion areas were established for the purpose of setting deal promotions with customers in those areas (Tr. 2006). While Mr. Toy is only generally aware of the dealing areas of his competitors, he believes that all competitors would consider major metropolitan areas as part of one promotion area. Differences between competitors' trade areas would occur between cities. For example, the area between Cleveland and Pittsburgh could be included in one sales district for General Foods and another one for Hills (Tr. 2008). **[19]**

63. Hills Bros. offers different deals, including different consumer deals in different promotional areas, as does its competitors (Tr. 1660, 2016–18). Its advertising levels also vary among its promotion areas (Tr. 2021).

64. Folger divides the country into smaller geographic areas called "sales promotion areas" (Tr. 2907). The boundaries of Folger's sales promotion areas were designed to comport with the areas in which Folger's competitors were making their offers (Tr. 2907–08), and these areas compare very closely with those of its competitors (Tr. 2908).

65. Folger sets its trade deals by promotional areas, and there are differences in Folger's dead-net prices among its sales promotion areas (Tr. 2908–09).

66. According to Mr. David W. Graham, who worked for both Standard Brands, which markets Chase & Sanborn coffee and Martinson/Beechnut (Tr. 10,526–28), Standard Brands' sales districts were generally similar to the Maxwell House Division's, with one difference—the Division, at the time he was talking about, had 20 sales districts,

while Chase & Sanborn had 23. In the case of Martinson/Beechnut, he estimated that there was probably 95% agreement between its sales districts and Maxwell House's (Tr. 10,643).

67. Hills Bros., Folger and Standard Brands kept records of or studied certain business activities (trade and consumer deals, advertising, and profitability) by district (CX 866I; Tr. 2019, 3152–56, 3169, 10,658).

(b) *Wholesale And Retail Distribution*

(1) Grocery Distribution Patterns

68. Mr. John J. MacDonald, a long-time employee of General Foods' Maxwell House Division testified that: "There are no national retailers. None. There are no national wholesalers. Each of them fills a particular piece of geography" (Tr. 7159). Within their particular piece of geography, wholesalers and retailers may use multiple buying offices and several distribution centers. For example, Kroger purchases its regular branded coffee in fourteen locations for delivery to its nineteen distribution centers (Tr. 1660), and Flickinger's, a wholesale grocery company located in Buffalo, New York, has six branches in New York, Ohio and Pennsylvania (Tr. 11,845). **[20]**

69. The Maxwell House Division and other coffee producers recognize that the demand for their products varies between sections of the country and structure their sales and promotion practices accordingly. The Division's sales districts and the distribution system that accompanied them were set up to match the particular needs of the retail coffee business (Tr. 4557). The actual pattern of retailer locations and the distribution to those retailers of coffee from General Foods' plants were among the many factors considered in determining what areas should constitute separate sales districts (Tr. 4557), and these factors continued to be considered in delineating sales districts during the 1970's (Tr. 4558).[6]

70. According to Mr. Toy of Hills Bros., all industry members consider major metropolitan areas as one promotion area. A city like Cleveland could not be separated into two promotion areas because retailers in Cleveland cover the city wide area. Differences among the dealing area boundaries of industry members only exist in outlying areas (Tr. 2008).

71. The most important factor that Hills Bros. considers in establishing its sales promotion areas is the retailers' areas of distribution. This is most important because it is "a very difficult job to sell if you

[6] On the other hand, the Maxwell House Division's decision in 1972 to reduce the number of sales districts (Finding 26) indicates that factors other than customer demand were important considerations in setting up district boundaries.

cut across the retailer's warehouse distribution area."[7] Hills Bros. includes all the stores receiving products from a warehouse in a single sales promotion area (Tr. 2007). Hills Bros. also aligns sales promotion areas to retailers' needs to minimize transshipment problems (Tr. 2022).

72. Folger's sales promotion areas were also designed to reflect trade distribution boundaries. These boundaries are the areas to which the wholesale and retail trade ship their products (Tr. 2907–08). **[21]**

(2) Overlap Of Sales Districts And Grocery Distribution Patterns

73. Complaint counsel commissioned a study by Audits and Surveys in an attempt to demonstrate that there is a correlation between the buying and warehousing patterns of grocers and the boundaries of Maxwell House sales districts. Mr. Richard Lysacker, president of this firm, testified about the study which it conducted. Mr. Lysacker has had extensive academic and business training in survey techniques and statistics (Tr. 1743–52).

74. Mr. Lysacker's study analyzed for 1971 and 1973: (1) the extent to which merchandise flows from wholesaler warehouses located in a sales district to stores located in that same district; and (2) the extent to which General Foods' sales districts align with retail market areas defined by an independent source that considered grocery distribution patterns (Tr. 1811–12).

75. The *Grocery Distribution Guide* is an annual report containing data that identifies the locations of grocery warehouses and the retail stores that the warehouses supply (Tr. 1791–92), and it was used by Mr. Lysacker to analyze to what extent food sold in grocery chain stores within Maxwell House sales districts were also warehoused in those districts (or outside of them) (Tr. 1795).

76. Mr. Lysacker satisfied himself that the *Guide* was accurate by having his staff conduct 200 randomly selected interviews with chain warehouses and buying offices and he concluded (a) that the interviews demonstrate that coffee is warehoused in the same location as other food products included in the *Guide* and (b) that his study applies, therefore, to coffee as well as to grocery products in general (Tr. 1812–13, 1818–19, 1856–57).

77. Mr. Lysacker's analysis of warehouse distribution patterns in 152 metropolitan areas for 1971 and 1973 led him to conclude that merchandise sold in a sales district was by and large also warehoused in that same sales district (CX 1029A–C; Tr. 1798).

78. This analysis reveals, according to Mr. Lysacker, that for 1971

[7] And, as will be discussed below, this phenomenon often leads to a breakdown in the containment of demand forces within sales districts.

and 1973, 96% of the grocery products sold within a Maxwell House Division sales district were also warehoused in the same sales district and that trade flow across district boundaries was minimal. The 96% figure is an average among sales districts weighted on the basis of area volume (CX 1029A–C; Tr. 1914–15). **[22]**

79. Mr. Lysacker conceded that in the northeast, some shipments cross sales district boundaries, but, according to him, the amount is only 3% in Boston, 4% in New York, 6% in Philadelphia and 6% in Syracuse (Tr. 1917–18).

80. *Progressive Grocer* is a widely used marketing guide book that supplies numerous details relating to the grocery business in 79 different marketing areas. These areas were developed by taking into account merchandise flow between retail stores and warehouses that service them and media coverage patterns (Tr. 1761–63).

81. After comparing maps of General Foods sales districts with the *Progressive Grocer* marketing areas[8] (CX's 1017A–Y and 1018A–L), Mr. Lysacker concluded that the sales districts had a "strong degree of correspondence" with the *Progressive Grocer* marketing areas (Tr. 1770–71; CX 1027A–E).

82. Although Mr. Lysacker's study of Maxwell House Division sales districts and *Progressive Grocer* market areas reflected, in his opinion, the alignment of sales districts with television markets, he also undertook an analysis focusing specifically on how television reception areas correspond to the boundaries of Maxwell House Division sales districts (CX 1015A–F; Tr. 1778–91).

83. Arbitron is a company that measures television on a market-by-market basis (Tr. 1778–79). It constructs advertising coverage areas that encompass the geographic area predominantly served by the stations located within each area (Tr. 1779–80). These 210 areas are referred to as ADIs (areas of dominant influence) (Tr. 1778–80). Interviews with television viewers are used to establish the ADI to which an area will be assigned (Tr. 1779–80).

84. A comparison of the Maxwell House Division sales districts and Arbitron's ADI areas was made using a random sample of six sales districts for 1971 (CX 1028A–C; Tr. 1781– **[23]** 85), and Mr. Lysacker believes that there is a high degree of correspondence between Maxwell House Division sales districts and ADI areas, and that the spillover of advertising messages across sales districts is relatively small (Tr. 1786–87, 1790). Mr. Lysacker's study indicates that for the sales dis-

[8] The study compared counties which are included within the confines of both a General Foods sales district and a *Progressive Grocer* marketing area with counties which are included only within a General Foods sales district and counties which are included only in a *Progressive Grocer* marketing area (Tr. 1764). The study revealed that 91% of food sales fell in counties which are common to General Foods sales districts and *Progressive Grocer* marketing areas (Tr. 1767–68).

tricts analyzed, the overlap contained over 90% of the food sales in the combined areas (CX 1028A–C).

(3) Trade Flow And Transshipment

85. Transshipment is the purchase of a product by a retailer for one warehouse and its shipment to a different warehouse in another area (Tr. 1664, 5729–30). Trade flow occurs when a single warehouse serves retail outlets in more than one sales district (Tr. 6558).

86. On the basis of his study, Mr. Lysacker concluded that trade flow was insignificant in 1971 and 1973 and that it did not prevent manufacturers from marketing in a different fashion from one sales district to another (Tr. 1774).

87. Retailers who sell the Maxwell House Division's regular coffee products are free to ship coffee from one district to another, but the Division has attempted to discourage these shipments by announcing that it will not honor offers available in one area when retailers seek to take advantage of that offer in other areas.

(4) Attempts To Limit Trade Flow And Transshipment

88. Retailer coupons may be employed as a method of lessening transshipment (Tr. 5813–14), and one Maxwell House Division retailer coupon assessment states that their use "avoids trade flow problems" (CX 186C). Another trade deal document states that:

> RECU's are financially efficient for RMH and offer the brand a tactical tool to deal with distinct competitive situations where trade flow prevents an economical case rate response (CX 190L).

89. The Maxwell House Division insists that retailer coupons be redeemed only by stores in the sales district or area in which the Division runs the offer (Tr. 5814, 6528). The deal [24] bulletin for a retailer coupon offer defines the district or trade dealing area in which the retailer coupon is to be run (Tr. 6528). Retail chains outside the area in which a retailer coupon offer is made cannot take advantage of the offer unless they have stores within the geographical boundaries of the offer. In such a case, only the retailers' stores within the geographical boundaries can take advantage of the retailer coupon offer (Tr. 5814, 5997–98).

90. For example, if a retailer in the Syracuse sales district ran a coupon that was offered only in the New York sales district, the redemption center would void those coupons redeemed in Syracuse. This would be unauthorized performance, *i.e.,* performance outside the authorized area (Tr. 6095–98).

91. The offer number associated with a particular retailer coupon

offer must appear in the coupon that the retailer prints in the newspaper, and it can be determined quickly whether a retailer coupon offered in one sales district has been redeemed in another sales district (Tr. 5854–55).

92. Under the terms of a Maxwell House Division retailer coupon offer, a consumer could not cut a retailer coupon out of a newspaper ad for Kroger in Cincinnati and redeem the coupon at a Kroger store in Cleveland (Tr. 5853). Controls that exist in General Foods' coupon redemption centers are designed to monitor and control that kind of redemption (Tr. 5854).

93. The Maxwell House Division's promotional announcements limit the geographic area of the offers (Tr. 3555–56). A typical promotion announcement identifies the geographic area in which the offer is available and states that payment on the allowance will be made only on volume shipped to retail outlets located in the offer area (CX 1125).

94. According to Mr. Engle, a Kroger official, the Maxwell House Division would not permit his company to issue a purchase order for regular coffee for delivery at one location at a price being offered by a promotional announcement in another part of the country (Tr. 1662). More specifically, since 1971, the Division would not permit Kroger to issue a purchase order for regular coffee to be delivered in Cleveland at a price being offered by the Division to retailers in Texas (Tr. 1661).

95. Transshipment can also theoretically be controlled by persuasion, restructuring of allowances, and allocations (Tr. 1664). "Allocation" means that a manufacturer will limit retailers' acceptance of offers to a specific number of cases (Tr. 1666–67). **[25]**

96. Allocation can control transshipment because only the amount of product actually needed for the market in question would be sold to the retailer. The retailer would not be sold enough volume to ship to other areas (Tr. 1666–67).

97. In at least one instance, the Maxwell House Division monitored transshipment. The Syracuse District Action Plan, under the heading "Transshipment Monitor/Control," states:

> The higher case rates on RMH could lead to higher than usual transshipment into neighboring districts. As a means of monitoring this flow of product, *the Brand will continue to ship the Fresh-Lock Lid into the Syracuse District.* This will provide a ready and visible means of tracing the shipment of Syracuse product.
>
> Secondly, *key account purchases will be monitored in White Plains* and compared against historical purchases. Consistent and unusually heavy purchases will indicate transshipment.

These two monitoring devices will provide data to use in support of discouraging transshipment at our customer headquarters (CX 710K) (Emphasis in original).

In a covering memorandum, Mr. Einloth of General Foods concluded that "we believe we have the means to monitor and, therefore, exercise control with our key accounts" (CX 710A).

(5) The Increase In Trade Flow And Transshipment

98. While Mr. Lysacker does not believe that trade flow between sales districts is significant, his conclusion is based on 1971 and 1973 data, and General Foods has presented evidence which indicates that it is often unable to control trade flow as well as transshipment. In fact, trade flow and transshipment are increasing as wholesalers and retailers expand their trading areas. **[26]**

99. One example of the Maxwell House Division's inability to discourage transshipment is the result of its monitoring effort described just above. According to Mr. Salesman, the Maxwell House Division Syracuse district manager at the time Regular Maxwell House converted to straight case rates in Syracuse, he received calls from district sales managers across the country reporting the appearance of fresh-lock lid product in their districts (Tr. 5933). Specifically, that peculiarly identifiable product was transshipped from Syracuse to Portland, Oregon, to Los Angeles, California, to Boston, Massachusetts, to Philadelphia, Pennsylvania, to Jacksonville, Florida and to Youngstown, Ohio (Tr. 5934), and the Division's southern region manager testified that Daylight Grocery, a small grocery chain in the Jacksonville area, had fresh-lock lid products on its shelf during the time of the Syracuse test (Tr. 6586).

As explained by Mr. Salesman:

The rate differential that existed between what they could buy it for in Syracuse and what the trade rate that existed in another area was—the differential was so great that it more than covered the freight cost plus any profit that they might make on that. Transshipping is not only done by the grocery trade, but there are people that we have referred to as bandit brokers, and Wilco and Trepel out of New York have made a business out of this. . . . They know what the going trade [rate] is, and they can buy that coffee in that area and still pay the freight and make a profit on it (Tr. 5934–35).

100. Other coffee producers have also experienced transshipment of their product (CX 540B; Tr. 2909, 10,630).

101. John Mann, the Maxwell House Division's eastern region manager, gave specific examples of transshipment into and out of sales districts in the eastern region. In summary:

Into the Youngstown District, there is transshipment from the New York, Boston, Chicago and Dallas districts by Seaway, Fisher Fazio, Pick-N-Pay and First National.

Into the Syracuse District, there is transshipment from the Cincinnati, Philadelphia, New York and Boston districts [27] by S.M. Flickinger, P&C, Grand Union, Price Chopper, Springfield Sugar Co. and C&S Wholesale Grocers.

Into the Cincinnati District, there is transshipment from the Syracuse district by S.M. Flickinger.

Into the Philadelphia District, there is transshipment from the Syracuse and Boston districts by S.M. Flickinger, New England Grocers and C&S Wholesale Grocers.

Into the Boston District, there is transshipment from the Youngstown district by Springfield Sugar Co. (Tr. 6463–72).

102. Because trade flow also occurs, the Maxwell House Division has sometimes offered similar deals to stores in different districts. Mr. Mann testified that trade flow is common in the eastern part of the country (Tr. 6446). Of 86 major grocery trade customers in the eastern region, at least 40 trade flow from one district into another (Tr. 6449). According to other witnesses, trade flow is so widespread that it would be impossible to develop district boundaries to contain it (Tr. 5741, 6288). Because of the prevalence of trade flow, trade deals must be structured to take it into account (Tr. 6575).

103. Over the years, the Maxwell House Division has referred to the Boston, New York, and Philadelphia sales districts and part of the Syracuse sales district as "the complex" because it is a contiguous area in which trade flow necessitates that all the areas be trade dealt together (Tr. 5730, 6454–56). Close to 70% of the eastern region's total volume of coffee sales is so significantly influenced by trade flow in the complex that it is necessary to offer trade deals of an equal value throughout that area (Tr. 6455–56).

104. Mr. James Keller, southern regional sales manager for the Maxwell House Division, and Mr. Mann detailed the regularity of trade flow into and out of districts in their regions. In summary:

From the Charlotte sales district, there is trade flow into the Philadelphia, Youngstown, Cincinnati, Atlanta and Jacksonville districts by the following trade factors: Rich Foods, Virginia Foods, Acme Stores, Kroger, Merchants [28] Distributors, Thomas & Howard, Engles, Winn-Dixie, Bi-Lo, Piggly-Wiggly and Wetterau.

From the Philadelphia sales district, there is trade flow into the New York and Charlotte districts by the following trade factors: A&P, Safeway, Giant Foods, Food Fair and B. Greene.

From the Youngstown sales district, there is trade flow into the Syracuse, Cincinnati, Detroit, Cleveland and Philadelphia districts by the following trade factors: Betsy Ross, Golden Dawn, Kroger, Seaway, Giant Eagle, Riverside, Fisher Foods, McClain Grocery and Thorofare Supermarkets.

From the New York sales district, there is trade flow into the Syracuse, Philadelphia, Boston and Miami (Jacksonville) districts by the following trade factors: Shop-Rite Stores, Pathmark, Krasdale, White Rose and Waldbaum's.

From the Syracuse sales district, there is trade flow into the Boston, New York and Youngstown districts by the following trade factors: P&C, Price Chopper and S.M. Flickinger.

From the Boston sales district, there is trade flow into the New York, Syracuse and Philadelphia sales districts by the following trade factors: Stop-N-Shop, First National, Springfield Sugar, Bozzuto's and Waldbaum's (Tr. 6446–48, 6560–72).

3. The Supply Forces

(a) *The Shipment Of Regular Coffee From Plant To Customer*

105. The Maxwell House Division ships ground coffee to all areas of the country from its plants located in Hoboken, New Jersey; Jacksonville, Florida; Houston, Texas; and [29] San Leandro, California. All of the Division's brands of regular coffee are in nationwide distribution (CX 1072D–G). Because these coffee plants ship the Division's products to almost anywhere in the country, its quality assurance department was formed to ensure that the products produced at each plant conform to uniform quality specifications (Tr. 5082–83).

106. No single plant has the exclusive responsibility for shipping the Division's regular coffee products to a specific area (Tr. 5132). There are a number of factors which determine which plant ships coffee to which area, one of the most important being which plant is the most efficient or least-cost producer (Tr. 5125). For example, the Jacksonville plant, because of efficiencies realized there, produces 50% of the Regular Maxwell House coffee distributed in the United States and 60% of all the regular coffee distributed by the Division (Tr. 5125).

107. Regular Maxwell House is produced at each of the four Maxwell House Division plants, none of which is the exclusive source of supply for any area of the country (Tr. 5124). All the Division's plants produce Yuban regular coffee, with the single exception of Yuban Electro-matic brand which is produced only at the San Leandro plant and distributed nationally from there (Tr. 5133).

108. Max-Pax is produced only at the Jacksonville plant and distributed nationally from there whereas Mellow-Roast is produced only at the Hoboken plant and distributed nationally from there (Tr. 5134–35).

109. The beans used in the production of Sanka and Brim are decaffeinated only at the Hoboken and Houston plants, but are processed into regular coffee at all four plants. There are no limitations on the areas to which a particular plant can ship Sanka or Brim (Tr. 5133).

110. There is a strong market in the United States for Kosher coffee products. The Division's Hoboken plant is not authorized to produce Kosher for Passover products because Mellow Roast, an extended coffee product manufactured at Hoboken, uses grain. Thus, no products from the Hoboken plant conform to the Kosher for Passover dietary requirements, and, during certain periods, the Hoboken plant does not ship Maxwell House Division brands across the river to the

New York City area, where there is a great demand for Kosher for Passover products. All of the Division's Kosher for Passover products are supplied to the New York City area from its other plants (Tr. 5128–30). [30]

111. Folger has three regular coffee plants, one in San Francisco, California, one in New Orleans, Louisiana, and one in Kansas City, Missouri (Tr. 3224). When Folger expanded into the east, it did not build any new production capacity. In fact, it had recently divested itself of its Houston plant in compliance with an FTC consent order. The New Orleans and Kansas City plants supplied the coffee for Folger's eastern expansion (Tr. 3223).

112. Folger's flaked coffee is manufactured only in the San Francisco plant and distributed nationally from there (Tr. 3227), and its High Point brand is manufactured only in the San Francisco plant and shipped to Portland, Oregon and St. Louis, Missouri (Tr. 3226).

113. During much of the 1970's, Standard Brands' Chase & Sanborn brand of coffee was in national distribution (CX 1072A–G). Since the early 1970's, Standard Brands has distributed Chase & Sanborn nationally from only one manufacturing plant in New Orleans, Louisiana (Tr. 10,585). Its other coffee roasting plants in San Francisco, California, Chicago, Illinois, and Hoboken, New Jersey were closed during the sixties and early 1970's (Tr. 10,585).

114. Hills Bros. has two coffee plants, one in San Francisco, California and the other in Edgewater, New Jersey (Tr. 2664–65). During the period 1970-1976, the San Francisco plant generally serviced an area west of a line extending diagonally from eastern Montana to the eastern-most point in Texas, while the Edgewater plant generally serviced the area east of that line. Specifically, the Edgewater plant serviced areas as far west as Oklahoma City, Chicago, most of North and South Dakota, and Des Moines, Iowa (RX 1086; Tr. 2666–68).

115. During an eight-month period from mid-1977 to early 1978, all of Hills Bros.' regular coffee distributed in the United States was being produced at the Hills Bros. Edgewater, New Jersey plant (RX 1276).

116. Regional producers also ship their coffee over great distances. Chock Full O'Nuts, which is produced and principally marketed in the New York City area, ships its products as far west as California (Tr. 10,299, 10,542). During the period 1971–1977, Savarin coffee, which was produced and principally marketed in the New York City area, was being distributed in the following Maxwell House Division sales districts: Jacksonville, Florida; Youngstown, Ohio; Portland, Oregon; and Denver, Colorado (CX 1072A–G; Tr. 10,542). The MJB brand, which was produced and principally marketed on the west coast, was [31] distributed during fiscal 1971–1977 as far east as Dal-

las, Cincinnati, Minneapolis and Jacksonville, Florida (CX's 437G, 1072A–G).

(b) *Coffee Producers' Areas Of Distribution*

117. Some regular coffee producers in business during the 1970's sold their product only in one Regular Maxwell House sales district. For example, the Victor, Autocrat and Maplewood brands, were sold only in Boston/Providence; Breakfast Cheer and Columbia were sold only in Pittsburgh; Wilkins appeared only in the Baltimore/Washington area; the Seven Thirty brand was sold only in Charlotte; and the Red Diamond, Royal Cup and Bailey's Supreme brands were sold in Atlanta, Birmingham and Montgomery (CX 132G–P; Tr. 4559).

118. As to other brands which were sold in more than one sales district, there were variations in the market shares of these brands from district to district (CX's 20Z–37; 132G–P).

4. Expert Analysis Of The Demand And Supply Forces

(a) *Dr. Elzinga*

119. Approximately 25% of regular coffee is shipped between 500 and 1000 miles from the plants where it is produced (RX 1227). During fiscal 1971–1977, about 40% of the Maxwell House Division's regular coffee brands were shipped more than 500 miles (RX 1225). The fact that one can ship coffee long distances at freight rates that are rather inconsequential in terms of overall cost of the product (Tr. 9432), the absence of legal barriers to the nationwide shipment of coffee, and evidence that the four Maxwell House Division plants, and plants of other producers, ship regular coffee nationwide, led Dr. Elzinga to conclude that the geographic market for regular coffee is probably nationwide (Tr. 9430–32, 9445–46).

120. Dr. Elzinga used the word "probably" because the purpose of his testimony was to challenge Dr. Mann's conclusion as to the relevant geographic market, not to determine how extensive it actually is. Dr. Elzinga's challenge was based on his application of the Elzinga-Hogarty test to determine whether **[32]** the Youngstown, Syracuse and Philadelphia sales districts or the combination of those sales districts qualified as relevant geographic markets for the sale of regular coffee (RX 1228; Tr. 9446, 11,987).

121. The Elzinga-Hogarty test for determining geographic markets was published in the *Antitrust Bulletin* in 1973. It was developed in conformity with the economic theory of geographic market delineation and was designed to be applicable in a scientific manner, *i.e.*, practically workable and capable of replication. Under this test, a particular area qualifies as a relevant geographic market if two condi-

tions are met: (1) very little of the total production in that area is exported; and (2) consumers in that area are consuming goods primarily produced there. If there are substantial exports by producers located in that area or significant imports into that locale, or both, then the area is drawn too narrowly to constitute a real world geographic market (Tr. 9420–21).

122. Dr. Elzinga's test has been used to determine the relevant geographic market for cement, bulk electric power, coal, beer, and crude oil (Tr. 9429). Dr. Douglas Greer,[9] in his testimony and in a textbook authored by him, describes the Elzinga-Hogarty test as one of the few constructive analytical procedures that has been advanced for determining relevant geographic markets (Tr. 11,595; *Industrial Organization and Public Policy,* at 162).

123. The Elzinga-Hogarty test embraces the two economic factors pertinent to the determination of a relevant geographic market. If transportation costs are so high relative to the value of the product that an area of the country is essentially sealed off from outside competitive pressures, that fact would be revealed by the absence of significant shipments to or from the area. In like fashion, the shipment data would reveal whether a legal barrier prevented commercial transactions from occurring between particular areas (Tr. 9424).

124. Each of the sales districts examined by Dr. Elzinga failed the Elzinga-Hogarty test by a considerable margin (Tr. 9455). In the Youngstown sales district, more than 80% of the ground coffee consumed there was imported from other areas (Tr. 9449). At least 85% of the coffee consumed in the Syracuse sales district was imported (Tr. 9451–52); and, in the combined **[33]** Syracuse, Youngstown and Philadelphia sales districts, about 75% of the coffee consumed in that area was imported (Tr. 9454–55) Thus, none of these areas qualify as a relevant geographic market under the Elzinga-Hogarty test (Tr. 9453).

125. Dr. Hilke, an FTC economist called by complaint counsel in rebuttal, presented a hypothetical challenging Dr. Elzinga's contention that the Elzinga-Hogarty test is conservative.[10] Although Dr. Elzinga conceded that Dr. Hilke's hypothetical is very provocative and clever (Tr. 11,999), he concluded, and I agree with him, that it has no relationship to shipment data in the coffee industry (Tr. 11,998).

126. The Elzinga-Hogarty test is an accepted method of presenting a numerical description of the Supreme Court's decision in *Tampa Electric, infra,* which placed great emphasis on shipping patterns in the determination of relevant geographic markets, and absent con-

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[9] A professor of economics at San Jose State University who was called as a rebuttal expert by complaint counsel.

[10] That is, on the basis of shipments data, you might designate two areas as separate geographic market areas when in point of fact, if there was a slight price increase in one, it would elicit shipments from the other, which would show that the two areas in fact should have been construed as one geographic area (Tr. 11,998–99).

vincing countervailing arguments, I believe that it should be given primary consideration in deciding this issue. I now turn to the countervailing arguments presented by complaint counsel's experts.

(b) *Dr. Mann*

127. Dr. Mann relied on the following facts in arriving at his conclusion that the relevant geographic markets for regular coffee were no larger than a Maxwell House Division sales district:

(a) Statements in Maxwell House Division documents which recognize different levels of trade dealing between the sales districts (Tr. 3530–33). **[34]**

(b) The fact that the "economic" price and the "dead net" price of Regular Maxwell House, differ between sales districts and that they do not converge as one would expect them to do if the sales districts were not separate geographic markets (Tr. 3536–42).

(c) The appearance of different competing sellers in various sales districts (Tr. 3553).

(d) Restrictions on transshipment by the Maxwell House Division (Tr. 3554).

(e) Retail distribution patterns as revealed by the Lysacker study which indicate that 90% of regular coffee stays within the confines of a sales district (Tr. 3564–65).

(c) *Dr. Greer*

128. Another fact, product differentiation, was considered by Dr. Greer, for he believes that the scope of the geographic market can be limited by this phenomenon (Tr. 11,512). Thus, according to him, if one finds that a particular brand of coffee is the leading brand in a limited geographic area, one could conclude that this area constituted a relevant geographic market (Tr. 11,602).

5. Conclusion

129. After considering all of the expert testimony on this point, I have come to the conclusion that the Elzinga-Hogarty test describes more accurately than any other fact or set of facts relied upon by complaint counsel's expert witnesses the primary forces which determine the relevant geographic market for regular coffee.

130. The only fact relied upon by Drs. Mann and Hilke which even suggests that the market for regular coffee is regional is the claimed difference in the economic and dead net prices of Regular Maxwell House between sales districts, for one can expect a convergence of prices within a relevant geographic market. However, after analyzing the testimony of these **[35]** gentlemen, I have decided that Dr. Elzinga

is correct: price data is so complex and ambiguous[11] that it is of little practical utility in resolving the issue of relevant geographic market (Tr. 11,992).

131. The other facts relied upon by Dr. Mann are of no significance. The statements by Maxwell House Division employees and other industry members relied on by him reveal only that demand for coffee differs among sales districts; they indicate nothing about the supply side of the equation, the issue of most importance. The same is true with respect to retail distribution patterns. Even if the Lysacker study is valid,[12] it reveals only the pattern of shipments from warehouse to retail store. It does not tell me which roasters retailers can turn to for their supply of regular coffee. Furthermore, the pattern of distribution disclosed in the Lysacker study is changing. General Foods is unable, as a practical matter, to control trade flow and transshipment and more grocers are expanding their area of distribution across sales district boundaries. Finally, the fact that different sellers appear in different sales districts means only that they choose to restrict their area of distribution, not that they are limited to those areas by market forces.

132. Dr. Greer's injection of product differentiation as an additional factor leads to a rather bizarre result—each seller of a branded product would operate within a geographic **[36]** market defined by his area of distribution (Tr. 11,520). Whatever the merits of this approach may be when other issues are considered, antitrust analysis would be impossible if one accepted this theory. Furthermore, Dr. Greer agreed that the implication of this theory is that the geographic market for Regular Maxwell House is nationwide since it is sold nationwide (Tr. 11,521), a point which complaint counsel obviously do not want made.[13]

133. In conclusion, I accept the Elzinga-Hogarty test as a valid means of testing whether or not a given area is a relevant geographic market. The Youngstown, Syracuse and Philadelphia sales districts individually and in combination fail the test by considerable margins. For this reason, and for the reasons given in my conclusions of law, *infra,* I find that neither these sales districts, nor the other Maxwell

[11] For example, price differences may be the result of different marketing mixes in use in different areas of the country or distribution costs (Tr. 9466–67). Furthermore, analyzing the price of Regular Maxwell House tells one nothing about the prevailing market price of the coffee sold by all producers and relying on the price of one brand of coffee might result in different geographic markets for each brand of coffee (Tr. 11,994). Finally, price data is subject to varying interpretations. CX 1380, which compares Regular Maxwell House's average annual prices in the Youngstown and Syracuse sales districts from fiscal 1971–1977 disproves, according to Dr. Hilke, a national market (Tr. 10,929–30). However, Dr. Elzinga pointed out that if one looks at the prices over the seven year period, they differed only by 1% (Tr. 11,990).

[12] General Foods argues that it is seriously flawed (RPF 4–107 to 4–110) but I need not decide this question because its conclusions are of no relevance in the circumstances of this case.

[13] Complaint counsel argue that Dr. Greer's statement can be "misconstrued" (CRF 3–1) but I believe that the implication of his theory is as he stated.

House Division sales districts (or any smaller geographic areas such as the Cleveland or Pittsburgh market areas) are relevant geographic markets for the sale of regular coffee.

134. Since complaint counsel allege that General Foods attempted to monopolize the sale of regular coffee only in certain sales districts, further analysis of their Section 5 claim is unnecessary, for General Food's market power or its sales below cost in individual sales districts are irrelevant in terms of their effect on competition in the actual relevant geographic market which is much more extensive than the sales districts. Nevertheless, the parties are entitled to findings on the other issues presented by complaint counsel for purposes of possible appeal, and I will discuss them at some length.

I. *The Alleged Attempt To Monopolize*

1. The Definition Of Price

(a) *Introduction*

135. Before discussing complaint counsel's claim that General Foods attempted to monopolize "the Eastern ground coffee markets" (CLA, p. 1) by engaging in price and non-price predation, one must decide what price one will use in analyzing that claim. **[37]**

136. The Maxwell House Division sells its regular coffee to wholesalers and retailers, but the price which these customers pay (and the revenues which General Foods receives) is not solely a function of its list prices, for price is also affected, if one does not view them as costs, by the allowances which General Foods offers to its customers in trade deals (non-performance and performance allowances) and to its customers' customers, the ultimate consumer, in the form of consumer promotions (RECUs and consumer coupons).

137. The definition of price may also be affected by the purpose for which it is used—that is, whether one is analyzing complaint counsel's attempt to monopolize or Robinson-Patman claims. The present discussion deals with the former claim. The Robinson-Patman price is discussed more fully in the section dealing with that statute.

(b) *"Economic" Price*

138. Dr. Mann testified that "economic price" equals average revenue received by the seller per unit, and that this price is calculated by deducting from net sales revenue "other forms of price reductions" (Tr. 3674).

139. In calculating price, economists do not treat costs, such as advertising, as reductions in revenue, and costs do not, therefore, affect that evaluation (Tr. 3687).

140. The parties agree that non-performance allowances are price

reductions and that they should be deducted from list price. The parties disagree on the proper treatment of the other promotional allowances which the Maxwell House Division offers to its customers and to the ultimate consumer. Complaint counsel argue that these allowances are price reductions whereas General Foods urges that they are costs and should not be deducted from list price.

141. Dr. Mann testified that the economic price for Regular Maxwell House equals net sales less promotions divided by volume. He included all trade and consumer promotions in his definition of promotions (Tr. 3676). Professor John Dearden, who computed the profitability of the Maxwell House Division's regular coffees agreed that promotions are price reductions, whether they are offered to the retailer or to the consumer (Tr. 66–67). **[38]**

142. Dr. Elzinga offered a definition of economic price which differs markedly from that proposed by complaint counsel's experts, for he would not treat as a price reduction any offer which is not unambiguously welcomed by a customer (Tr. 9462–63). Since some customers turn them down, Dr. Elzinga does not, therefore, view consumer coupons or performance-related offers as price reductions (Tr. 9464).

143. Dr. Greer was called in rebuttal by complaint counsel. He testified that Dr. Elzinga's treatment of consumer coupons and performance-related offers is inconsistent with the law of symmetry, that is, that a price reduction to the buyer must result in a reduction in the price received by the seller (Tr. 11,338, 11,344–46).

144. I see no reason why Dr. Mann's definition of economic price as revenue received should not be accepted for Section 5 purposes. Given this, I cannot agree with Dr. Elzinga's analysis, for his test proposes that the definition of price depends on the type of promotional allowance which is offered, and to whom it is offered, even though, from General Foods' point of view, its revenue is reduced by the same amount whether a 10% promotional or buying allowance is given to a retailer, or a ten cent coupon is redeemed by a consumer.

145. I therefore agree with Dr. Greer that coupons given to consumers by the Maxwell House Division, either directly or through retailers, reduce the consumer's (but not the retailer's)[14] purchase price (Tr. 11,399) and that, to the extent they are redeemed, they reduce General Foods' revenue (*i.e.,* Dr. Mann's economic price) by a corresponding amount. The same logic also applies to performance offers which are accepted by the trade, for to the extent they are accepted, they reduce the Division's revenue.

146. In conclusion, I believe, with some reservations, that the Maxwell House Division's revenue, as reduced by its non-performance and

[14] *See* my discussion, *infra,* of the definition of Robinson-Patman price.

performance offers and its consumer coupons, is a price which may be used to analyze the attempt to monopolize charge.

147. The reservations I have with Dr. Mann's and Dr. Greer's definition of price is caused by the fact that the **[39]** definition assumes that retailers always accept promotional offers and that consumers redeem every coupon. This is demonstrably untrue. While there is a high rate of acceptance of the Division's performance offers, some are not accepted (Tr. 2391). The rate of coupon redemption is much lower. Complaint counsel's accounting expert, Mr. Rowe, estimated that it is 33% (Tr. 2392). Thus, one cannot assume that all coffee sold under a particular mix of promotional offers is sold at the same economic price. For example, if the Maxwell House Division sells one-pound cans of coffee for 90 cents and offers a 10 cent coupon to consumers, General Foods' revenue, and the "economic price" of that coffee is 80 cents only to the extent that the 10 cent coupon is redeemed. If only 10% of coupons are redeemed, then only one out of ten cans of coffee are sold at the 80 cent economic price. The other nine are sold at a higher price.[15]

(c) *"Dead Net" Price*

148. While complaint counsel state that: "Economic price provides a more accurate measurement than dead net price of the prices that respondent actually received," some of their price analyses, including their Robinson-Patman analysis, use the latter price, defined by them as "total Maxwell House sales revenue, net of trade deals (buying allowances, performance allowances, and retailer coupons), divided by sales volume" (CPF 12-1; CLA, p. 87, n. 312).

2. The Maxwell House Division's Response To Folger's Eastern Expansion

(a) *Cleveland*

149. At the time of Folger's expansion into the HFNI, Mr. Laster was president of the Maxwell House Division. **[40]** Although he was charged with developing a plan of defense, it had not been developed when, in October 1971, Folger entered Cleveland, and the Division's response was modest (Tr. 2743, 6952-53).

150. Regular Maxwell House's share in Cleveland at the time of Folger's entry was 43.5%; Hills had a 22.4% share; Chase & Sanborn

[15] The somewhat theoretical nature of "economic price" was recognized by Dr. Mann when he was asked if it was "the actual price paid by any customer of General Foods." He replied: "It is what the average customer pays. If you pick one single customer out in the real world this may not be the price paid, but it is what the average customer pays" (Tr. 3676). This colloquy also reveals Dr. Mann's difficulty in keeping his definition of price consistent, for his definition of price as "revenue received" is not necessarily equal to the price which the Division's customers pay (*See* Finding 448, n. 41).

had a 9.8%; and COB[16] share was 17.1%. Because of the trade's emphasis on "hot features," share levels had fluctuated significantly: Regular Maxwell House from 33% to 52%, Hills from 14% to 37%, and Chase from 6% to 15% (CX 85B).

151. Mr. Laster recalled that Folger's came in "with a very good product"—"they believe in quality as we do," a very strong market plan using proven advertising at high levels, consumer promotions at "significant levels" and "trade deals that were significantly higher than the deals that were in the Cleveland area prior to their coming" (Tr. 6958). Folger's consumer promotions also included delivery of free coffee to homes as a sampling device (Tr. 6958). General Foods perceived the Procter & Gamble introduction as "higher than a normal introduction would warrant" (Tr. 7040).

152. On the other hand, Mr. Hunter, Folger's general manager at the time of the Cleveland test, believed that its planned spending was similar to that of recent Hills Bros. and Taster's Choice introductions (Tr. 2734–38). Folger's initial share objective in Cleveland—20%—and its 22-month payout[17] objective were considered to be "about on the line" and "modest" by him (Tr. 2711, 2713, 2738, 3022).

153. On October 8, 1971, the Maxwell House Division computed Folger's net cost to the trade (not counting RECU's) as lower than Regular Maxwell House's (CX 85E), and another Division memorandum reported that Folger's introductory rates on two pound and three pound were "considerably higher than the traditional rates for Cleveland" and, in fact, were 100% greater than the traditional Cleveland trade rates (CX 694A).

154. In November 1971, Mr. Laster and Mr. Nelson, the Division's national sales manager, made a personal inspection of the Cleveland area. Mr. Laster concluded from the inspection that "there was no question in my mind that Folger's had established itself in the marketplace at an extremely high level and that their brand in a very short period of time had become [41] extremely successful" (Tr. 6961). Mr. Nelson reported in a November 16, 1971 memorandum that Folger's introduction into Cleveland had been "disturbingly successful" and that Folger's had obtained an "outstanding coffee section" in many stores (CX 122). The same point was reported by Mr. Tower, the Division's marketing manager in a January 3, 1972 memorandum to Mr. Tanck, then ground category manager of the Division. He reported that Folger had attained excellent distribution of its coffee, and had an excellent retail shelf position, in some cases better than Regular Maxwell House. Folger's shelf prices and feature prices were equal to Regular Maxwell House's, it was experiencing strong trial by con-

[16] "Chain's own brand," or private label coffee.

[17] "Payout" is the time needed to recoup introductory investment (Tr. 2713).

sumers, was employing an effective advertising copy and had an excellent package and product (CX 692A).

155. Folger's perceived initial success in Cleveland convinced Mr. Laster that it would soon be a national brand and that if Regular Maxwell House wanted to maintain its share position it had to adopt a different posture than that adopted during Folger's first three months in Cleveland (Tr. 6967). Mr. Laster felt it "was important not to have [Folger] expand rapidly to the rest of the East before we have thoroughly learned from the Cleveland test market. . . ." (Tr. 6979), and he felt that it was important to defend so that Procter & Gamble would realize that General Foods "would not be the Scott Paper of the coffee industry" (Tr. 6978).[18]

156. Consequently, on March 23, 1972, Mr. Laster presented a recommendation to General Foods' management on its response to Folger's national expansion (CX 130A–I; Tr. 6967).

157. CX 130A is a cover memorandum dated March 23, 1972, from Mr. Laster to Mr. R. Bohm. At the time of this memorandum, Mr. Bohm was executive vice-president of General Foods with line responsibilities for the Maxwell House Division (Tr. 6950–51, 6966–67, 7029). Mr. Laster's memorandum states:

> Attached you will find a deck showing assumptions, strategies and calculations for the various Folger defense options. [42] Basically, this covers some of the material discussed at the recent Operating Committee meeting. Please let us know if we can elaborate on the attached material (CX 130A).

The attached "deck," CX 130B–L, is entitled "Folger's Defense Options" and is dated March 16, 1972 (CX 130B).

158. The "Operating Committee" was a senior management group in General Foods that was used as an "advisory group" to Mr. Bohm when he had to make significant decisions (Tr. 6967, 7029). Mr. Bohm initiated the formation of the Operating Committee, which was made up of many of the high-ranking executives of General Foods, including some division presidents and corporate staff personnel. Mr. Bohm was chairman of the Operating Committee at the time of CX 130A-I (Tr. 4545–46).

159. CX 130B–I is an analysis presented to General Foods' corporate management which shows the financial impact of following the options of "not defending," "defending now," or "defending later" (Tr. 6963–64).

160. On the basis of CX 130B–I, Mr. Laster recommended to the

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[18] A reference to the experience of the Scott Paper Company when Procter & Gamble expanded into its market:

> You look at Scott Paper or a couple of other companies that were fairly passive in their reaction, they literally almost went down the tubes (Trone, Tr. 1468).

Operating Committee that General Foods "defend . . . from the very first day that P&G moves into new markets. . . ." (Tr. 6964). The "defend now" strategy described in CX 130A-I was adopted at the Operating Committee meeting (Tr. 6994, 7031).

161. Under the "defend now" strategy, the study did not project losses on a national basis but predicted a loss of $4 million in the HFNI sales districts in year one. A positive profit before taxes of $6 million was projected for year two and $7.5 million was expected in year three (CX 130F).

162. In Mr. Bohm's judgment, the best strategy for Maxwell House to follow in response to Folger's expansion was the "defend now" strategy, and the figures set forth on CX 130F were one of the reasons for his judgment (Tr. 4547). The maintenance of Maxwell House's level of profitability in the high franchise non-infringement sales districts was a factor that influenced Mr. Bohm in his conclusion (Tr. 4547–48). Mr. Laster also testified that an objective of the Folger defense was to maintain the long term profitability of regular Maxwell House (Tr. 7011). He explained:

> [M]axwell House coffee is a very important division to General Foods and as such, the profitability of our brands is highly significant to the corporation (Tr. 7012). **[43]**

163. The Maxwell House Division expected its "defend now" strategy to increase future division-wide profits of the Maxwell House Division by several millions of dollars as compared to the profits that would be made if the other proposed plans were followed. For fiscal years 1973 through 1977, the "defend now" strategy would result in $16.2 million dollars more profit than the "no defense" strategy, and $23.1 million more than the "defend later" strategy (CX 130I). By fiscal 1977, the Division would earn $77.2 million under the "defend now" strategy, as contrasted with $62.6 million and $66.5 million respectively under the "no defense" and "defend later" strategies (CX 130G).

164. While the "defend now" strategy outlined in CX 130 shows a higher national profitability than either the "no defense" or "defend later" strategies, the projected profits resulting from the "defend now" strategy were lower than Regular Maxwell House's "base" profits, or profits prior to the Procter & Gamble expansion. Prior to Folger's expansion, Regular Maxwell House's national "base" profit was $19.8 million. This base profit would be expected to decline to $8 million in the third year of a "no defense" strategy, to rise to $11 million in the third year of a "defend later" strategy and to equal $15.5 million in the third year of "defend now" strategy (CX 130F).

165. The Maxwell House Division also expected its response to

Folger's entry to increase Regular Maxwell House's market shares and limit Folger's market shares in the HFNI sales districts:

Regular Maxwell House and Folger's will be able to achieve the following on-going HFNI shares under the alternative defense options:

Share	Base Plan	No Defense	Defend Later	Defend Now
RMH	39%	30%	39%	42%
Folger's	—	20%	20%	10%

(CX 130C).

166. Although the plan described in CX 130 was accepted by management, plans such as these were revised based on new [44] information and experience. For example, as a result of an ongoing debate within General Foods on whether it was necessary to match Folger's marketing levels, when Folger's expanded into Syracuse General Foods abandoned the strategy of attempting to meet Folger's trade deal rates in favor of an approach that would result in less trade promotion expenditures for Regular Maxwell House (Tr. 6994).

167. A later document prepared between mid–1974 and mid–1975 attempted to quantify the financial impact of the "defense" versus "no defense" options (Tr. 8231–32).

168. Under the defense option, Maxwell House anticipated losing $100,000 on a national basis in year one (RX 518E; Tr. 8245, 8866), but its profit would be $43 million by year ten (RX 518E; Tr. 8867).

169. Under the defense option between year one and year ten, Maxwell House's trade deal rate per unit would decrease by about 25%, its consumer promotion rate per unit would decrease by over 50%, and its advertising rate per unit would decrease by over 50%. Its total marketing expenditure rate per unit would decrease by almost one third (RX 518E; Tr. 8867–69).

170. RX 518A also describes the financial and market share impact of defending versus not defending against the Folger introduction. Under the defense option, Maxwell House's market share would increase by 5% (RX 518A–B; Tr. 8238, 8865). Under the "no defense" option, Folger would reach a 25% share and Maxwell House would lose market share in proportion to its share at the time of entry (RX 518A–B; Tr. 8238, 8859–60). Under the defense option, Maxwell House's volume would increase from its pre-entry levels by 530,000 units in year one, by 505,000 units in year two, and by 480,000 units on an on-going basis (RX 518A; Tr. 8239, 8865). Each unit represents twelve pounds of coffee (Tr. 8239).

171. RX 518A indicates that a decision to defend against Folger's entry, as opposed to not defending, would generate a profit for General Foods of 34% in terms of incremental ROFE before taxes, which was "favorable when compared to RMH's [then] present ROFE of

22%" (RX 518A; Tr. 8235). "ROFE" refers to return on funds employed (Tr. 8235).

172. At the beginning of the March quarter of fiscal 1972, the Division concluded that it had to match Folger's marketing levels in Cleveland (Tr. 696). This matching strategy was adopted because a disparity in trade deals would put Regular Maxwell House "in a very significant disadvantage" (Tr. 6977). Disparity in trade deal rates could result in a disparity in [**45**] shelf price so that Regular Maxwell House would be selling at a premium versus Folger's. This would result in Folger's being featured more frequently and aggressively by the trade, and would increase the trade's purchases of the Folger brand because it would be a more profitable item (Tr. 6978).

173. General Foods imposed two restrictions on the Division's ability to respond to Procter & Gamble. First, all sales of Regular Maxwell House during a four-to-six week trade promotion period had to exceed its reasonably anticipated variable costs (as defined by General Foods) (Tr. 7051–55, 9073–74). Second, the Division was not to "aggress," which meant that Regular Maxwell House could not lead any element of the marketing mix and could not have higher levels of consumer promotions than Procter & Gamble (Tr. 6973).

174. Documents written by Division personnel during the Cleveland test reveal that the Division was attempting to meet Folger's trade dealing, and, hopefully, to de-escalate it (CX's 14P, 110A, 633J, 643H, 644W, 649D, 651E).

(b) *Defense Expenditures In Cleveland*

175. In January 1972, the Maxwell House Division launched what Mr. Hunter termed a "heavy counter-attack" (CX 494). The counter-attack included the use of a $.50 mailed coupon, as opposed to Folger's introductory $.35 coupon and a planned follow-up coupon of $.10 (CX 494; Tr. 2086, 2745). The Division also used in-pack coupons of 10 cents, 29 cents and 39 cents on one, two and three pound coffees, as opposed to Folger's 25 cent and 35 cent coupons on two and three pound coffee (CX 494; Tr. 2745–46). Third, the Division offered a trade allowance on the three pound size of $2.50 a case, a $.50 retailer coupon and a $.50 display allowance. According to Mr. Hunter, the $2.50 trade allowance was substantially higher than the allowance previously offered in the market (CX 494; Tr. 2745–47).

176. The Maxwell House Division's response must, however, be considered in light of Folger's distribution of free coffee to Cleveland consumers (Tr. 6291). Furthermore, Folger's advertising expenditures in its first year in Cleveland were $596,000, while Regular Maxwell House's advertising expenditures during the same period were actual-

ly less ($540,000) (CX's 553A, 1389). Folger also exceeded Regular Maxwell House's per case advertising rate (CX's 553A, 954). **[46]**

177. Complaint counsel argue that these and other comparisons are meaningless and they offer alternative methods of assessing the Division's response which take into account, they claim, "advertising weight" and the number of times each firm used coupons (CRF 1–78 to 1–80).

178. While it may be true that "For the entire year [in Cleveland] Maxwell House had 53% more GRP's than Folger" (CX 450K) (and even this is disputed by General Foods (RPF 6–86)), complaint counsel do not explain the significance of this fact. With respect to the number of times a coupon is used, one would expect the company with the larger market share to spend more money because it has greater volume than the new entrant. In fact, complaint counsel argue that the reasoning behind the Division's western retaliation (*infra*):

> [W]as clear. General Foods' response to Folger's introduction in Cleveland had cost it a great deal of money. The Western Retaliation was devised so that General Foods could go into highly profitable Folger markets and equalize those financial expenditures (CPF 5–11).

179. In another proposed finding (CPF 5–5(a)), complaint counsel argue that the purpose of the retaliation was "to force Folger to increase its spending." Mr. Trone explained the reasoning behind the retaliation:

> A. Well, as Folger's came into the east and came into our high volume, high profit centers, the idea was to go into the west . . . into one of their markets that they had very high share levels in and were very dependent on profits.
>
> Q. How would this . . . strategy help to achieve the objective of increasing Folger's payback?
>
> A. Because our volume base was so small and their volume base was so high in those areas; in order for them to meet our deal rate structures, they would have to spend an awful lot of money. . . . (Tr. 1399–1400). **[47]**

180. It seems inconsistent to me to argue that the Division's defense expenditures in response to Folger's blitz in the HFNI, however measured, were inordinate while arguing that Folger's expenditures in the West were "forced" by the Division's retaliation. Thus, while there may be several valid ways to estimate the intensity of the Division's response, I believe that the one proposed by General Foods offers as much insight as do complaint counsel's comparisons. Using these, even as expanded by complaint counsel (CRF 1–81), one sees that while the Division spent more than Folger for consumer promotion and advertising after the introductory period, it was not, with one exception (1–3/72 in Cleveland) by very much.

(c) *Pittsburgh*

181. At the time of Folger's expansion into Pittsburgh, Regular Maxwell House's share was 45%, the Breakfast Cheer brand had an 18% share and Hills had a 9% share. Breakfast Cheer, according to a Maxwell House Division memorandum, enjoyed "strong consumer/ trade acceptance" in Pittsburgh and was expected to "vigorously defend" (CX 94B).

182. Folger's formal introduction into Pittsburgh in March 1973 consisted of case rates 40¢ higher than Regular Maxwell House's, 40-day credit terms, and distribution of one pound free samples of Folger's coffee in the Johnstown/Altoona area and six ounce free samples in the metropolitan Pittsburgh area (CX 57B). Under 40-day credit terms, the grocery trade received a 2% prompt payment discount if they paid Folger's within 40 days. The prevailing prompt payment terms in Pittsburgh were 2% - 10 days, which offered a 2% discount only up until the 10th day (Tr. 8580). Following its initial offerings, Folger then escalated its trade deal rates to 40 to 50% higher than prevailing rates (Tr. 6981).

183. Due to the heavy cost of distributing free coffee to consumers, General Foods did not match Folger's free coffee program. Instead, General Foods responded to the Folger's six ounce free sample with a 25¢ DMCU and to the one pound free sample with a 39¢ DMCU (CX 169A). General Foods did not respond to Folger's more attractive payment terms, nor did it respond to Folger's increased introductory trade rates (CX 169A). As in Cleveland, the objectives of General Foods in Pittsburgh as transmitted to the Maxwell House Division's national sales manager were to maintain Regular Maxwell House's share there (Tr. 5772). Regular Maxwell House was allowed to meet but not [48] beat Folger's trade rates, with the overriding restriction that it was not to be sold below cost (as defined by General Foods) (Tr. 5774, 5785; *see also* CX's 57C, 150C, 735A).

(d) *Philadelphia*

184. Procter & Gamble introduced Folger's into Philadelphia in February 1973. Procter & Gamble recognized that expansion into Philadelphia was a "risky venture" because the grocery trade was selling coffee at five to twelve cents a pound below its "dead net cost" (CX 522; Tr. 3071–73). "Dead net cost," as used in this exhibit, refers to list price less trade deals only and does not take RECU's into account (Tr. 3073). It was anticipated that the grocery trade would, therefore, refuse to buy Folger's, "simply saying we don't want another brand of coffee to help us lose money" (CX 522).

185. Procter & Gamble's introduction into Philadelphia used strong

trade promotions and strong advertising and consumer promotions, including distribution of free coffee to 80% of the households in the area (Tr. 6980). As in Pittsburgh, Folger's trade rates were 40 to 50% higher than the previously prevailing rates (Tr. 6981).

(e) *Defense Expenditures In Pittsburgh And Philadelphia*

186. According to Mr. Hunter, after Folger's entry into Pittsburgh and Philadelphia, the Maxwell House Division employed a series of repetitive coupons, including several direct mail coupons, that far exceeded the amount of couponing used by Folger (Tr. 2813).

187. During the first year of Folger's entry into Pittsburgh and Philadelphia, General Foods, according to complaint counsel, continued to have a strategy of advertising more heavily than Folger (CX's 462P, Q, W, 480D).

188. General Foods responds that in Pittsburgh from April-September 1973, Procter & Gamble outspent Regular Maxwell House on consumer promotions ($1,027,000 vs. $532,800) and that during the first year of its expansion, Procter & Gamble's expenditures on consumer promotions were $1,131,000 as compared to Regular Maxwell House's $665,000 (CX's 553E, 956, 1389). **[49]**

189. General Foods also points out that Folger exceeded Regular Maxwell House's consumer promotion expenditures on a per-case basis in the April-June and July-September 1973 periods (CX 57B) and emphasize that Folger, unlike Regular Maxwell House, also had an extensive free coffee promotion in Pittsburgh.

190. As to advertising, Folger outspent Regular Maxwell House (CX's 449Z–5,450Z–6). Furthermore, Folger's trade rates in Pittsburgh and Philadelphia were in many instances higher than Regular Maxwell House's (Tr. 2847, 2878).[19]

(f) *Syracuse*

191. Prior to Folger's expansion into the Syracuse/Buffalo area, Regular Maxwell House's share there was 41.5%. Other competitors in that area included Hills, with a share of 11.3% and Chase & Sanborn with a share of 13.7% (RX 1114A).

192. Procter & Gamble introduced Folger in Syracuse in October 1974 with trade deal case rates about four to five times higher than the historic rates and substantially greater than Regular Maxwell House (Tr. 5946, 6199). Folger did not offer RECU's in Syracuse but instead focused on higher trade deal allowances that the grocery trade viewed as more attractive than RECU's (Tr. 11,872).

193. General Foods did not match Procter & Gamble's trade deals,

[19] This is because Folger began to meet the trade rates of the so-called "secondary brands" in these cities, and these brands generally offered better trade deals than the leader (Tr. 2844, 2846, 3051).

but went significantly "below them," meaning that the value of Regular Maxwell House's trade deals were lower. According to Mr. Laster, there was a "great debate" in the Division as to whether it was important to match Folger's trade deals during the introductory period, or whether the limited marketing funds available could be better spent on advertising and consumer promotions (Tr. 6991).

194. The Division responded to Folger's trade deals with trade deals of lesser value plus RECU's. This strategy was not regarded by the Maxwell House Division as a true match of Folger's trade deals and caused Regular Maxwell House to lose significant share in the Syracuse area (Tr. 6992). **[50]**

195. Folger's higher trade deals resulted in lower everyday retail shelf prices for Folger (Tr. 6105). Since Regular Maxwell House's retail shelf price was higher than Folger's, and because of the frequency of coffee purchases, this everyday shelf price disadvantage had a negative effect on Regular Maxwell House's business (Tr. 6105). Under the "rate-RECU" program employed by General Foods, Regular Maxwell House's consumer dead net was competitive with Folger's everyday shelf price only one week of a four- to six-week trade promotion period, provided that the grocery participated in the RECU offer and the consumers clipped the RECU from the newspaper and presented it for redemption (Tr. 5933–35).

196. Share data for Folger's third month in the Syracuse/Buffalo area show the effect on Regular Maxwell House of its strategy. In its third month, Folger's attained a share of 33.7%, while Regular Maxwell House's share declined from 41.5% to 36.7% (RX 1114B).

197. The refusal to match Folger's levels of dealing activity continued to cause erosion of Regular Maxwell House's share through the first half of 1975. A May 9, 1975 Maxwell House Division memorandum reported that Regular Maxwell House's share had reached all time lows due to poor feature activity and shelf price disparities:

> RMH's share dropped 17.3 points to 30.3%, our lowest share to date. Folger's gained 6.1 points to 20.5% and C&S gained 9.0 points to 17.8%. Regular Maxwell House's decline can be attributed primarily to poor feature activity and widespread shelf disparities in Buffalo (CX 751A).

198. Regular Maxwell House, according to an August 7, 1975 memorandum, reached another record low share in June 1975 while Folger's attained an all time high share of almost 27%:

> RMH dropped 7.2 points to 30.1%, its lowest share to date and significantly below share objective. Conversely, Folger's gained 7.2 points for a new high of 26.9%. RMH's decline can be attributed, in part, to feature activity which while greater than Folger's

. . . is [51] consistent with the share obtained. In addition, shelf pricing disparity continues to plague the Brand (CX 752A).

199. Due to this erosion of Regular Maxwell House's business, Mr. Einloth, in a July 10, 1975 memorandum, recommended that Regular Maxwell House convert to trade deal rates equal to Folger's levels, and eliminate RECU offers (CX 710A). In July, the decision was made to terminate the rate and RECU strategy and to meet Folger's trade deal rates head on, "dollar for dollar" (CX 715A).

(g) *Defense Expenditures In Syracuse*

200. Complaint counsel claim that General Foods planned to employ a consumer promotion and advertising plan stronger than Folger's in Syracuse (CX 710D), that Maxwell House increased some trade deals after the announcement of Folger's introduction into Syracuse (CX 547A, C), and that, according to its advertising agency, General Foods out-advertised Folger in Syracuse (CX 462Z–12).

201. However, during the first three quarters of its expansion, $1,198,000 was expended on Folger's consumer promotions by Procter & Gamble as compared to $769,000 on Regular Maxwell House for the same period (CX's 553G, H, 957). During the first year, Procter & Gamble spent $1,257,000 on consumer promotions as compared to $969,000 for Regular Maxwell House (CX's 553G, H, 1389). Procter & Gamble spent $1,380,000 to advertise Folger's during the first three quarters, while Regular Maxwell House's advertising expenditures during the same period were $720,000 (CX's 553G, H, 957). On a rate per case basis, Folger's also outspent Regular Maxwell House on consumer promotion and advertising in Syracuse (CX's 553G, H, 957).

(h) *Documents Discussing The Maxwell House Division's Defense Efforts*

(1) Introduction

202. Complaint counsel rely extensively on contemporaneous statements by Regular Maxwell Division employees or agents which they say evidence General Foods' predatory intent (CPF's 3–81 to 3–184). There is no doubt that documents such as CX 130A–I and RX 518A–E establish what Division policy was at the time they were written. However, General Foods, citing statements [52] which I made when some documents were offered in evidence, warns that unless the author is known or unless complaint counsel establish that a proposal was relied upon, little weight should be given to statements made in the documents. General Foods also argues that inferences should not be drawn unless they are clearly justifiable (RPF 2–11 to 2–24).

203. All of this is sensible, but the fact remains that General Foods

also relies on statements in many of the documents offered in evidence by complaint counsel, a recognition, I believe, that the documents, if analyzed carefully in light of the circumstances surrounding their production, offer some insight into its intent when it responded to Folger's eastern market thrust.

(2) Intent To Maintain Profitability And Market Share

204. CX 130A–I and RX 518A–E, discussed above, reveal that one goal of the Maxwell House Division's response to Folger's eastern thrust, using the "defend now" strategy, was to maintain the Division's profitability and market share, and perhaps even increase it even though that strategy might result in an initial loss.

205. Other documents indicate that this strategy was considered and discussed throughout Folger's eastern expansion. A contingency plan dated June 9, 1976, states that:

RMH is clearly in a better franchise, volume and financial position *by defending* when Folger enters the marketplace (CX 640M) (emphasis in original).

206. A September 13, 1972, memorandum from Mr. Tower to Mr. Laster (CX 633A) attached a contingency plan which listed as objectives:

Provide a sound platform for restoring long-term profitability to RMH.

Aggressively defend the HFNI against Folger's introduction and build share by 10+%. [53]

Prevent Folger from exceeding a Year I 13% SOM in HFNI (CX 633F).

Mr. Einloth also wrote and confirmed that the objective of the defenses in Cleveland, Pittsburgh, and Philadelphia were to:

Prevent Folger from exceeding a 13% share of market in non-infringement areas while building the RMH business by at least 10%.

* * * * * * *

Provide a strong platform for restoring long-term profitability to RMH (CX 725A; Tr. 1581).

207. A plan was developed by the Boston Consulting Group (CX 724A–G) to determine "What are the appropriate competitive and corporate goals for the MHD relative to the Folger Company" and "How can Folger's geographical expansion be halted or extremely constrained and at what cost to GF?" (CX's 724A, 725A). Complaint counsel argue that this document unmistakably indicates predatory

intent, yet the plan, although endorsed by Mr. Einloth, was never implemented (Tr. 1622).

208. Contingency and defense plans written between 1975 and 1977 reveal the authors' hopes that by defending, the Division could maintain profitability and build Regular Maxwell House's share from 5–10% (CX's 640J, 709G, H, 710A, D), and other documents written between 1971 and 1977 contain similar hopes (CX's 87A, C, 659D).

(3) Intent To Delay Further Expansion By Folger

209. Both Mr. Laster and Mr. Bohm testified that one of General Foods' defense objectives was to delay Folger's expansion into the eastern markets (Tr. 4537, 6984), and Maxwell House Division documents confirm that this was one of its goals (CX's 14C, F, 15E, 73H, 74E, 76C, 80F, 150B, 168A). Statements in other documents suggest that delaying Folger's expansion would maintain profits in the eastern sales districts:

> [t]he value of delaying [Folger's] expansion into the HFNI by two years **[54]** almost pays for our efforts (CX 724A; *see also* CX15W, 74Z–1, 80F, 82C, 88D, 19Z–44).

210. Some documents even reveal hopes by the authors that a vigorous defense would discourage further Folger's eastern expansion. While recognizing that "finite predictions are obviously impossible," Mr. Einloth, in a confidential memorandum stated that:

> If ground Folger were to match our spending levels, they would be placed in an LBT position of $12–15 [million] annually without any additional expansion. Expanding into the HFNI would increase that to $25–35 [million] (CX 724E; *see also* CX's 14C, 86M, 163A).

(4) Intent To Increase Payback

211. The fiscal 1973 marketing plan stated that one objective for Maxwell House was to "[i]ncrease Folger's payback" (CX 14C) and Mr. Einloth confirmed that this was a Maxwell House objective (Tr. 1549–50). The phrase "increase Folger's payback" meant that General Foods wanted to lengthen the time it would take Folger to break even after having entered a given market (Tr. 1608).

212. Another document indicates that Mr. Tower wanted to:

> develop plans that will prove to Procter that entry into our high-franchise markets will be expensive for them (CX 121B; *see also* CX's 74E, 77B, 87A, 133).

(5) The Statements In Perspective

213. The statements discussed just above must be considered in light of actual developments. Thus, the ambitious projection [55] that Regular Maxwell House could defend against Folger and increase its share in the HFNI was rejected by General Foods' management. Mr. Einloth testified that:

We chose [the goal of preventing Folger's from exceeding] 13 per cent. Because if everything else held constant, they got 13 in the HFNI and we built by 10, we would retain national share leadership by about one-tenth of one percentage point. That was my objective as far as I was concerned—I had to convince a lot of people that that was important. I couldn't convince them to defend, let alone maintain, national share leadership. That is how I arrived at the 13.

* * * * * * *

MR. SPIEGEL: Did I understand you to say that you had to convince certain people at General Foods about these objectives?

A. Damn right I did.

Q. Who were the people that you had to convince?

A. Tower, Laster, primarily those two.

Q. Did you convince them?

A. No.

Q. You didn't convince them?

A. Absolutely not. You know what General Foods' share of market is today?

Q. I am talking about at this point in time.

A. If I convinced them of national share leadership? Absolutely not. I did not (Tr. 1573–75). [56]

214. Mr. Einloth felt that maintaining national leadership was "absolutely vital," but this was an objective which he was not able to persuade management to adopt (Tr. 1613–15). The "real question" for management at the time of Procter & Gamble's expansion was whether funds should be spent for defending at all (Tr. 1615). According to him, it was a "constant battle" to sell management on the recommendation of the product group that leadership should be maintained. Eventually, the leadership issue "dropped out" (Tr. 1616).

215. Furthermore, despite the widespread belief among Maxwell House Division personnel that an immediate response to Folger's entry into the test markets was essential, an effective response in Syracuse was not attempted until Folger's success was almost assured (Findings 191–99), an indication that management was still reluctant to commit itself to an all-out defense.

(i) *The Reasonableness Of The Maxwell House Division's Defense Efforts*

216. After considering the defense mounted by the Maxwell House Division in Cleveland, Pittsburgh, Philadelphia, and Syracuse, the

documents describing those efforts, and Procter & Gamble's prior success in marketing new products, I find that the Division's response to Folger's entry was not "inordinate" as claimed by complaint counsel.[20]

217. Complaint counsel view the Division's response as "inordinate" because new entrants must use high promotion and advertising levels. They claim that Folger's entry spending plans were reasonable in view of that requirement. It is true that when introducing a product in a new geographic area, an entrant must employ higher levels of advertising and consumer promotion than the already-established brands to convince consumers to try the new product; and higher levels of trade promotion are also needed to convince retailers to stock and market the product (Tr. 2070–72, 2091–93, 2722–23, 2726, 2731–32). It does not follow, however, that the Division's decision **[57]** to meet Folger's expenditures in some areas was "inordinate," for Folger was not the typical new entrant.

218. From July 1, 1970 through June 30, 1971, the period immediately prior to the start of Folger's expansion into the HFNI, Procter & Gamble's worldwide sales were $3.2 billion, with net earnings of $238 million (CX 642F). In fiscal 1972, General Foods' worldwide sales were $2.5 billion, with net earnings of $113 million (CX 438F). At the time of its expansion of Folger's, Procter & Gamble marketed detergent products, food products, paper products and toilet goods under the following brand names: Tide, Cheer, Ivory, Joy, Safeguard, Comet, Cascade, Mr. Clean, Spic & Span, Crisco, Duncan Hines, Jiff, Pringle's, Charmin, Puffs, Bounty, Pampers, Crest, Gleem, Head & Shoulders and Prell (CX 642G).

219. Gordon Wade, who was employed by Procter & Gamble for nine years in various product management positions and was qualified as an expert in the sale of food and grocery products, testified that Procter & Gamble is the "best marketer of packaged goods in the world" (Tr. 4607). Although there have been some failures, Procter & Gamble has enjoyed great success in entering various consumer goods categories and attaining a leadership position while relegating prior market leaders to number two positions (Tr. 4607–11).

220. Mr. Wade's opinion is shared by the grocery trade. Mr. Engel regards Procter & Gamble as the "best packaged goods marketer in the United States" and testified that there was no way General Foods could keep Procter & Gamble's Folger's brand out of Cleveland or out of any other area Procter & Gamble desired to enter (Tr. 1702–05).

221. The management of General Foods also had great respect for Procter & Gamble (Tr. 4509). According to Mr. Laster, the president

[20] I discuss *infra* complaint counsel's allegations that the Division's below cost sales, its use of Horizon, its western retaliation and its "Cora" campaign were illegal.

of the Maxwell House Division, "everything we knew about Procter & Gamble, everything we knew about Folger's, would lead us to believe that we were up against a very strong and very formidable competitor" (Tr. 6955). In fact, Procter & Gamble "was the most formidable competitor we could have encountered" (Tr. 7045).

222. According to Mr. Nelson, the Division's national sales manager:

> Procter & Gamble is a huge company. The Folger Division of Procter & Gamble is probably—probably represents 6 to 8 [58] percent of their total business. If they have a desire to move in to any piece of geography, they will do it; and in all candor, if they wanted to, they could eat us up like a Hershey bar, and the street is littered in the grocery industry with competitors of Procter & Gamble who thought that they were not going to eat them up (Tr. 5773).

223. General Foods had already experienced one major encounter with Procter & Gamble in the cake mix business. Procter & Gamble bought a regional brand, Duncan Hines Cake Mixes, and expanded it nationally, gaining significant share and volume at the expense of General Food's Swansdown brand and other brands of cake mixes (Tr. 1971). General Foods shortly thereafter discontinued the marketing of Swansdown cake mixes (Tr. 6954).

224. General Foods' management was also aware that prior to its eastern expansion Folger was the leading brand in areas where it competed with Regular Maxwell House. In this area, Regular Maxwell House's share was about 9%, while Folger's share had increased from 31% in fiscal 1967 to 40% in fiscal 1973 (CX 648Y). Furthermore, management believed that when Folger's expanded into areas where Regular Maxwell House had a major or leading share, Folger's volume grew at its expense. For example, Folger expanded into the Jacksonville district in fiscal 1959. Regular Maxwell House's share at the time was 57%, but by fiscal 1968, its share had declined to 42%, while Folger's share had increased from 5% to 22% (CX 109–E).

225. In 1959, Folger's expanded into the Chicago area with a "vigorous entry campaign" (Tr. 4503). At that time, Hills Bros. had the leading share of 35%, and Regular Maxwell House had a share of 25%. By fiscal 1972, Folger's had overtaken Hills as the leading brand, and Regular Maxwell House's share had fallen to 10.1% (CX 1072–B).

226. The strength of the Folger brand was evidenced by "frequent and repetitive" efforts to improve Regular Maxwell House's business in the west (Tr. 4499). Maxwell House Division efforts in the west were of such frequency and intensity that the A.C. Nielson Co. concluded in a report presented to the Division in mid–1971 that one reason for Folger's expansion eastward would be to force the Division

to focus on the defense of its high franchise areas and alleviate its competitive pressures on Folger's high franchise areas (CX 642Z4). **[59]**

227. Finally, because coffee contributed so much to General Foods' profits (Tr. 4641–43) and was so much more important to it than to Procter & Gamble, as Mr. Hunter recognized (Tr. 3045), management was aware of the profound effect a successful eastern penetration by Folger would have on those profits.

228. After considering all of the facts—*i.e.,* Procter & Gamble's prior marketing successes, the strength of its Folger brand in the west, the importance of coffee to General Foods, and Folger's perceived initial success in Cleveland,[21] I find that while Folger as a new entrant into the HFNI had to offer consumer and trade promotions below the going rates in the test markets, General Foods was justified in defending its market share and profits vigorously after realizing that Folger's entry was successful. If it had not done so, management might have threatened General Foods with a substantial decline in profits, for Mr. Klein stated in discussing the financial justification for defending (RX 518):

> I thought that the financial analysis was reasonable. It dealt with only the incremental impact, which is the proper way to deal with this kind of a decision, and in fact, it was a fairly simple decision to make. The magnitude of the numbers, the negative impact that we expected if we did nothing or did not defend, was so large that it made the decision to defend easy. It would be irrational not to defend (Tr. 8249).

229. Mr. Hunter agreed that the effect on General Foods would have been adverse if it had chosen not to defend:

> Q. . . . what would be the particular effects if General Foods had elected not to defend?
> A. There would be no question about it. Their Maxwell House business would have been adversely affected. It would have declined. **[60]**
> Q. Would that adverse effect have been a significant adverse affect?
> A. Yes, I assume it would be. Because a proportionate loss of share would have been very substantial (Tr. 3043–44).

230. Under the circumstances described above, the Maxwell House Division's belated decision to defend its market share and profits by delaying Folger's expansion into the HFNI did not result in the expenditure of an "inordinate" amount of advertising and promotion funds for, given its substantial market share in the entry cities, it is inevitable that the Division would have to spend large sums to defend (just as its western retaliation would force Folger into large defense expenditures). And, I reject complaint counsel's argument that the

[21] Whether, in hindsight, Folger was as successful in its Cleveland introduction as General Foods claims (RPF 6–36, 6–37) or only minimally successful, according to the Nielsen figures (CRLA, p. 10), management believed at the time that Folger was a significant threat (Findings 153–55).

Division should have chosen a less expensive defense option, for the record reveals that any other decision than "defend now" would have resulted in excessive share and profit losses.[22]

(j) *The Probability Of Successfully Excluding Folger From The HFNI*

231. The immediately preceding discussion leads to a further conclusion: while General Foods hoped to delay Folger's expansion into the HFNI by making that expansion costly, no reasonably knowledgeable member of the industry would have believed that it could be excluded from the HFNI. For example, Mr. Graham of Martinson's said when asked if his company or any other coffee company could stop Folger's eastern expansion:

> No. We didn't feel that there was any way to stop Folger's from coming into that part of the country when they decided to expand into the area (Tr. 10,556; *see also* Findings 218–25). **[61]**

232. This conclusion is borne out by the financial analyses justifying the Maxwell House Division's defensive efforts. None of these analyses assumed that Folger could be stopped from expanding into or be excluded from the HFNI. Rather, all of the financial projections anticipated expansion throughout the HFNI by Folger (Tr. 8248–51).

3. The Effects of Folger's Entry Into The HFNI And The Maxwell House Division's Response

(a) *Introduction*

233. Folger entered the eastern markets with established profit and payout period objectives. After some initial hesitation in the first three test markets, the Maxwell House Division decided to compete vigorously with Folger for market share in these markets. As a result of the intense competition from the Division, Folger was not only unable to achieve its objectives on schedule but experienced losses in the eastern United States.

234. The intense competition between Folger and Maxwell House also resulted in losses for some roasters in these markets. Smaller companies such as Paul de Lima, Euclid and Hills were unable to compete against their larger and stronger rivals. Folger's entry and the Maxwell House Division's response were the major reasons for the decline of these companies, although there were other factors which caused the losses.

[22] Whether General Food's profits were excessive and its defense caused it to sell its Maxwell House brand below average total or average variable cost in some of its sales districts or market areas is a separate question which is discussed *infra*.

(b) *The Maxwell House Division*

235. In Cleveland, where Regular Maxwell House's pre-entry share was 44.6% (CX 1119C), its market share grew to 49.5% in the first year after entry, and then went to 46.9%, 48.5%, and 55.7%, respectively, for years two, three and four (CX 1119C).

236. In Pittsburgh, Regular Maxwell House's share grew from the pre-entry base of 44.2% to 51.5% and 53.2%, respectively, for years one and two (CX 1119E).

237. For the entire Youngstown sales district, Regular Maxwell House's market share grew from a pre-entry base of 42.0% to 45.3%, 45.7%, 49.2%, 53.3%, and 51.3%, respectively, for years one, two, three, four, and five (CX 1387).

238. In Syracuse, without the inclusion of Horizon's market share, Regular Maxwell House's market share moved from the **[62]** fiscal 1974 base of 39.2%, the year prior to Folger's entry, to 41.7%, 38.4% and then 45.4%, respectively, for years one through three (CX 1387).

239. In these districts, Maxwell House was able to maintain its market share position relative to the number two brand (CX 1387).

(c) *Folger*

240. Folger's eastern expansion and Maxwell House's response resulted in losses for Folger. Its comptroller, Mr. Clark, estimated that through June 1976, in Cleveland, Pittsburgh and Syracuse, Folger had cumulative losses of $10,369,000. In Cleveland, 57 months after its entry, Folger had a cumulative loss of $3,050,000 (CX 980). In Pittsburgh, 44 months after its entry, Folger had a cumulative loss of $3,174,000 (CX 981). In Syracuse, 21 months after its entry, Folger had a cumulative loss of $4,145,000 (CX 982).

241. The Maxwell House Division's response to Folger's expansion into the east was undoubtedly the main reason for the substantial losses incurred by Folger, but Mr. Hunter recognized that increased competitive expenditures by Chase & Sanborn and Hills Bros. in response to its entry also affected Procter & Gamble's ability to attain its objectives (CX 570A; Tr. 3050–51).

242. Although Folger suffered losses in the sales districts that it entered, Mr. Clark testified that an analysis of the profitability of Folger's coffee is meaningful only on a national basis (Tr. 3143), and Folger's national sales and profitability reveals that it suffered no overall competitive injury (RX 1080C).

243. For the year ending June 30, 1970, Procter & Gamble's sales of Folger's coffee were 284.4 million pounds. For the year ending June 30, 1976, sales of Folger's coffee had increased to 328.6 million, an increase of 15% (RX 1069B). During roughly the same period, total

consumption of ground coffee declined nationally by 10% (RX 1105B). During that same period, sales of Regular Maxwell House coffee declined by approximately 12% (RX 1105B, 1107A).

244. Procter & Gamble financed the expansion of Folger's coffee from Folger Coffee Co. profits in its "Folger area," the area of the country where it had the leading share (Tr. 2891). An exhibit specially prepared by Procter & Gamble for complaint counsel reported the following profits on Folger's in the "Folger area:" **[63]**

Calendar	1972	$17,698,000
	1973	$ 7,961,000
	1974	$18,884,000
	1975	$33,689,000

(CX 552A–B).

245. Maxwell House's response resulted in a longer payout period for Folger. Payout refers to the length of time it will take to reach a break even position on a cumulative basis. It is the time it takes for cumulative profits to offset initial introductory spending (Tr. 3214).

246. Folger's estimated payout for the plan implemented in Cleveland was 22 months (CX 491B; Tr. 2713). This estimate anticipated a response by the established brands (CX 491B), but the response by General Foods was not what was expected (CX 495A–B, 520A).

247. Folger estimated that increasing its marketing effort to respond to a second round of increased Maxwell House activity would raise the Cleveland payout to 33 months (CX 497F, 518A).

248. By the end of 1974, approximately 38 months after entry, Folger had not achieved payout in Cleveland (CX 553I; Tr. 3246–47). Folger did not continue to calculate its payout for Cleveland. However, given the volume performance and the amount of money Folger was spending in Cleveland, the payout would probably have been, according to Mr. Hunter "infinity" (Tr. 3103).

249. The principal reason for Folger's inability to achieve its payout goal in Cleveland was the Maxwell House response (Tr. 2786–87).

250. After its experience in Cleveland, Folger increased the projected payout period for its expansion plan for Pittsburgh to 35 months (CX 498A, 538B).

251. Forty-two months after its entry into Pittsburgh, Folger had not achieved payout (CX 553, 981). The unusually strong response of Maxwell House was the key reason for Folger's lack of success in Pittsburgh (CX 539A–B).

252. General Foods concluded that Maxwell House's response had resulted in Folger's payout being extended to 68–85 months (CX 649E).

253. While there is some testimony that Folger's projected payout was unrealistic (CX 493A; Tr. 4625–26), the Maxwell House Division's response was certainly one cause of Folger's failure to meet it. **[64]**

(d) *Other Roasters*

254. Folger's eastern expansion and the Maxwell House Division's response severely restricted the ability of some other industry participants to compete and caused them substantial monetary and volume losses.

(1) Paul de Lima

255. The Paul de Lima Coffee Co. is a small coffee roaster in the Syracuse, New York area that reported a net worth of $512,900 in 1975 and a net worth of $547,636 in 1977 (RX 1072A; Tr. 2577–79). The de Lima Coffee Company marketed coffee to institutional customers, to office coffee service customers, and to grocery customers (Tr. 2503).

256. Prior to Folger's entry in 1975, de Lima sold regular coffee to retailers in a 60 mile radius around Syracuse (Tr. 2504). de Lima's retail business was profitable prior to October 1974 (Tr. 2513).

257. de Lima lowered its price during the first nine months of 1975 in an attempt to remain competitive with Folger and Regular Maxwell House (Tr. 2521). During the summer of 1975, de Lima realized that it was losing too much money in grocery operations. de Lima had to make a choice as to whether to continue selling below cost, thereby endangering the whole company, or to attempt to price at a more realistic level and take the chance of losing volume. de Lima made the decision to raise its wholesale prices to a level it considered more realistic (Tr. 2522).

258. After de Lima chose to stop selling its coffee at a loss, the firm suffered an 80% drop in retail sales (CX 1068C; Tr. 2522). The low prices of Regular Maxwell House and Folger also caused de Lima to reduce its distribution area from a 60 mile radius around Syracuse to a 10 mile radius (CX's 607, 1068D; Tr. 2526–27). Because of the severe drop in sales, de Lima was forced to dismiss two of its three salesmen (Tr. 2527).

259. Because of the battle between Folger and the Maxwell House Division, de Lima's retail coffee business incurred substantial losses (Tr. 2536); however, the Division's response to Folger's expansion into the east was not the only cause of the losses suffered by de Lima. **[65]**

260. In the eight years prior to the Procter & Gamble expansion into the Syracuse sales district, de Lima's grocery sales of ground coffee had declined from 976,000 pounds in 1966 to 613,857 pounds by 1973, a decline of approximately 37% (RX 887).

261. Prior to Folger's expansion into Syracuse, de Lima had not

advertised its coffee, had not used any consumer promotion devices or retailer coupons and only used trade promotions from time to time (Tr. 2506–08, 2566). According to Mr. de Lima, "[w]e have never been convinced of the merit of [retailer coupons and consumer coupons] and we do not have the administrative facilities to control them" (Tr. 2506).

262. Mr. de Lima testified that one factor in his loss of business was the increase in the price of coffee caused by the Brazilian frost, increases which, because of his small inventory of coffee and inventory accounting system, resulted in immediate increasing costs for his coffee (Tr. 2586–87). Due to this increase in costs, Mr. de Lima's wholesale price was above the price of Regular Maxwell House and Folger's (Tr. 2593); nevertheless, most of de Lima's sales losses were not due to the frost (Tr. 2597).

263. de Lima is still in the coffee business today and is the leading seller of institutional coffee in the Syracuse area (Tr. 2572, 2590).

(2) Euclid

264. Since 1928, Euclid Coffee, located in Cleveland, Ohio, has sold its regular coffee products to retailers in all of Ohio and surrounding areas (Tr. 2601–02).

265. In 1970, Euclid's coffee sales were about $2.25 million (Tr. 2608). The Euclid Coffee Company was profitable in 1970, making about four or five cents per pound (Tr. 2608).

266. The increased levels of promotions and couponing by Maxwell House and Folger after its entry into Cleveland drastically reduced Euclid's sales (CX 611; Tr. 2615). For example, Euclid's yearly sales to Fisher Foods, its largest retail customer, dropped from 14,580 cases (10,380 tins + 4200 bags) in 1971, to 2,045 cases in 1974 (CX 612A; Tr. 2621).

267. Euclid's sales drastically declined because its products were selling for a higher retail price than Maxwell House's and Folger's, and the product did not, therefore, move off the shelf (Tr. 2616–17). **[66]**

(3) Hills

268. During the period of Folger's entry, recommendations were made that Hills Bros. should meet the level of promotion existing in the Youngstown and Syracuse markets. Hills Bros. could not afford to meet these promotions, because to do so would, in the opinion of Mr. Toy, result in the sale of its coffee below its cost of goods (Tr. 2213).

269. The effect of the decision by Hills Bros. not to meet the Maxwell House and Folger promotions was that Hills Bros. suffered severe market share losses. For example, during 1971 through 1977, Hills

Bros.' market share in the Youngstown sales district dropped from a pre-entry level of 15.8% (CX 1072A) to 8.5% (CX 1072G). In the Syracuse sales district, Hills Bros.' market share went from a pre-entry level of 11.0% (CX 1072D) to a 1977 level of 6.9% (CX 1072G).

270. Hills Bros.' market share losses were nearly 50% of its pre-entry level shares. Had Hills Bros.' market share losses been proportional to its previous share position, it would have lost less than 20% (CX 130C; RX 518A; Tr. 3010).

271. The pricing of Maxwell House and Folger was not the only cause of Hills Bros. decline, however, for prior to the time of Procter & Gamble's expansion into the Cleveland and Pittsburgh area, the grocery trade there did not regard Hills Bros. as a successful marketer of ground coffee because of its failure to maintain a consistent product quality and its lack of consumer promotions (Tr. 1698–1700). In fact, Mr. Engel of Kroger regarded Hills Bros.' merchandising activities in Cleveland as "dumping" the product there when Hills Bros. had excess capacity (Tr. 1698).

272. According to Maxwell House Division salesmen, grocery trade factors in Syracuse also reported a decline in the quality of Hills Bros. coffee (Tr. 5992–93).

273. Hills Bros.' share has declined not only in the areas of alleged predation, but throughout all areas of the country. In Hills Bros.' three areas of greatest share strength, its share dropped by 24%, 39% and 48% during the period fiscal year 1972 through fiscal year 1980 year to date (RX 1117). Specifically, Hills Bros.' share declined from 32.7% to 24.8% in Chicago, from 23.7% to 12.4% in Detroit, and from 11.8% to 7.2% in Los Angeles (RX 1117). These three areas in fiscal year 1972 accounted for over 53% of Hills Bros.' total national volume (RX 1117). **[67]**

4. Regular Maxwell House's Market Power

(a) *Introduction*

274. "Market power," which Drs. Mann and Elzinga agree is synonymous with the term "monopoly power" (Tr. 3630, 9501–02) is, according to Dr. Mann, the ability of a firm to maintain price persistently above the levels that would occur under full competitive pressure (Tr. 3577, 3630). Market power is identified by evaluating the structure of an industry within a relevant geographic market. This analysis looks at market share relationships, pricing conduct, and performance (profitability) (Tr. 3577–78, 9498–9500).

(b) *National Market Shares Of Regular Coffee Producers*

275. In fiscal 1971, Regular Maxwell House's share of the national regular coffee market was 24.1%; Folger's national share was 19.1% (RX 1107A).[23] At the time of Procter & Gamble's expansion into Cleveland, its Folger's brand was sold in an area of the country that included 55% of the national population and that accounted for almost 60% of total ground coffee sales (Tr. 3016). Folger's had the leading share throughout that area, running about 33% to 34% (CX 491A; Tr. 3017). In certain parts of its area of distribution, Folger's had over a 50% share (CX 1072A).

276. As a result of share gains from its eastern expansion, Folger became the leader in the national regular coffee market in 1979. This dominance continued in 1980 (RX's 1107A, 1279).

(c) *Regular Coffee Shares In The East*

277. In fiscal 1972, which marked the beginning of Folger's expansion into the eastern United States, Regular Maxwell [68] House's share in that area was 38.5%; Folger's share was 5.8%. The latest Nielsen data shows that Regular Maxwell House's share has declined in that area while Folger's has grown substantially (RX 1279).

(d) *Regular Coffee Shares In The Eastern Sales Districts*

278. Absolute market shares of General Foods' regular coffee brands and its Maxwell House brand in the eastern sales districts from 1971–1977 were:

Market Shares Of All General Foods' Regular Coffee Brands

Sales District	1971	1972	1973	1974	1975	1976	1977
Atlanta	37.5	39.5	44.9	47.9	48.4	42.2	45.1
Boston	44.2	45.6	49.6	50.1	49.1	47.1	43.3
Charlotte	47.7	47.4	50.3	49.9	50.1	48.9	38.6
Jacksonville	44.3	46.1	48.6	50.9	47.3	48.5	45.7
New York	35.2	36.1	40.4	40.2	40.4	38.0	34.9
Philadelphia	49.6	47.9	55.4	55.6	51.9	49.8	41.4
Syracuse	41.3	44.4	48.9	48.6	51.1	46.2	52.5
Youngstown	46.4	49.8	53.3	56.9	61.4	60.1	55.7

[23] Although General Foods objects to any market analysis which focuses only on Regular Maxwell House (RPF 3-1), Dr. Elzinga testified that analysis of this brand's market power is appropriate because it is General Food's "flagship" coffee brand (Tr. 9787-88).

Market Shares Of Regular Maxwell House

Sales District	1971	1972	1973	1974	1975	1976	1977
Atlanta	32.9	34.6	37.5	40.1	39.5	34.2	38.5
Boston	40.1	40.8	40.8	40.5	39.1	38.2	35.9
Charlotte	41.3	40.5	41.8	41.2	41.5	40.2	32.2
Jacksonville	41.5	42.8	42.7	43.9	39.6	41.5	40.1
New York	29.8	29.9	29.9	28.3	29.9	28.4	26.2
Philadelphia	45.1	42.5	45.1	45.6	41.7	39.7	33.4
Syracuse	36.4	37.7	40.8	39.2	41.7	38.4	45.4
Youngstown	42.0	45.3	45.7	49.2	53.3	51.3	48.3

279. The latest Nielsen data reveal that Regular Maxwell House's share of regular coffee sales in the Youngstown, Philadelphia and Syracuse sales districts has declined from its market share in those sales districts at the time of Folger's entry into each of them, whereas Folger has achieved a substantial share in each of these districts (Compare Finding 278 with RX 1279). **[69]**

280. The shares of Regular Maxwell House and its next largest competitors in the eastern sales districts from 1971–1977 were:

Market Shares Of Regular Maxwell House And The Next Largest Competitor

Sales District	1971	1972	1973	1974	1975	1976	1977
Atlanta							
RMH	32.9	34.6	37.5	40.1	39.5	34.2	38.5
#2 Brand	15.0	12.9	12.5	11.6	11.1	8.8	7.6
	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)
Boston							
RMH	40.1	40.8	40.8	40.5	39.1	38.2	35.9
#2 Brand	10.2	9.6	9.5	8.3	9.8	9.5	9.5
	(H)*	(CS)	(CS)	(CF)	(H)	(CF)	(CF)
Charlotte							
RMH	41.3	40.5	41.8	41.2	41.5	40.2	32.2
#2 Brand	14.1	13.8	12.0	12.7	11.8	12.1	8.9
	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)
Jacksonville							
RMH	41.5	42.8	42.7	43.9	39.6	41.5	40.1
#2 Brand	20.8	21.0	20.2	17.7	19.4	14.8	14.9
#2 Brand	(F)	(F)	(F)	(F)	(F)	(F)	(F)
N.Y.							
RMH	29.8	29.9	29.9	28.3	29.9	28.4	26.2
#2 Brand	13.7	14.1	12.6	14.1	18.7	18.2	12.8
	(S)	(S)	(S)	(S)	(CF)	(CF)	(CF)
Philadelphia							
RMH	45.1	42.5	45.1	45.6	41.7	39.7	33.4
#2 Brand	9.7	10.3	10.4	7.8	10.0	7.7	10.0
	(H)	(CS)	(CS)	(CS)	(F)	(H)	(F)

Sales District	1971	1972	1973	1974	1975	1976	1977
Syracuse							
RMH	36.4	37.7	40.8	39.2	41.7	38.4	45.4
#2 Brand	17.1	17.4	14.9	14.0	11.1	17.7	21.7
	(H)	(CS)	(CS)	(CS)	(CS)	(F)	(F)
Youngstown							
RMH	42.0	45.3	45.7	49.2	53.3	51.3	48.3
#2 Brand	15.8	12.5	11.3	13.8	14.7	13.1	16.2
	(H)	(H)	(H)	(F)	(F)	(F)	(F)

CS = Chase & Sanborn; CF = Chock Full O'Nuts; F = Folger; H = Hills; S = Savarin.
* (CS) also had a share of 10.2 [70]

281. The relative market share ratios (Regular Maxwell House share divided by share of second largest brand) were:

Relative Market Shares

Sales District	1971	1972	1973	1974	1975	1976	1977
Atlanta							
Ratio	2.19	2.68	3.00	3.46	3.56	3.89	5.07
#2 Brand	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)
Boston							
Ratio	3.93	4.25	4.29	4.88	3.99	4.02	3.78
#2 Brand	(H)*	(CS)	(CS)	(CF)	(H)	(CF)	(CF)
Charlotte							
Ratio	2.93	2.93	3.48	3.24	3.52	3.32	3.62
#2 Brand	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)	(CS)
Jacksonville							
Ratio	2.00	2.04	2.11	2.48	2.04	2.80	2.69
#2 Brand	(F)	(F)	(F)	(F)	(F)	(F)	(F)
N.Y.							
Ratio	2.18	2.12	2.37	2.01	1.60	1.56	2.05
#2 Brand	(S)	(S)	(S)	(S)	(CF)	(CF)	(CF)
Philadelphia							
Ratio	4.65	4.13	4.34	5.85	4.17	5.16	3.34
#2 Brand	(H)	(CS)	(CS)	(CS)	(F)	(H)	(F)
Syracuse							
Ratio	2.13	2.17	2.74	2.80	3.76	2.17	2.09
#2 Brand	(H)	(CS)	(CS)	(CS)	(CS)	(F)	(F)
Youngstown							
Ratio	2.66	3.62	4.04	3.57	3.63	3.92	2.98
#2 Brand	(H)	(H)	(H)	(F)	(F)	(F)	(F)

(CX 1072) [71]

282. Complaint counsel argue that Regular Maxwell House's absolute and relative share dominance of regular coffee sales in the western districts, its "product differentiation" advantage, its ability to command a price premium, and its supracompetitive profits (CLA, p. 111) evidence its market or monopoly power—that is, the power to control prices or exclude competition (CLA, p. 109). They claim support for their conclusion in statements made by industry members.

(e) *Regular Maxwell House's Market Power As Viewed By Its Competitors, Employees And Agents*

(1) Trade Dealing

283. Trade dealing, which accounts for 80–90% of Maxwell House's marketing funds, is the most important element of the marketing mix for regular coffee (CX's 14Z, 203D; Tr. 1555).

Mr. Einloth testified that:

> The concept that was commonly accepted was that if Maxwell House has a larger share of the business than competition and the strengths of the franchises is (sic) reflected in that share from the standpoint of trade dealing, we should be able to spend less than competition (Tr. 1589).[24] [72]

284. Other General Foods documents recognize that share dominance makes it possible to keep trade dealing down and increase regular coffee profitability (CX's 74S, 90E, 96E, 190R, 205Z–5, 633F, 637L, 646L, 691C).

285. Ogilvy & Mather issued studies in 1972 and 1975 which argued that the larger the market share of Regular Maxwell House relative to the share of the second largest brand in the market, the less the Maxwell House Division had to trade deal and the greater was Regular Maxwell House's profitability. These studies found that there was a high statistical correlation between the level of Regular Maxwell House's share dominance over the second leading brand and its ability to have lower trade deals and make greater profits. The statistical correlations were .7 and .9 (the highest possible correlation is 1) (CX's 1L, 679A).

286. The first analysis indicated that in Maxwell House's high franchise sales districts "there is a high level correlation between the extent of share dominance and profitability. The coefficient is .7. This is very significant when you consider that a coefficient of 1.0 would indicate that share dominance explains all the variation in profit" (CX's 1L, 468K).

287. Mr. William Phillips, Ogilvy & Mather's chairman, testified that the analysis proves "something everybody knows," that is, when your franchise is dominant in a trading area:

> You have less need to promote with the trade to get trade cooperation in the consumer offers and, if there are two or three brands about the same in share and position, its

[24] In a document which he authored, Mr. Einloth stated:

> Evidence that 2X share leverage results in ability to underspend competition can be found in RMH history in the East. In nearly all of our Eastern or noninfringement markets (areas where Folger is not in distribution) RMH enjoys a minimum share advantage by pack-size of twice that of its nearest competitor. Competitive trade dealing has always been considerably higher than RMH, sometimes by as much as $3.00/case, but the Brand has been able to withstand it, build its share and improve its margin less deal position (CX 725E).

a much more competitive environment and your trade deals are high and your contribution[25] is lower (Tr. 1947). [73]

288. A second study by Ogilvy & Mather came to the same conclusion as the first, except that the correlation between share leadership and Maxwell House profitability had increased from .7 to .9 (CX 679A).

289. An additional conclusion of the first study was that when another brand reached the 20% market share range, profitability for Maxwell House (CMLTD) began to decrease (CX1D, 468C). When there is a second brand with a market share above 20%, it meant that Maxwell House's profit decreased by about $.50 per unit (CX's 1D, 468C). The analysis also concluded that if Maxwell House could keep Folger below the 20% share level, Maxwell House could earn an additional $8 million in long-term profit (CX1D, 468C; Tr. 1439–40).

290. The Maxwell House Division adopted trade dealing practices which recognized the significance of share dominance:

For each district, market area, and dealing area, RMH share vs. competition is tracked. Depending on the RMH to competitive share ratio, RMH deals at a different level keying only to significant competition (CX's 194Q, 195Q).

291. The Maxwell House Division's fiscal 1973 marketing plan describes the HFNI as the area where:

RMH is the dominant brand with no significant competition.[26] RMH's leverage[27] is great with spending generally independent of competition (CX 14Z–1). [74]

292. The fiscal 1972 through 1976 marketing plans for Maxwell House state that in the HFNI, the Division could "spend below competition" on trade deals (CX's 13D, M, Z–10, 14P, Z–1, 15G, 16K, W, 18K, Z–18, 19R, Z–28).

293. General Foods recognized that in the high franchise sales districts, Regular Maxwell House's trade rates were less than in the low franchise sales districts. In the fiscal 1975 Marketing Plan, the trade rates per unit for 1973 and 1974 were:

[25] Contribution margin is the amount remaining from net revenue after deducting the cost of goods sold. It is the amount available for marketing and profit (Tr. 1248).

[26] Mr. Einloth testified that the phrase "no significant competition" referred to the fact that "[t]here was no single competitor whose presence was found throughout the entire non-infringement area" but that "[t]here was significant competition by area within the non-infringement markets" (Tr. 1611).

[27] Meaning that the Division was able to use lower trade deals than its competitors in the area (Tr. 1417–18, 1552–53).

	HFNI	HFI	LF
1973	1.13	1.42	2.40
1974	1.42	1.54	2.45

(CX 16Z–36).

294. Its competitors confirmed that the Division trade dealt less heavily in areas where it had a dominant[28] market share (Tr. 2026, 2847, 2878), and, in some areas, had higher dead net prices than its competitors.

295. Mr. Trone testified that Regular Maxwell House had higher dead net prices than Hills Bros. and Chase & Sanborn (Tr. 1384, 1505).

296. In Cleveland and Pittsburgh, prior to Folger's entry, Regular Maxwell House's case rate (non-performance and performance allowances) generally was less than other competitors, up to $1.50 per case less. Thus, the list price less case rate for Regular Maxwell House was up to $1.50 higher than the other competitors (Tr. 1647–48, 1681–82).

297. Prior to Folger's entry into the Charlotte and Atlanta sales districts, Regular Maxwell House did not meet competitors' trade rates on a continuing basis; when it was not meeting the competitive trade rates, its dead net price was above the dead net prices of its competitors (Tr. 6636–37).

298. Prior to Folger's entry into Syracuse, Regular Maxwell House's trade deals were lower than those of Hills Bros. and Chase & Sanborn. Under both "trade dead net" (list price less [75] non-performance and performance allowances) and "consumer dead net" (list price less non-performance and performance allowances and retailer coupons) it had a higher price than Hills Bros. and Chase & Sanborn. In terms of "consumer dead net," there could be a $.10 per pound differential (Tr. 6026–32, 6035–39).

299. An analysis by Mr. Toy of the dead net price differences between Hills, Regular Maxwell House, and Chase & Sanborn in the east prior to the entry of Folger indicates that Regular Maxwell House commanded higher prices than Hills Bros. and Chase & Sanborn. In this analysis, Mr. Toy cumulated the net price differences between Regular Maxwell House, Hills Bros., and Chase & Sanborn on all three pack sizes for a period of seven months (CX 866H–I; Tr. 2046, 2152–54).

300. The analysis for the areas dominated (as Mr. Toy defined the word) by Maxwell House indicates that:

In Philadelphia, Regular Maxwell House's cumulative dead net price was 15 cents

[28] Defined by Mr. Toy of Hills Bros. as the situation in which "Maxwell House has far and away the largest share of market and the next nearest competitors have roughly less than half of the share that Maxwell House would have" (Tr. 2026).

higher than Hills' and 23 cents higher than Chase's.[29]

In Pittsburgh, Regular Maxwell House's cumulative dead net price was 7 cents higher than Hills' and 12 cents higher than Chase's.

In Cleveland, Regular Maxwell House's cumulative dead net price was 26 cents higher than Hills' and 17 cents higher than Chase's.

In Detroit, Regular Maxwell House's cumulative dead net price was 16 cents higher than Hills' and 24 cents higher than Chase's.

In Boston, Regular Maxwell House's cumulative dead net price was 4 cents higher than Hills' and 13 cents higher than Chase's.

In Albany, Regular Maxwell House's dead **[76]** net price was 5 cents higher than Hills' and 17 cents higher than Chase's.

In Buffalo, Regular Maxwell House's cumulative dead net price was 6 cents higher than Hills' and 15 cents higher than Chase's (CX 866I; Tr. 2045–46, 2050).

301. In a study of Philadelphia, Mr. Toy found that Maxwell House sold at higher net prices to the trade than Hills Bros. and Chase & Sanborn for 21 consecutive months between February 1968 and October 1969. The average difference in price between Maxwell House and Hills Bros. over the two years was over 2.6 cents per pound and the average difference between Maxwell House and Chase & Sanborn was over 2.9 cents per pound (CX 872C; Tr. 2059).

(2) Price Leadership

302. The Maxwell House Division's competitors sometimes priced their products with reference to Regular Maxwell House. From 1971 to 1977, Kroger "pegged" the price of its private label coffee to the price of Regular Maxwell House. Its prices were set about 5 cents below Regular Maxwell House's prices (Tr. 1651). de Lima Coffee Company primarily looked at the price of Regular Maxwell House in setting the price for its coffee because Regular Maxwell House was the number one brand in the market. It set its price so that it would have a lower shelf price than Regular Maxwell House (Tr. 2507–08). Hills Bros. also priced its coffee in relationship to Regular Maxwell House's prices so that it could obtain a lower shelf price, for it believed that it required a lower shelf price than Regular Maxwell House in order to maintain its sales volume (Tr. 2036–37).

[29] Price per pound over a seven month period. Thus, the 15 cent difference averaged, per month, 2 cents per pound (Tr. 2045–46).

(3) Competition Within The HFNI

303. All of the above notwithstanding, Regular Maxwell House's share dominance in the HFNI did not mean that it could ignore the pricing and trade and consumer dealing of its competitors, nor was its dominance so great that it could exclude competitors from the HFNI.

304. Thus, despite the statement in CX 14Z–1 that Regular Maxwell House's spending is independent of competition (Finding 291), the same document points out that trade promotions "maintain competitive pricing and feature activity **[77]** necessary for the short-term health of the franchise" (CX 14Z), and that 45% of the $40 million trade deal expenditures for the brand would be spent in the HFNI. This is convincing evidence that the Division could not simply ignore its competition in that area.

305. Mr. Graham, who has had extensive experience with the Maxwell House Division, Martinson's and Standard Brands (Chase & Sanborn) testified that Regular Maxwell House was, and had to be, competitive in the east prior to Procter & Gamble's eastern expansion. Had it not been, "the grocery trade would have tended to lean much heavier toward the brands where they received larger offers, and Maxwell House would have lost ground, would have lost sales and share of the market" (Tr. 10,544–45). In the east, prior to Procter & Gamble's expansion, according to Mr. Graham, Regular Maxwell House could not charge higher than competitive prices to the grocery trade, could not control the price of coffee, and could not command a premium price over other coffees (Tr. 10,545). In fact, Martinson's and brands other than Regular Maxwell House were sold at a premium price in the east (Tr. 10,563–64).

306. Mr. Graham considered the eastern United States even prior to the expansion of Procter & Gamble to be the most competitive portion of the country (Tr. 10,541). This is because the east had a number of strong regional brands that were marketed vigorously in addition to a number of national brands. The national brands, in addition to Regular Maxwell House, were Hills Bros. and Chase & Sanborn, and the strong regional brands were Savarin, Chock Full O'Nuts and Martinson's, all of which were marketed "on almost the entire eastern seaboard" (Tr. 10,542). Mr. Graham's opinion as to the competitiveness of the east is shared by the Maxwell House Division's national sales manager (Tr. 5747).

307. Again, despite the sweeping statements in the documents discussed above, knowledgeable witnesses testified that Regular Maxwell House could not ignore its competitors in the eastern sales districts. Mr. Trone testified that New York "used to give us a fit" in terms of competitive marketing expenditures (Tr. 1473), and that

Regular Maxwell House competed with Standard Brands, Hills and was faced with "formidable COB (Chains' own brand) competition." Because coffee was so price sensitive, the consumer would switch to a coffee whose trade deals were reflected on the shelf, and General Foods would have to react to that or lose volume (Tr. 1474–76).

308. Mr. Mann, who is the Maxwell House Division's eastern region sales manager, testified that in New York, Regular Maxwell House responded to major competitors through a diversified marketing approach using consumer promotions, advertising and trade deals (Tr. 6481). It did not always match [78] its competitors penny for penny on trade deals, but also employed advertising and consumer promotions. By contrast, its competitors in New York concentrated on trade deals "with very little attention to the advertising and consumer promotion components of the mix." In some instances, Regular Maxwell House matched competitive deals penny for penny or even exceeded the level of competitive deals (Tr. 6482–83). Despite these efforts, during the three years immediately prior to Procter & Gamble's entry into New York, Regular Maxwell House had been losing share (Tr. 6487).

309. In Boston, Regular Maxwell House's major competitors prior to Procter & Gamble's expansion were Chock, Hills Bros., Chase & Sanborn and COB (Tr. 6479). Regular Maxwell House responded to the trade deals of competitors in Boston in much the same way as in New York, sometimes matching them penny for penny, sometimes exceeding them, and sometimes not matching them exactly but relying instead on advertising and consumer promotions (Tr. 6482). Despite these efforts, Regular Maxwell House in Boston, as in New York, had been losing share during the three years prior to the Procter & Gamble expansion (Tr. 6487).

310. A June 1, 1976 Maxwell House Division memorandum entitled Eastern Complex Revised Dealing Strategy reported that Regular Maxwell House's share was declining in all areas of the complex, which is comprised of the Boston, New York and Philadelphia sales districts. The cause was stated to be chains-own-brands: "the magnitude of RMH's losses in Boston and Philadelphia reflect significant on-going shelf/feature price disadvantages to RMH's largest competitor in both markets, COB" (CX 192B). The share decline in New York was attributed to significant shelf and feature price disadvantages versus COB, but "major shelf price disadvantages to CFON (Chock Full O'Nuts) have impacted RMH more significantly than COB in New York" (CX 192C). The memorandum concluded that "RMH will continue to risk suffering share declines throughout the complex as long as feature activity remains suppressed and RMH experiences differentials vs. COB and CFON of the current magnitude" (CX 192E).

311. A December 2, 1976 Maxwell House Division memorandum reported on the inability of Regular Maxwell House to ignore competition in New York and Boston:

In New York and Boston, CFON and Savarin are taking their toll on RMH. We are attempting to stay competitive but are finding more and more trade resistance to featuring coffee (CX 689B). **[79]**

312. Mr. Keller, the Maxwell House Division's southern regional sales manager, testified that the Division had to be responsive to competitors in that area (Hills Bros., Chase & Sanborn, Chock Full O'Nuts, COB and smaller local competitors) (Tr. 6590–94).

313. In Detroit, Atlanta and Charlotte, Regular Maxwell House used a balanced marketing mix which included advertising and consumer promotion as well as trade promotion. Most of Regular Maxwell House's competitors used trade offers as their primary means of marketing. They did very little advertising or consumer promotion, in Mr. Keller's opinion (Tr. 6595).

314. To assure that the retail grocery trade would price it competitively with other brands, Regular Maxwell House had to offer trade deals competitive with other manufacturers in Mr. Keller's region. Otherwise, "the consumer will walk right by us and pick up a competing product," because if competitors had better trade deal programs, the trade would feature them and not Regular Maxwell House (Tr. 6596).

315. Procter & Gamble was an established competitor in the Jacksonville sales district in fiscal 1971 with a share of 20.8% (CX 1072A). The Jacksonville sales district was part of the high franchise infringement area, an area where the Division regarded Folger's and Regular Maxwell House as equal in size and strength and where the Maxwell House Division regarded the competition as being "fierce" (CX 14Z–1).

316. According to the head buyer for S.M. Flickinger's, a major wholesaler in the Buffalo area, Regular Maxwell House's list price and trade promotional allowances equalled those of Hills Bros. and Chase & Sanborn prior to the time of Folger's expansion there (Buffalo is in the Syracuse sales district) (Tr. 11,859–60), and he believed that if it was not competitively equal with Hills Bros. and Chase & Sanborn, it would cease to be a popular brand:

It's that competitive. We wouldn't feature them. They wouldn't have the same retail [price] and the consumer wouldn't pick them up (Tr. 11,860).

317. The Division's Syracuse sales district manager also confirmed that during the period 1964 up to the time of Folger's entry, Regular Maxwell House would be competitive with the offerings of Hills Bros.,

Chase & Sanborn and Beechnut by making [80] its dead net to the consumer[30] the same as these brands (Tr. 5943). Specifically, Regular Maxwell House had to respond to the offerings of these brands:

> Any one of those two brands could have had Maxwell House for lunch if we did not respond to their trade offer. Coffee is a very volatile, volatile product. The customer is well aware of what the price is. It's featured quite frequently. If the price is right and the quality is there, brand loyalty goes out the window (Tr. 6156).

At times from 1970 to the date of Folger's expansion, there were periods when Regular Maxwell House's consumer dead net and trade dead net were lower than that of Hills Bros., particularly during holidays or other special merchandising events (Tr. 6196–97).

318. Mr. Engel of Kroger testified that prior to the expansion of Procter & Gamble, Regular Maxwell House competed with Hills Bros., Chase & Sanborn, COB, Chock Full O'Nuts and Breakfast Cheer (Tr. 12,063), and he stated that Regular Maxwell House's prices were comparable with other brands, as were its promotional activities (Tr. 12,064).

319. He also stated that Regular Maxwell House had the leading share in both Cleveland and Pittsburgh at the time of Folger's entry because it had the product quality desired by the consumer, it utilized consumer promotion and it provided "incentive to the trade to support the product at retail" (Tr. 1696).

320. Mr. Engel further testified that Regular Maxwell House did not have the ability to control either the retail price of coffee or the price charged by others to the grocery trade in the Cleveland and Pittsburgh areas, and Mr. Metzger stated that the grocery trade in the Buffalo area would not feature Regular Maxwell House if its trade promotions did not equal Hills Bros.' and Chase & Sanborn's (Tr. 11,860, 12,070).

321. Convincing evidence that the Maxwell House Division could not exclude competitors from the HFNI is the successful [81] expansion of both Hills and Folger into that area, and the expansion of regional roasters within the HFNI.

322. Hills Bros. increased its national share from 9.6% in fiscal 1963 to 11.2% by fiscal 1968, with most of the increase attributable to expanded distribution in the "new Eastern areas" (CX 11Z–7). Hills Bros. formally introduced its coffee into the Cleveland area in 1962, the Pittsburgh area in 1963, the Syracuse sales district in 1964, the Boston sales district in 1965, the Philadelphia sales district in 1966, and the New York sales district in 1967 (RX 1116).

323. As of fiscal 1971, Hills had established a share of 17.1% in the

[30] List price minus buying allowances, performance offers and RECU's. "Trade dead net" excludes RECU's (Tr. 5941).

Syracuse sales district and 15.8% in the Youngstown sales district (CX 1072A). Hills Bros.' eastern expansion was regarded as a successful expansion by both Hills Bros. and by the Maxwell House Division (Tr. 2130, 5793).

324. Other Maxwell House Division competitors have increased their business within the HFNI. Through the use of a new advertising campaign and "aggressive" use of trade promotions, Martinson's increased its share in New York from 9% in 1971 to 13.5% in 1973 (Tr. 10,562–63). In the Syracuse, Boston and New York sales districts, Chock Full O'Nuts has increased its share above its fiscal 1978 levels (RX 1278). Savarin coffee increased its share in the New York sales district over its fiscal 1978 share level (RX 1278). It also increased its share considerably in the Jacksonville sales district during the period fiscal 1971 through 1977 (CX 1072A, G). In early 1976, Savarin commenced a "major introduction" in the Baltimore-Washington area (CX 681E).

(4) Conclusion

325. Although it is apparent that the Maxwell House Division did not believe it was necessary to meet the trade deals of all competitors at all times in the HFNI, the Division did not control the amount of trade dealing in the sales districts, for it ignored its competitors' offers at its peril, even before Folger entered the HFNI. Stated simply, if the Division had not trade dealt along with some of its competitors in the HFNI, it would have lost market share.

326. Furthermore, complaint counsel emphasize trade dealing and ignore the other aspects of the marketing mix, *i.e.*, advertising and consumer promotion. Although expenditures in these areas were less than for trade promotions (10–20% of the marketing mix), the Division used advertising and consumer promotions more than its competitors, and concentrating solely on its trade promotions gives a false picture of its competitive [82] activity in the HFNI. For example, according to Professor Dearden (*infra*), Regular Maxwell House spent more in HFNI sales districts than in low franchise districts on advertising and consumer and trade promotions in 1973 and 1977 (CX's 987Z–67 to Z–85, Z–147 to Z–166). While these expenditures were undoubtedly influenced by the response to Folger's and Regular Maxwell House's greater sales volume in the HFNI, they certainly cast doubt on the claim that Regular Maxwell House had no significant competition in the east.

327. Furthermore, ignoring consumer promotions is inconsistent with Dr. Mann's definition of "economic price" which deducts these promotions from list price. Because the Division emphasized consumer promotions, ignoring them tends to raise the price the Division

charged vis-a-vis its competitors. The same problem exists with Mr. Toy's charts, for they do not include RECU's in his definition of price (Tr. 2040).

328. The problems with complaint counsel's inconsistent definition of price and the testimony of industry members indicate to me that, despite the inflated rhetoric of some Maxwell House Division personnel, the Division could not ignore competition in the HFNI, did not "control" price in the HFNI, and, in view of Hills' and Folger's successful expansions into that area, could not exclude competition from the HFNI.

329. Finally, aside from making the claim, complaint counsel offer no evidence that Regular Maxwell House had a product differentiation advantage over other coffees. While it was and is the dominant brand in the HFNI, according to Mr. Graham, aside from some private label coffees, it did not sell at higher than competitive prices to the grocery trade (Tr. 10,570–71).[31] If by "product differentiation advantage" complaint counsel mean simply that it is a product which commands consumer loyalty, then Regular Maxwell House had no advantage over other branded coffees which, one must assume, also had a loyal following. If they did not, they could not remain viable competitors. **[83]**

(f) *Share-Price-Profit Analysis*

330. Dr. Mann conducted statistical tests that were designed to determine whether the share-price-profit relationship which he believes indicates market power is reflected in the relationship between the market shares, prices, and profits of Regular Maxwell House (Tr. 3595, 3608, 3698–99).

331. His study analyzed five different statistical relationships: the relationship between absolute share and profit (CX's 1104, 1110); the relationship between relative share and profit (CX's 1106, 1112); the relationship between absolute share and price (CX's 1105, 1111); the relationship between relative share and price (CX's 1108, 1114); and, the relationship between price and profit (CX's 1107, 1113).

332. Dr. Mann was satisfied, based upon correlation analyses (which measure the degree of association between two pieces of data) (Tr. 3545) that each of his five studies established a statistically significant[32] positive relationship between share, price and profit (Tr. 3596–99, 3603–07, 3609–12, 3614–18, 4021–24, 4035–36).

333. Since these correlations showed that Regular Maxwell House's

[31] A General Foods document describes Regular Maxwell House as a brand "that exists to satisfy the coffee drinking needs of ground coffee users who want a consistently high quality and satisfying coffee beverage at a popular price" (CX 11Z–9; *see also* CX's 23H, 44J, 45Z–64).

[32] Evaluation of statistical significance is a process that reveals how likely it is that two variables are related to each other (Tr. 3548).

pricing behavior and profitability were influenced by absolute share and relative share, he concluded that "some of the profitability levels enjoyed by the Maxwell House brand were consistent with the presence of market power" (Tr. 3688). Dr. Greer also agreed that this analysis established the presence of market power (Tr. 11,582–83).

334. On the other hand, Dr. Elzinga warned that high economic profits are not necessarily explained by the presence of monopoly power. Other factors such as superior management or simple good luck may well account for such profits (Tr. 9821). Correlations such as those prepared by Dr. Mann thus do not necessarily explain Regular Maxwell House's profitability[33] or **[84]** lead to the conclusion that it possessed market or monopoly power in the HFNI. In fact, the findings immediately above, which are based on testimony by knowledgeable industry members, reveal that the Maxwell House Division had neither control over price in the HFNI nor the ability to exclude competition in that area, and I reject Dr. Mann's and Dr. Greer's conclusions for they are based on statistical analyses which do not reflect the actual state of the regular coffee market in the HFNI or in its sales districts.

(g) *Regular Maxwell House's Profitability*

(1) Professor Dearden's Calculations

335. Professor John Dearden of Harvard University, who is an accounting expert, calculated the profitability of General Foods' regular coffee brands by sales district (Tr. 29).

336. Professor Dearden followed two principles in his profitability calculations: A business segment must be charged with all costs that benefit that segment (Tr. 36–38, 106–07); and, a common denominator must be found that will allow a comparison of the calculation with the profitability of other businesses. The common denominator selected by Professor Dearden was ROFE, or "return on funds employed" (Tr. 36–38). **[85]**

337. ROFE's for General Foods' regular coffee products by sales district were calculated by assigning as much of the cost and revenue as possible directly to the sales district and allocating the remainder in the most equitable way possible (Tr. 214).

[33] Historically, analysts have often jumped to unjustified conclusions by mistaking an observed correlation for a cause-effect relationship. A high sample correlation coefficient does not necessarily signify any causal relation between two variables (Bhattacharyya & Johnson, *Wiley Series in Profitability & Mathematical Statistics,* at 406–07, 1977).

It is not difficult by associating different pairs of variables to find a high degree of correlation among some of them. In such a situation, it is tempting to conclude that one variable causes the other to change—to assume automatically a cause-and-effect relationship (Mandel, *Statistics for Management,* at 37, University of Baltimore).

The fact that we find a relationship between two variables does not imply a cause-and-effect relationship (Salvatore & Berliner, *Statistics,* at 173).

338. General Foods routinely allocates and assigns costs to determine product line profitability (CX 1006; Tr. 144), and Professor Dearden testified that what he did—assigning revenues, costs, and funds employed to a geographic area—is no different than assigning them to a product (Tr. 21–23). Thus, his district profitability calculations, according to him, give "a fair picture of the profitability among sales districts" (Tr. 310).

339. On at least two occasions, General Foods prepared analyses similar to those of Professor Dearden. From 1971 to 1973, the Maxwell House Division prepared district profitability statements that reported a quarterly profit figure by brand for each sales district (CX 993A–W) and, in 1977, General Foods financial planning and analysis department prepared a "Max-Pax regionalization study" which calculated profitability quarterly on a sales district basis (CX 815K).

340. The Regular Maxwell House ROFE's calculated by Professor Dearden for the eastern sales districts ranged from about 30 to 70% pre-tax in fiscal 1971 and 1972. The ROFE's for the western sales districts were lower, and in some cases were negative (CX 1115A). The national profits for Regular Maxwell House, according to Professor Dearden's calculations, were 42.40% pre-tax in fiscal 1971 and 37.20% pre-tax in fiscal 1972 (CX 1386).

(2) Mr. Klein's Calculations

341. Mr. Donald Klein, director of financial planning and control for General Foods (Tr. 8217) testified that Professor Dearden improperly treated certain Maxwell House Division cost and investment data and misinterpreted other data, and he revised Professor Dearden's figures to present what he believes is a more accurate calculation of profitability (RX 1170; Tr. 8457–68).

342. In addition to selling coffee packaged for sale at retail, General Foods also has a separate military business which sells to military commissaries and other military outlets. The military business is handled by a separate **[86]** organization which has its own separate overhead expense, general and administrative expense and sales force (Tr. 8461, 8467).

343. Professor Dearden's calculations attributed certain grocery coffee expenses to the military sales business. Mr. Klein returned these grocery coffee expenses to the grocery coffee business, which has the effect of reducing the Dearden profit before tax figure for the grocery coffee business. This in turn reduces the ROFE profitability estimate (RX 1170A–H; Tr. 8468).

344. When General Foods decaffeinates coffee during the production of its decaffeinated coffee products, caffeine is produced as a by-product, and the processing and sale of this caffeine is treated by

General Foods as a separate business with its own separate profit and loss statement (Tr. 8418–19). In the ordinary course of its business, General Foods does not include profits from the sale of caffeine in its ground coffee profits (CX 991A–N; Tr. 8473).

345. Mr. Klein testified that the demand factors affecting the profitability of General Foods' caffeine business are unrelated to the ground coffee business. Caffeine is basically an industrial product and is not sold through the same channels as ground coffee (Tr. 8418–20).

346. General Foods claims that inclusion of caffeine profits and exclusion of the investment needed to produce these profits inflates sales district profitability and I agree with this argument (RPF 8–39); however, Professor Dearden assigned no caffeine profits to Regular Maxwell House, and Mr. Klein's adjustments do not affect profitability figures for this brand (Tr. 9030–31).

347. The Maxwell House Division self-manufactures about one half of the coffee cans used to package its regular coffee products. This results in a saving to the Division over the purchase price of the can and represents a unique saving as a result of packaging efficiency, and Mr. Klein does not believe that savings resulting from self-manufacture of cans belong in any computation of profitability for comparison with a profitability benchmark which does not reflect such packaging efficiencies (Tr. 8407).

348. The Division transfers these self-manufactured cans to itself at the prevailing market price and accounts for savings due to self-manufacture in a separate profit and loss statement (Tr. 8408). In the ordinary course of its business, the Division does not include can plant savings in its calculation of ground coffee profits (CX 991A–k; Tr. 8473). **[87]**

349. Professor Dearden added these savings to profit before taxes and included the investment in the can plant in his calculations (Tr. 8411). This, according to Mr. Klein, inflated General Foods' profits for purposes of comparability with other businesses (Tr. 8409), and his revision excludes can plant savings from profits and can plant investment from funds employed (RX 1170A–H; Tr. 8472).

350. Other revisions by Mr. Klein to Professor Dearden's calculations were use of an actual tax rate of 51% (rather than assumed rates of 48% or 52%) which, in some cases, decreased profitability (Tr. 8500–01); inclusion of interest expense, which increases profitability (Tr. 8413–17, 8500–01); adjustment of accounts receivable data to reflect actual accounting experience which in most cases reduces the ROFE estimate (Tr. 8503–07); revision of accounts payable data which increases the funds employed (Tr. 8527–28); inclusion of certain cash investment items overlooked by Professor Dearden which increases

investment (Tr. 8532–37); and, revision of fixed asset allocations (Tr. 8541).

351. The following chart compares Professor Dearden's calculations (CX 1115C) with Mr. Klein's (note, however, that Mr. Klein's calculation is for all of the Division's regular coffee) (RX 1171A):

	CX 1115C Regular Maxwell House Estimated Return	RX 1171A GF Total Regular Coffee Estimated Return
Boston	25.5%	15.7%
New York	18.6	10.4
Philadelphia	22.3	12.6
Syracuse	10.5	0.3
Youngstown	2.5	2.6
Charlotte	38.7	27.7
Atlanta	35.1	27.7
Detroit	13.1	12.2
Total Eastern Area	20.8	12.2

352. Mr. Klein also computed an "economic" as opposed to an "accounting" rate of return. Dr. Elzinga explained that accountants expense items which economists recognize as having a useful life beyond the period of expenditure (Tr. 9819). Items which an economist would amortize or depreciate to reflect their useful life are advertising, promotion and research and [88] development (Tr. 9580, 9819). Dr. Elzinga concluded that an amortization rate of 36.8% was appropriate for costing the advertising and promotion of the Maxwell House Division, and that this rate was supported in the economic literature (Tr. 9770–75, 9817–32). The following chart compares Professor Dearden's estimated Regular Maxwell House accounting return with the economic return for all of the Division's regular coffee as estimated by Mr. Klein:

	CX 1115C Regular Maxwell House Estimated Accounting Return	RX 1171B General Foods' Regular Coffee Estimated Economic Return
Boston	25.5%	9.0%
New York	18.6	6.8
Philadelphia	22.3	7.9
Syracuse	10.5	4.8
Youngstown	2.5	3.8
Charlotte	38.7	17.3
Atlanta	35.1	16.9
Detroit	13.1	7.8
Total Eastern Area	20.8	8.1

(3) Criticisms Of ROFE Calculations By Sales Districts

353. Dr. Roman Weil, a professor of accounting at the University of Chicago (Tr. 8018) may have been exaggerating somewhat, but I believe that he reflects the general attitude of the accounting profession about allocations:

[T]he Dearden procedures carry out allocations and those allocations are meaningless. The reason that I use the word meaningless is that those are the very words that Professor Dearden uses in his own writings.

The views that I hold about the meaningless—the general feeling I have about these allocations of costs that are not directly [89] attributable are widely held among accounting theorists, accounting writers, and one of the most noted writers on the subject of the meaningless of these allocations is John Dearden of Harvard University (Tr. 8045–46).

354. While General Foods has, on occasion, calculated district profitability, Mr. Klein stated that national financial data cannot be retroactively assigned to districts to arrive at an accurate determination of sales district profitability. For example, to determine profitability for a sales district, one would need to know which of General Foods' four coffee plants, each with differing costs of producing coffee, supplied coffee to that sales district (Tr. 8260–62).[34]

355. In response to a question by complaint counsel, Mr. Graham of Standard Brands stated:

Q. And you considered the Standard Brands' own calculations of Chase & Sanborn profitability by sales district to be a good measurement tool and very useful to you, did you not?

A. The concept was useful. The results weren't very good. . . .

[34] Professor Dearden disagrees on this point, arguing that since green bean and packaging material costs represent nearly 98% of all variable manufacturing costs incurred at the coffee plants and are purchased centrally, the use of national costs is appropriate (Tr. 58–59).

> And somehow I just felt the way the costs had been accumulated, there was something very imprecise in the system. So, we quit using the system (Tr. 10,658–59).

356. Charles Clark, Comptroller of The Folger Coffee Co., testified that Folger's, in the ordinary course of its business, **[90]** does not compute profit data by geographic area because it is not meaningful:

> Q. Does the Folger Coffee Company usually compile information regarding its revenues, costs and profits on a less than total marketing area basis?
> A. No, we do not compile that information normally on a less than total U.S. basis.
> Q. Why is that, sir?
> A. We have not felt that it was meaningful in the operation of our business to do that (Tr. 3171).

(4) Comparison Of Regular Maxwell House's Profitability With The "Benchmark"

357. Dr. Mann testified that firms with market power have the ability to raise prices above cost and hold them there, and that high profits over a sustained period of time indicate that a firm has market power (Tr. 3577, 3630–31, 3991–93). To determine whether Regular Maxwell House enjoyed market power, Dr. Mann compared its sales district ROFE's with a "benchmark." An appropriate benchmark is one which approximates the competitive rate of return (Tr. 3621). Dr. Mann used two benchmarks, one based on the average rate of return for food and kindred products and the other on the average rate of return for all manufacturing, as reported by the FTC's Quarterly Financial Report (QFR). Each average was calculated for the period 1971–1977 (CX 1085B, D; Tr. 3619, 3622–27, 3627–29).

358. Dr. Mann used a seven year average because an average over that long a period of time establishes the ability of a firm to hold prices persistently above the competitive level, evidencing a firm's ability to prevent competitors from eroding those profits by expanding and undermining the price structure (Tr. 3630–31).

359. Dr. Mann multiplied the average by 1.5 to obtain the rate of return that he used in his market power analysis (Tr. 3629–31). He used the 1.5 multiplier because he believes **[91]** that studies of the relationship between profit and share suggest that firms that are expected to have monopoly power have profit rates about 1.5 times the benchmark, and because 1.5 is a conservative number that adjusts for any imprecision in the calculations (Tr. 3631, 3692, 4076). A rate of return greater than 1.5 times the QFR benchmark is, in his opinion, higher than a competitive rate of return (Tr. 3645).

360. The all manufacturing seven year average was 11.04% and the food and kindred products seven year average was 11.49%. One point

five times the average equals 16.56% for all manufacturing and 17.24% for food and kindred products (CX 1085; Tr. 3626–31).

361. Using the Dearden estimates, Regular Maxwell House ROFE's in the following eastern sales districts exceeded the food and kindred products 17.24% standard:

Sales District	Regular Maxwell House ROFE %
Atlanta	38.67
Boston	25.51
Charlotte	35.10
Jacksonville	20.50
Memphis	20.80
Philadelphia	22.25

(CX's 1085, 1115C).

362. Dr. Mann testified that the profitability figures in the Youngstown and Syracuse districts did not meet the average profitability standard of 1.5 times the QFR benchmark because of predatory pricing which he believes occurred in the middle of this period (Tr. 3700, 3705).

(5) Criticisms Of The QFR

363. Dr. Mann believes that the QFR average is conservative because it is biased upward by inclusion of monopolists which earn above average rates of return (Tr. 3639, 3692). On the other hand, General Foods argues that, conservative or not, the QFR is so flawed that it cannot be used as a benchmark.

364. Mr. R.T. McNamar was executive director of the FTC from 1973–1977. He was given responsibility for managing the development of the FTC's line of business reporting program and [92] in that role undertook an analysis of the QFR program (Tr. 9595–96).

365. Under QFR procedures, a reporting company is initially classified in the mining, manufacturing, wholesale trade or retail trade industry groupings based upon which of the above activities accounted for most of that firm's gross receipts. A corporation assigned to the manufacturing division is then further classified into two-digit Enterprise Standard Industrial Classification ("ESIC") groups, such as food and kindred products, based upon that two-digit ESIC group "which accounts for more gross receipts than any other two-digit Manufacturing Group" (RX 1182I). The QFR publication warns that this procedure results in entire large conglomerate companies being assigned to an industry group which accounts for only a small portion of that company's gross receipts:

It should be noted that these procedures may lead to a conglomerate corporation being assigned to an industry group from which only a small proportion of its receipts are obtained (RX 1182I).

366. Mr. McNamar believes the primary industry classification scheme not only distorts data by including operations of firms not engaged in that business, but also distorts data through introduction of items not at all related to the operations of a QFR industry classification. According to Mr. McNamar in a memorandum on the QFR which he sent to the director of the Bureau of Economics:

To illustrate, a company's "primary industry" based on its gross receipts may be a relatively low capital intensive one. Yet, within the same company in filling out its QFR form other asset intensive industries cost structures are included in the "primary industry." These aggregated results are then combined with other similarly treated firms to become QFR data. Hence, the high asset structure of a "secondary industry" (line of business) is combined with the sales from a less capital intensive one. Obviously, the operating expenses, depreciation charges, etc., are inappropriately subtracted from the **[93]** primary industry's sales to derive net income before taxes.

Clearly, the QFR's primary classification scheme violates sound accounting principles with no apparent justification precedent. More importantly, the reporting approach by design masks the operation of any one industry, and I would submit makes inter-industry comparisons meaningless (RX 1181H; Tr. 9616–19).

367. Mr. James Folsom, when deputy director of the FTC's Bureau of Economics, also cited several concerns about QFR data in a February 7, 1975 affidavit filed in *FTC* v. *American Standard.* On page 3 of his affidavit, Mr. Folsom stated:

The QFR data are deficient in three major respects. First, the industry categories are too broad to be of maximum utility in analyzing individual industries. . . .

Second, the QFR data are assembled by assigning all activity of a firm to that single industry which accounts for the plurality of its sales. This leads to a problem known as contamination. . . . (RX 1155C).

368. A report by the FTC Bureau of Economics staff on the justifications for the FTC LB Program also recognizes deficiencies in QFR:

There are two serious problems with the QFR data which severely limit their usefulness. The industry groupings are excessively aggregated, and all of the operations of a company are assigned to a single industry (RX 1179S).

The report also stated:

[Some] activities are included in each of the categories which should not be, and some activities which should be included are not. . . . **[94]**

The magnitude of this problem can be illustrated by some results of a recent internal analysis. This analysis covered slightly more than 100 companies, with a total value of gross receipts of more than 250 billion dollars. For these companies approximately one-third of total gross receipts was from QFR categories other than the one to which they were assigned. In four of the 31 categories, from 30 to 39 percent of gross receipts belong in other categories; in two categories, the percent is between 40 and 49; in one category, the percent is between 50 and 59; and in other categories is between 60 and 69. As these data show, the distortions introduced in the QFR data by diversification are demonstrably both severe and pervasive.

* * * * * * *

And, given the magnitude of the distortion which [diversification] causes, extreme skepticism is called for in any of the various uses of industry data on sales, costs and profits (RX 1179S–W).

369. While complaint counsel argue that criticism of the QFR applies to its use to determine the profitability of specific product markets, and not to its use as a benchmark (CRF 4–13), Dr. Mann, when he was director of the FTC's Bureau of Economics, testified before a Congressional subcommittee that:

Most major firms are so highly diversified that any particular 4-digit sic category accounts for so little of the company's business that it is very misleading to claim we are measuring industry profitability (RX 1275E). **[95]**

(6) General Foods' Benchmark

370. Given the above criticisms and other problems which General Foods sees in the QFR,[35] it offered a benchmark consisting of a sample of 25 firms with at least 50% of their sales in branded consumer grocery products (RX 8–123). The problem with this benchmark is that it is most likely more biased and contains more sampling error than QFR. First, the sample is very small, whereas QFR samples over 10,000 firms (RX 1182U; Tr. 3619).[36]

371. Furthermore, the benchmark's profit rate is probably biased upward because at least 18 of the 25 firms operate in one or more product markets with four firm concentration ratios ranging from 52% to 90% (Tr. 9206–14), where, presumably, profits are higher than in markets with less concentration. Thus, I do not believe that the alternative benchmark offers any more insight into the monopoly profits issue than does QFR.

[35] QFR data is estimated and unaudited (RPF 8–96 to 8–99); it suffers from "significant discontinuities" (RPF 8–100 to 8–102); it includes bankrupt companies (RPF 8–108 to 8–109; and, it reports accounting rather than economic rates of return (RPF 8–110).

[36] Because of this Dr. Elzinga stated that sampling is not a problem with the QFR (Tr. 9840–41).

(7) Conclusion

372. I do not agree with Dr. Mann that the comparison of Regular Maxwell House's estimated profits in certain eastern sales districts with his QFR-based benchmark establishes that the brand enjoyed market or monopoly power in those districts.

373. I use the term "estimated profits" deliberately, for I do not believe that even Professor Dearden would argue that the figures which he calculated are anything other than estimates. They are, to be sure, estimates of a highly-respected expert and are entitled to serious consideration; however, they are based on an assumption which I cannot accept.

374. The assumption is that aggregated accounting data can be broken down so accurately that precise economic conclusions can be made about the profitability of one brand of regular coffee in one Maxwell House Division sales district. Furthermore, even if Professor Dearden's estimates are accepted **[96]** at face value, the possibility that the "excess" profits identified by Dr. Mann are due to something other than monopoly or market power has not been excluded. And, finally, the fact that QFR may have been used by economists as a benchmark in other cases or in articles analyzing industry power (CPF 11–258 to 11–266) does not mean that it must be accepted in this case. Enough problems with the QFR have been identified in this case to make me very wary of accepting it whole-heartedly as a benchmark here. In conclusion, I agree with Dr. Elzinga's summary of the proper use of QFR—*i.e.*, it may be used for insight, but using it to draw firm conclusions in this case is very risky:

> Where I would disagree with my friend Professor Mann, is that instead of taking the data for insight, he uses the data to drawn conclusions. And I have two reactions to that. One is that high profits relative to a QFR contaminated benchmark do not necessarily mean monopoly. Before I ascribed an antitrust violation to that situation I would want to be very certain that those high profits were not simply the result of a better run company.
>
> The second thing is, is that I've made an examination of the profitability of the Maxwell House Division,[37] and even on the basis of accounting data, this is no money machine. Its average rate of return approximates that of the average of all manufacturing (Tr. 10,493).
>
> Now, economists are always making judgment calls. It's one thing to make a judgment call when your numbers represent the phenomenon you are actually measuring. But here we are using a rubber yardstick with accounting data and consequently I think it is imprudent to take numbers that are as fuzzy as accounting numbers and from it draw the conclusion that **[97]** profits are too big and they have lasted too long, especially when your benchmark has some of the problems that I have already ascribed to it (Tr. 9846).

[37] An apparent reference to Mr. Klein's two calculations of the profitability of all of the Division's regular coffee (Findings 351 and 352).

375. Mr. Keith B. Anderson, a staff economist called by complaint counsel, agreed with Dr. Elzinga:

A. . . . One would not look at profit data alone. One would look at it in the context of an overall examination including conduct, structure and performance variables.

Q. You would not conclude that monopoly power existed solely on the basis of comparisons with QFR data, is that correct, Mr. Anderson?

A. I would not conclude that monopoly power existed solely on a comparison of a firm's performance, a firm's profitability to a benchmark from the QFR. I would look at the whole range of information available (Tr. 10,826).

376. The danger of relying solely on a profit-benchmark analysis is evident, for when one compares Professor Dearden's profitability estimates of General Foods' Yuban brand with Dr. Mann's benchmark, one comes to the conclusion that a brand with no more than a 3.5% market share in seven sales districts would be deemed to have market or monopoly power:

Ground Yuban FY 1971-FY 1977

	After Tax ROFE	Share Of Market
Charlotte	43.5%	1.0%
Atlanta	50.1	1.0
Jacksonville	41.1	0.5
Cincinnati	19.3	0.4
Chicago	19.9	0.3
Denver	33.7	0.9
Portland	18.8	3.5

(RX 1268). [98]

Dr. Elzinga properly concluded that these figures show that the uncritical acceptance of Dr. Mann's theory can lead to "some very bizarre, if not absurd, results" (Tr. 10,502–03).

377. Looking at all of the available evidence, I find that Regular Maxwell House did not possess, or come close to possessing, market or monopoly power either in the nation, the HFNI, or in the HFNI sales districts. I do not accept Dr. Mann's analysis of the brand's performance because his profit-benchmark theory can lead to the conclusion that a brand which clearly does not possess monopoly power could be found to have that power (Finding 376). Furthermore, even if Dr. Mann's theory provided some insight into this issue, the structure of the market, and the brand's performance in that market, show its lack of market power, for in none of the areas mentioned above did Regular Maxwell House have enough share to cause concern about, or to lead to the conclusion that it had, monopoly power (Tr. 9503–04, 11,963). Moreover, its market conduct indicates that

Regular Maxwell House did not control the price of regular coffee and could not exclude competition from any area—the nation, the HFNI, or the HFNI sales districts.

5. The Alleged Predatory Conduct

(a) *Introduction*

378. According to complaint counsel, General Foods' response to Folger's eastern expansion amounted to an attempt to monopolize the eastern regular coffee markets by (1) engaging in predatory pricing, that is, sustained pricing below average variable and average total cost; (2) using a "fighting brand"; and (3) attempting to impose an allocation of markets on a competing firm. They also claim that General Foods copied a Folger advertising campaign to impede its entry into the HFNI.

(b) *Proof Of Sales Below Cost*

(1) Complaint Counsel's Exhibits

379. Complaint counsel contend that Regular Maxwell House coffee was sold below average variable cost and average total cost as revealed on exhibits introduced by Mr. Ronald Rowe (CX's 954–57, 1389; Tr. 2249). At the time of his testimony, Mr. Rowe had been a staff accountant with the Federal Trade Commission for 19 years (Tr. 2237–38), and he has previously testified as an expert accountant. He has also been assigned to **[99]** cases involving issues of sales below cost and area price discrimination (Tr. 2239–43).

380. Mr. Rowe prepared exhibits showing revenues and costs per unit for Regular Maxwell House coffee on a quarterly average basis for the Cleveland market area for the period April 1971 through December 1974 (CX 954–55); for the Pittsburgh market area for the period from April 1972 through March 1975 (CX 956); and for the Syracuse sales district for the period from October 1973 through December 1976 (CX 957; Tr. 2250–52).

381. Mr. Rowe determined the method of calculating the figures appearing on CX 954 through CX 959, and he performed the calculations (Tr. 2252–53). He explained in detail his methods of calculating each of the revenue and cost figures appearing on CX 954 through CX 959, and described the specific sources of the data he used for each calculation (Tr. 2254–313).

382. The data Mr. Rowe used to make these calculations came from information that General Foods submitted in summary format or from underlying General Foods business records, with the exception of one line item on the Syracuse chart (CX 957). Mr. Rowe developed the figures on that line from data obtained from General Foods' adver-

tising agency (Tr. 2253). Mr. Rowe testified that, in his opinion, the accounting data shown on CX 954 through CX 959 are very reliable data, and that they accurately show the revenues and costs per unit for the respective geographic areas and time periods (Tr. 2313).

383. Regarding most of the information used by Mr. Rowe, a letter to complaint counsel from Mr. Robert Y. Fox, then assistant general counsel of General Foods, stated that the information had been organized "to show as closely as possible the actual, local, geographic cost data" (CX 436B; Tr. 2313–15). Mr. Rowe also considered reliable the information he received from General Foods after the date of Mr. Fox's letter. He considered this additional information reliable based on the deposition statements of Mr. Donald Klein, a General Foods' employee and financial consultant, that Mr. Klein had supervised the preparation of the information and that it was generated in a manner consistent with the information referenced in Mr. Fox's letter (Tr. 2315).

384. CX 954 and CX 955 show that General Foods' revenues for Regular Maxwell House in Cleveland were below total variable cost for four of the first 12 quarters following Folger's entry into Cleveland in October 1971 (Tr. 2322). Those quarters were the first quarter of 1972, and three of the four quarters of 1974 (Tr. 3712–13). On a yearly average basis, General Foods' revenues for Regular Maxwell House in Cleveland were $.168 below total variable cost per unit from October 1973 through September 1974 (CX 1389). **[100]**

385. CX 956 shows that General Foods' revenues for Regular Maxwell House in Pittsburgh were below total variable cost for seven of the eight quarters following Folger's entry into Pittsburgh (Tr. 2322). Starting with the June quarter of 1973, General Foods' revenues for Regular Maxwell House in Pittsburgh were below total variable cost for seven consecutive quarters (Tr. 3720). On a yearly average basis, revenues for Regular Maxwell House in Pittsburgh were below total variable cost by $.855 per unit from April 1973 through March 1974, and by $2.90 per unit from April 1974 through March 1975 (CX 1389). On a yearly average basis for the Youngstown sales district as a whole, General Foods' revenues for Regular Maxwell House were $.329 below total variable cost per unit from April 1973 through March 1974 (CX 1389).

386. CX 957 shows that General Foods' revenues for Regular Maxwell House coffee in the Syracuse sales district were below total variable cost in seven of nine consecutive quarters starting with the quarter of Folger's entry in October 1974 (Tr. 2323, 3724). On a yearly average basis, General Foods' revenues for Regular Maxwell House in the Syracuse sales district were below total variable cost by $.516 per

unit from October 1974 through September 1975, and by $.375 per unit from October 1975 through September 1976 (CX 1389).

387. If Mr. Rowe's calculations are accurate, Regular Maxwell House was sold below average variable cost for a total of 18 quarters or 54 months in the three areas. General Foods agrees that it sold below average total cost in these areas (RLA, p. 92).

388. General Foods parries Mr. Rowe's charts with charts prepared by Mr. Klein (RX 1137-42). However, these charts were not based on quarterly data and did not have separate information for Cleveland and Pittsburgh in the Youngstown sales district. General Foods also makes several objections to Mr. Rowe's data.

(2) General Foods' Objections To Complaint Counsel's Exhibits

389. There are three principal reasons why General Foods challenges Mr. Rowe's exhibits. First, in attempting to calculate the total costs for manufacturing the Regular Maxwell House product sold during a particular period, Mr. Rowe allegedly substituted an inventory accounting system that greatly inflated General Foods' actual costs. Second, in **[101]** classifying costs as fixed and variable,[38] several of Regular Maxwell House's fixed costs were treated as variable costs. And third, the data was presented in such a constricted and fragmented manner as to be an inaccurate representation of the business (RPF 9-16). These three objections will be discussed seriatim.

(aa) *The Inventory Accounting System Used By Mr. Rowe*

390. Cost of production is the cost required to produce a certain can of coffee during a given period and includes raw material costs, packaging material costs and labor costs (Tr. 8666–71). Cost of production is calculated for each Maxwell House Division plant (Tr. 8670). Cost of sales, on the other hand, reflects the cost of goods sold during a particular quarter and is a national average of the cost of production of the inventory on hand and current cost of production (Tr. 8666–71). General Foods uses cost of sales as a measurement of its costs (Tr. 8666).

391. Mr. Rowe employed cost of production in computing Regular Maxwell House's costs. When compared with cost of sales data, this tends to increase, or, as General Foods puts it, to "inflate the cost of goods sold during a particular period" (Tr. 8671; RPF 9–17). Since it uses cost of sales as a measurement of its cost (Tr. 8666), General Foods argues that Mr. Rowe should have used this data instead of cost of production figures.

[38] Variable costs are those costs that increase or decrease with some relationship to output (Tr. 2316). Fixed costs are those costs that would be incurred by a firm if it were producing at the zero output level, *i.e.*, those costs that the firm incurs no matter what level of output it produces (Tr. 3707).

392. Complaint counsel reply that cost of production is the correct methodology for computing below cost sales because pricing decisions are made on the basis of current costs, rather than on the value of inventory, and they point to Mr. Klein's testimony that General Foods does making pricing decisions on this basis:

> The market prices for green coffee, which we have to pay cash for, on a daily basis, **[102]** increased by almost the same amount. So our net sales rate had to increase by the same amount to cover our higher cash cost in the business (Tr. 8806).

Mr. Hunter also testified that the normal practice in the industry is to price to recover the replacement cost of green beans regardless of the firm's accounting system (Tr. 3084).

393. The choice by the Maxwell House Division of an average inventory system should not affect an analysis whose purpose is to determine whether it was charging prices below contemporaneous costs. Thus, I agree with complaint counsel that cost of production is the fairest method of computing sales below cost because it is the only method that permits comparison of current costs and prices.

(bb) *The Determination Of Whether Certain Costs Are Fixed Or Variable*

394. There are differences between General Foods and complaint counsel over the treatment of advertising, promotional costs and warehousing.

(i) Consumer Coupons

395. General Foods claims that some consumer coupons are not variable costs. In support of this assertion, General Foods demonstrates that over a seven-year period, while the volume sold of General Foods total regular coffee and Maxwell House has been relatively stable, consumer promotion costs have fluctuated greatly (RX 1153A–B; Tr. 8626–35).

396. Many of Regular Maxwell House's consumer promotion offers are not run on a sales district basis, but instead on either a national or regional basis (Tr. 8652). Even though the volume of coffee sold in a particular sales district may increase or decrease, the costs for redeeming coupons remain relatively constant for these national and regional consumer promotions (Tr. 8651). A single commitment is made to run a national or multi-district consumer promotion, and it cannot be altered to exclude a particular sales district (Tr. 8648–49). Nor is it possible to cancel a consumer promotion once it is issued.

397. Complaint counsel, on the other hand, argue that consumer coupons are variable costs. The requirement for **[103]** payment on a

consumer coupon is the purchase of a can of coffee, and they argue that nothing more directly varies with volume than the one-to-one relationship between a coupon redemption and a sale (CRF 1–18).

398. General Foods concedes in its charts that some consumer coupons are variable costs. For example, all consumer coupons issued under separate sales district promotion sheets are treated as 100% variable. On the other hand, consumer coupons which are issued on a multi-sales district basis, are treated only as 50% variable (Tr. 12,148).

399. I believe such treatment is illogical, since for each multi-district coupon redeemed in a sales district there is still a one-to-one relationship with volume: for each coupon payment, a full sale is made, not half a sale. Thus, these coupons vary directly with volume. General Foods' position ignores the fact that when a coupon is released, whether for an individual sales district or on a multi-district basis, the full impact of that coupon is felt by competition in each area. For example, Paul de Lima, who only sells in Syracuse, would have to compete with a 50 cent Maxwell House coupon in Syracuse, regardless of whether or not the same value coupon were also distributed somewhere else.

400. Coupons are directly related to volume. For each coupon redeemed, a sale must be made. General Foods' proposal to exclude half of the value of multi-district coupons is thus without merit. Accepting its theory would exclude from consideration substantial variable costs that are incurred in a specific sales district.

(ii) Advertising

401. General Foods claims that some advertising is not a variable cost. Complaint counsel, on the other hand, argue that all advertising is a variable cost (CRF 1–23).

402. General Foods treats spot advertising as variable in its own computation of costs (RPF 9–72). The only real dispute is over the inclusion of network advertising as a variable cost in estimating costs at the sales district level.

403. General Foods' assertion that network advertising is a fixed cost is based upon the fact that national network advertising is not controllable on a sales district basis, and the fact that it does not run national advertising campaigns to stimulate volume in particular sales districts (Tr. 8654). **[104]**

404. The allocation of national advertising costs to prove predation in local markets troubles me somewhat, for the costs are controllable only at the national level. On the other hand, the effects of such advertising are apparent at the local level, for it certainly affects the sales of local competitors, just as does spot advertising, which General

Foods agrees is a variable cost (RPF 9–67). The ability of advertising to affect rival firms is the primary reason that Areeda and Turner maintain that advertising should be included as a variable cost in a predatory pricing analysis (III. P. Areeda & D. Turner, *Antitrust Law,* ¶ 721a, at 191 (1978) (Hereafter, *Antitrust Law*). Since network advertising has the same effect on rival firms as spot advertising, it should not be excluded from such an analysis.

(iii) Warehousing

405. Finally, General Foods argues that only the shipping and labor components of the warehousing cost are related to volume on an annual basis. Warehouse management costs, warehouse overhead costs and taxes and insurance charges related to the operation of warehouses do not vary on the basis of volume. Therefore, Mr. Klein and Dr. Elzinga classified only 50% of warehousing costs as variable (Tr. 8619–22). Complaint counsel argue that General Foods, in the ordinary course of business, assigns warehousing costs to individual products on the basis of volume (Tr. 8720), but it does appear that General Foods is correct in recognizing that certain components of warehousing costs are fixed and it seems fair to consider 50% of that cost as fixed. The effect of such changes on Mr. Rowe's calculation is, nevertheless, minimal because warehousing cost is a small percentage of total variable costs (*See* CX's 954–57).

(cc) *The Use Of Quarterly Data For Geographic Areas As Small As A Sales District Or Market Area*

406. General Foods maintains that to prove predatory pricing one must show at least one full year of sales that are below average variable cost. Mr. Klein testified that annual or long-term data is preferable to quarterly data because it captures the full business cycle and presents a more accurate accounting picture (Tr. 8672–74), and he claimed that this is especially true in the coffee industry because the volatile nature of green coffee prices can heavily influence the relative price and cost levels (Tr. 8673). Dr. Elzinga argued that, given the entry and exit characteristics of the regular coffee industry, annual data, at a minimum, is preferable to quarterly **[105]** data. Predatory conduct, according to him, is not likely to be successful in only a 90-day period (Tr. 9792–94).

407. Dr. Roman Weil, who was qualified as an expert in accounting, also testified that the most appropriate time period for measuring prices and costs in the coffee industry is "very likely longer than a year" (Tr. 8084). A longer period than a year is necessary in order to capture two important cycles in the coffee business. The first cycle relates to the fact that consumers consume less coffee in hot weather

than in cold. The second cycle relates to the growing cycle for coffee beans, which is reflected in the volatility of green coffee bean prices (Tr. 8084–85). For purposes of properly capturing the seasonal nature of consumer purchases, as well as for purposes of properly encompassing green coffee growing cycles, periods of at least one year and possibly up to seven years may be necessary (Tr. 8085).

408. Complaint counsel point out that this argument is inconsistent with General Foods' business practice, for its own contribution margin test (*infra*) was for a four to six-week period (RPF 9–115). General Foods also maintains quarterly business records and thus evaluates its business on a quarterly basis (Tr. 9044–48).

409. The reason that Dr. Elzinga chooses a long-run test for predation is that he believes that if General Foods were to sell below average variable cost for a quarter, the smaller firms could simply sit back and let General Foods "bathe in their red ink" (Tr. 9964). This appears to be unrealistic for the record reflects that once share is lost it is hard to regain (RPF 5–32; Tr. 1680, 2528–29).

410. I agree with the traditional view that predation consists of the sacrifice of short-run revenues to make larger rates of return in the long-run, and I do not accept General Foods' argument that predation can be measured only over a one-year period. For example, Areeda & Turner would not permit a monopolist to engage even in promotional pricing which, by definition, is short run, if it results in sales below marginal cost. III *Antitrust Law,* ¶ 716, at 177.

(dd) *Using Sales Districts And Market Areas To Measure Predation*

411. Dr. Elzinga testified that because of the superior staying power of Procter & Gamble and the ease with which competitors can ship their coffee throughout the United States, sales below cost in a particular sales district or marketing **[106]** area could not drive out Procter & Gamble, nor could Procter & Gamble and other competitors be kept out during the recoupment period. He believes, therefore, that the presentation of sales district price-cost data is not relevant to a predation analysis when the absence of shipment barriers and actual shipment patterns evidence a much larger geographic market (Tr. 9793–95). While I agree with Dr. Elzinga, I am assuming that the geographic market is no larger than a sales district.

(ee) *Other Objections By General Foods To Mr. Rowe's Data*

412. General Foods claims that Mr. Rowe used inaccurate data in assigning plant costs and in calculating coupon and advertising costs for he relied on planning documents which do not record which plants actually shipped to a certain district (CX 387; Tr. 2270–72, 5119–23) and that, in calculating coupon costs, he relied on projected cost data

submitted by General Foods rather than campaign analysis documents which give the final actual cost of a particular coupon promotion. Finally, in calculating spot advertising expenditures, it is claimed that Mr. Rowe relied on Broadcast Advertiser's Report data which is a poor estimate of actual costs.

413. Complaint counsel's answer to these objections is that Mr. Rowe used the best available data. One of the reasons Mr. Rowe considered his data accurate was a letter from Mr. Robert Y. Fox, then Assistant General Counsel of General Foods, which states that the information had been organized "to show as closely as possible the actual, local, geographic cost data" (CX 436B; Tr. 2313–15). General Foods claims that this letter actually informed Mr. Rowe that the data in volumes 15 and 16 were estimates, because they were recent and based on projections (CX 436C). However, General Foods ignores the next sentence in the letter, and a later sentence, that states that it was providing the accurate data in volume 19.

> . . . The deal rate information in volume 19 applicable to each quarter is therefore the data that should now be used.
>
> . . . The advertising rates in Volume 19 are therefore the ones that should now be used (CX 436C).

Mr. Rowe did use the data from Volume 19 (Compare CX 954 and CX 955 with CX 263 and CX 264 (the 19 in the upper corner stands for the volume number)). **[107]**

(3) General Foods' Exhibits

414. General Foods introduced its own charts, prepared by Mr. Klein, which analyzed whether it sold below cost (RX 1137–42). However, the time period analyzed was one year rather than the quarterly data of Mr. Rowe, and Mr. Klein analyzed costs in the Youngstown sales district rather than in the separate market areas of Cleveland and Pittsburgh. As did Mr. Rowe, he analyzed costs in the entire Syracuse sales district. As previously discussed, I believe that quarterly data is to be preferred over annual data for an average variable cost test (Finding 412), and since I am assuming for purposes of this analysis that complaint counsel have correctly delineated the relevant geographic markets, analysis of costs in the entire Youngstown sales district is not appropriate.

(4) Conclusion

415. I am generally satisfied with the broad implications of Mr. Rowe's cost analysis although General Foods does make some valid objections. For example, it is certainly to be expected that there would

be some problems with calculating sales district and market area profits and costs for a company which is national, just as there are when ROFE's are calculated (*supra*). Furthermore, Mr. Rowe's estimates would have been better if more accurate data for some costs had been available. Nevertheless, I do not believe that these problems are serious enough to totally invalidate Mr. Rowe's analysis of average variable and average total cost in the Cleveland and Pittsburgh market areas and the Syracuse sales district. My conclusion finds support in General Foods' own documents which reveal that it did sell Regular Maxwell House below average variable cost in Pittsburgh and Cleveland.

416. Sales below cost occurred in these areas when trade deals on Regular Maxwell House equalled or exceeded Regular Maxwell House's "contribution margin." "Contribution margin" as it is used in General Foods' documents is defined in CX 1024 (CX 1024; Tr. 2335–36). The document states:

Contribution margin is a measure used by General Foods of the variable profitability of a product or total business. It is calculated by subtracting variable sales deduction, distribution, and manufacturing costs from gross revenues as follows: **[108]**

Gross Revenue

Less: Cash Discount Expense
Returns and Allowances
Transportation Expense
Warehousing Expense
Raw Material Cost
Packaging Material Cost
Variable Manufacturing Labor
Variable Manufacturing Expense
Contribution Margin

General Foods reporting formats identified contribution margin as the key measure of variable profitability from F'1971 through F'1974. Beginning with F'1975, General Foods reporting formats were revised with the term "volume contribution" replacing "contribution margin."

The two terms are synonymous, however, and are calculated in the same manner (CX 1024).

417. Simply stated, "contribution margin" is net revenue minus variable costs of manufacturing and distribution (Tr. 7051). Mr. Laster explained further:

Contribution margin is the amount of money that is left in a business after the variable [or] the direct costs have been absorbed, and that money can then either all go into profits, some of it can go into advertising, some of it can go into salaries. But it's basically what is left in the P&L after all direct costs have been absorbed (Tr. 7051–52).

418. General Foods' definition of contribution margin does not include reductions for trade deals, consumer promotions, and advertising (CX 1024; Tr. 7052, 8862). "Trade deals" includes performance offers, buying allowances and retailer coupons (Tr. 7054–55). If, in a given market area or sales district, General Foods' trade deal rate for Regular Maxwell House equalled its contribution margin for Regular Maxwell House, it would be selling that coffee below variable cost (Tr. 2336). It would be selling below variable cost by the amount of Regular Maxwell House's other variable costs—*i.e.*, consumer **[109]** promotions and media advertising combined (Tr. 2337). In fact, for the purpose of analyzing sales below cost in Syracuse and Youngstown, Mr. Klein classified all spot television expenditures, all trade deals, all direct consumer promotions, and half of the regional consumer promotions as variable costs (Tr. 9238). Thus, even by its own classification of costs, when General Foods' trade deals were at the contribution margin level, it was selling Regular Maxwell House below variable cost due to consumer promotions and expenditures on spot advertising.

419. General Foods' own documents show that in Pittsburgh and Cleveland, Regular Maxwell House's trade deals were greater than the amount of Regular Maxwell House's contribution margin. In that instance, Regular Maxwell House's revenues did not even cover the amount of its trade deals (CX 103A–I).

420. The "RMH Contingency Plan Re-Visited," dated November 6, 1973 (CX 103A–I), indicated that Regular Maxwell House's trade rate was above contribution margin at that time (CX 103E; Tr. 1576–79). The conclusions in the Contingency Plan were based on CX 103A–I that showed figures for Regular Maxwell House's CMLTD (contribution margin less trade deals) for the Pittsburgh market area and the Cleveland market area, which together make up the Youngstown sales district. The exhibit also shows Regular Maxwell House's CMLTD figures for individual pack sizes in the Pittsburgh and Youngstown market areas (CX 103I; Tr. 1578). Contribution margin less trade deals does not include reductions for consumer promotions and advertising expenditures (Tr. 8862).

421. The exhibit shows that in Pittsburgh, for the December quarter of fiscal 1974, contribution margin less trade deals for three pound Regular Maxwell House was estimated to be a negative 63.5 cents per unit and a negative $152,100 in total dollars (CX 103I). It shows that contribution margin less trade deals for all pack sizes of Regular Maxwell House in total in Pittsburgh for the December quarter of fiscal 1974 was estimated to be a negative 2.7 cents per unit and a negative $9,000 in total dollars (CX 103I; Tr. 1578–79).

422. CX 103 also states that in Cleveland "RMH trade spending is

currently above contribution margin on 3# (the 3 lb. size)" (CX 103E). The exhibit shows that in Cleveland, for the December quarter of fiscal 1974, contribution margin less trade deals for three pound Regular Maxwell House was estimated to be a negative 62.4 cents per unit and a negative $90,700 in total dollars (CX 103I). The estimated losses shown on CX 103I were based upon contribution margins supplied to the Maxwell House Division from the comptroller of the Maxwell House Division. The data was internally generated (CX 103I; Tr. 1579).

423. Thus, while there are some problems with Mr. Rowe's calculations, it is quite clear from its own documents and **[110]** Mr. Rowe's analyses that General Foods did price below average variable cost in the Pittsburgh and Cleveland market areas and the Syracuse sales district during a substantial period of time in the early 1970's.

(c) *General Foods' Use Of The Horizon Brand*

424. General Foods' Horizon Brand regular coffee was first test marketed in Washington, D.C. in the 1960's; it was later withdrawn (Tr. 1592–2099, 5791–92).

425. The next use of Horizon coffee was in General Foods' "Red Can offensive" whose purpose was to introduce that brand at the same time Folger entered into areas of the HFNI (CX's 112B, 115B; Tr. 1420). The areas chosen were Wilkes-Barre and Albany (CX's 521D, 534A; Tr. 1591–93, 2763, 5792).

426. General Foods never intended to use the Horizon brand in its second incarnation as anything other than a "fighting brand"—*i.e.*, a brand that is aimed at a specific competitor to disrupt its marketing efforts (Tr. 2849–51)

427. This conclusion is inevitable given statements in General Foods documents outlining the reasons for the use of Horizon[39] and the similarity between the Folger can and the Horizon can which was introduced into Wilkes-Barre and Albany (*Compare* CX 818, which is the Horizon can used in the Washington, D.C. test *with* CX 819, used during Folger's entry, and the Folger can, CX 820). Mr. Oliver Trone, a former General Foods employee, testified that General Foods decided to **[111]** introduce Horizon into the marketplace at the same time as Folger's with a can that "was about as close to them as our lawyers would allow us to go" (Tr. 1420).

[39] A chart in "RC Business Proposition," February 8, 1973, calculates the financial impact of using Horizon in Folger's test markets. The chart shows the impact on the profit before tax for the ground category of the Maxwell House Division. By using Horizon, the document concludes that the ongoing profit for the Ground Category with the Horizon effort would be $21.1 million, whereas, without Horizon, the ongoing profit would be only $15.9 million (CX 114S). Other statements in this document, although arguably discussing a long-term development program for Horizon, reveal that the primary purpose of the Horizon marketing effort was to impede Folger's entry into the HFNI (CX 114C, 114F, 114U). This purpose is explicitly stated in CX 107B: "The introduction of Horizon would severely hamper Folger's introduction in our HFNI area—It can extend Folger's payback from three to ten years."

(d) *General Foods' Western Retaliation*

428. At the time of Folger's expansion into the HFNI, Kansas City and Dallas were among its key western areas because they were high in volume, share, and profitability (Tr. 1399). Kansas City was Folger's hometown; it had a high market share there (55%–60%), and it contributed approximately 20% of Folger's national profits (CX 170C).

429. General Foods decided to step up its marketing efforts in these cities "to retaliate in the West on a one-for-one basis" as Folger expanded into the HFNI (CX 14C; Tr. 1399–1400). The purpose of this retaliation was disclosed by Mr. Bert Einloth, at the time the group product manager for Regular Maxwell House, in a 1973 memorandum:

> In addition RMH has initiated high-level marketing efforts in two major Folger markets, Kansas City/Dallas, intended to drain considerable funds from Folger which could be used in their new markets (CX 725A).

"New markets" as used in this sentence referred to current and future introductory markets in the east where Folger did not yet have distribution (Tr. 1584). Mr. William Philips, currently chairman of Ogilvy & Mather, colorfully characterized the retaliation in Dallas as "the same as bombing Hanoi" and viewed the increased marketing expenditures in Kansas City as "generally the same" (Tr. 1964–65).

430. The western retaliation was designed to cost Folger money—hopefully as much as $1 million per year in each western area where General Foods stepped up its marketing efforts (CX's 76C, 77B, 97K, 170C). While increasing its own market share in the west would have been welcome, to General Foods this was only a secondary objective of the western retaliation (CX's 17P, 19G, 76G).

(e) *General Foods' "Cora" Campaign*

431. Mr. Morgan Hunter, for four years Folger's general manager (Tr. 2707), testified that it had used a spokesperson named "Mrs. Olson" for a long time in the west and that Folger **[112]** had enjoyed consistent significant share growth for a number of years dating from the time that the "Mrs. Olson" advertising was put on the air (Tr. 3017).

432. Folger had proven and effective advertising copy in the "Mrs. Olson" campaign and Folger continued to use it when it entered the Cleveland market area (Tr. 3059–60).

433. The Maxwell House Division's "Cora" advertising campaign, instituted in July 1972 (CX 463Z125), was considered by Mr. Hunter, with some justification, to be a direct copy of Folger's "Mrs. Olson"

campaign. The campaigns were similar in the development of a character and the dialogue that took place between the young couple and the older woman, Mrs. Olson or Cora. Both involved the idea of the young housewife who cannot make a good cup of coffee, the husband complaining about it, and Mrs. Olson or Cora telling her what to do about it, thus solving the problem (Tr. 2760).

434. The "Cora" campaign was designed to appropriate for Regular Maxwell House the "slice-of-life" problem-solving approach of the "Mrs. Olson" campaign prior to Folger's entry and to make "Mrs. Olson" look like a "second rate" imitation when she arrived (CX's 1G; 468F). This would, if successful undermine the effectiveness of the "Mrs. Olson" campaign (CX's 88L, 171C).

435. The "Cora" commercial began running in 1972, shortly after Folger entered Cleveland (Tr. 5533, 5535, 5557, 5560–61).

(f) *Conclusion*

436. Although General Foods' western retaliation coincided with Folger's eastern expansion, I find nothing inherently anticompetitive in it. It was, to be sure, a signal to Folger that it might have to fight a battle for market share in both the east and west, but it seems to me perfectly legitimate for General Foods to defend its national market share by trying to increase its market share in the west while discouraging Folger's expansion plans. Furthermore, Folger's entry into the HFNI can be viewed as having the same purpose as the Division's western retaliation—to put pressure on the Division in the HFNI so it would concentrate less on its western efforts (Finding 226). Thus, I believe the western retaliation was a legitimate business endeavor, just as was Folger's entry into the HFNI.

437. The "Cora" campaign was also a perfectly reasonable reaction to Folger's eastern expansion. The fact that it copied some of the features of Folger's "Mrs. Olson" advertisement does **[113]** not mean that it was an anticompetitive act. The antitrust laws do not require a company faced with increased competition to accept only non-imitative advertising ideas from its ad agencies.

438. The Horizon campaign in Syracuse was a different matter: Horizon was not adopted because General Foods believed that it could be made into a successful brand. Its sole function was to blunt Folger's Syracuse entry by imitating its packaging. However, the introduction of Horizon and the Maxwell House Division's sales below total and average variable cost in the Cleveland and Pittsburgh market areas and the Syracuse sales district occurred in areas which are not relevant geographic markets; complaint counsel have, therefore failed to prove that these acts occurred in an economically meaningful area.

439. The relevant geographic market in which these practices oc-

curred is nationwide. Considering Regular Maxwell House's market share in that area at the time of Folger's eastern expansion, even complaint counsel would agree that it did not possess or come close to possessing market monopoly power.

440. None of the prerequisites for predation existed in the relevant geographic market. Regular Maxwell House was not sold below total or average variable cost in this area, and it did not possess market or monopoly power in this area; thus, even if it had been sold below cost in this area, its prices could not have been raised later to recoup the Division's losses. This is true even if the sales districts are considered to be relevant geographic markets, for new entrants would have been attracted into these areas (Tr. 9540, 9544–50, 11,963–64). In short, General Foods did not engage in predatory conduct through its Maxwell House Division in the relevant geographic market.

J. *The Robinson-Patman Charge*

1. Introduction

441. Complaint counsel claim that the lowest prices "charged to retail customers" (CPF 12–4) by the Maxwell House Division differed between so-called "predatory" areas (Cleveland, Pittsburgh, Syracuse, Kansas City, and Dallas) and "comparison" areas.

2. The Robinson-Patman Price

442. The lowest price charged to retail customers is defined by complaint counsel as "list price less trade deals. Trade deals are made up of three basic elements: buying allowances, performance deals, and retailer coupons" (CPF 12–1). **[114]**

443. Complaint counsel claim support for their definition of price in a statement by Mr. Rowe that it is "acceptable to an accountant" (Tr. 2372), in statements by industry members that buying allowances, performance deals, and retailer coupons are "trade deals" (Tr. 8863–64), and in the fact that "dead net" price is defined by some industry members as list price less buying allowances, performance allowances, and retailer coupons (Tr. 2011, 2508–09, 2749–50, 2766, 6228–29).

444. General Foods does not disagree with complaint counsel's definition of dead net price, but it argues—correctly I believe—that this price does not equal the price which it charges its customers, or which its customers pay General Foods (RPF 10–10).

445. For example, Mr. Hunter defined dead net as "the lowest price that the trade could sell that item and not lose any money on it" (Tr. 2749), not the price that Folger charged its customers. Mr. Zurcher referred to dead net as a term used in sales presentations to the trade

to show his customers what they could feature to the consumer (Tr. 6228–29)—again, not the price which the Maxwell House Division charges its customers. Mr. Salesman referred to "dead net to the consumer"—not to General Foods' customers—as reflecting buying and performance allowances and RECU's (Tr. 5941), and Mr. MacDonald denied that dead net "aligns itself with the price we are charging" (Tr. 7133–34; see also Tr. 11, 887).

446. Despite the statements described above, there may be some industry members who believe that performance allowances or retailer coupons reduce the price charged by the Maxwell House Division to its customers, but their opinion does not comport with the way price has been defined by many of those who have been forced to grapple with the complexities of the Robinson-Patman Act.[40]

(a) *RECU's*

447. Although complaint counsel argue in the section of their findings devoted to the definition of price that "coupons"—both RECU's and consumer coupons—are price reductions "given by General Foods" (CPF 3–190 to 3–192), they claim that only RECU's (along with buying allowances and performance **[115]** offers) should be deducted from list price to arrive at the Robinson-Patman price.

448. The reason for the difference in treatment is obvious: it is literally impossible for Robinson-Patman purposes to conceive of a coupon which is packed in every can of coffee or featured in every edition of a newspaper, which involves no retailer in its preparation or distribution, and which identifies no particular retailer as a price reduction "to" the retailer. It clearly is not: it is simply a way in which a consumer may reduce his purchase price if he redeems the coupon at a retail store. In this case, the retailer serves merely as a convenient way in which the discount to the consumer is passed on. The redemption of the coupon by the retailer quite simply does not affect the price he pays to the Maxwell House Division or the price which the Division charges him,[41] for he receives from the Division only the amount which he previously gave to his customer (plus a handling charge). From the point of view of the retailer, the transaction is a wash.

449. The only difference between a RECU and a consumer coupon is that particular retailers arrange the publication of the former, and identify themselves as the place where the coupon may be redeemed. The effect from the point of view of the consumer and the retailer is

[40] Complaint counsel recognize that the definition of the Robinson-Patman price "is ultimately a legal conclusion. The perceptions of industry witnesses as to what constitutes price cannot be determinative" (CPF 12–5).

[41] Of course, as I find above, a redeemed coupon does reduce the Division's revenue, but "revenue received" or "mill net" is not a Robinson-Patman price.

identical, and neither coupon effects a reduction in the price that retailers or wholesalers pay to the Division for their coffee.

450. Theodore Engel, a vice president of The Kroger Co., a large retail chain, stated that neither kind of coupon reduces his price:

Q. Mr. Engel, why haven't you included the retailer coupon in your definition of price?
A. Because that's all passed on to the consumer.

* * * * * * *

Q. So the store is really just a conduit for the coupon? [116]
A. Right (Tr. 1656–57).

During surrebuttal testimony, the point was reiterated:

Q. Mr. Engel in your explanation of how you go about determining the price that you pay to Regular Maxwell House and other coffee roasters, you did not mention retailer coupons or manufacturer's in-ad coupons as being a deduction in determining that price. Why is that, sir?
A. Well, that is basically a transaction between the vendor and the customer. I am a conduit for that. I transfer the funds, but that is the sum and substance of what happens (Tr. 12,083–84).
Q. So then you don't consider any coupon as a part of the price that you pay to General Foods?
A. That I pay, no, sir (Tr. 12,085).

451. Roger Metzger, head buyer for S.M. Flickinger & Co., a major wholesaler in the Buffalo area, testified that RECU's are not reductions in the price that a wholesaler pays for coffee:

Q. So then there is no reflection of a RECU or other coupon in the price that you pay to Maxwell House Division?
A. No. As a wholesaler we're not really—in our pricing—involved in that.

* * * * * * *

Q. So [do] you consider any type of coupon whatsoever as effecting a reduction in the price that you pay General Foods?
A. No, we don't (Tr. 11,864–65). [117]

452. Louis Epstein, president of Golden Dawn Foods, Inc., a major wholesaler in the Cleveland-Pittsburgh area, confirmed that coupons are not considered by him, as a customer of General Foods, as effecting a reduction in the price paid to General Foods. He considered RECU's as:

. . . a device for lowering the effective price that the consumer pays, but after a sale is over in which a coupon is used, our inventory is valued at the list less the performance and the advertising allowances.

The coupon is all over. So we don't—for that reason—consider it a reduction in the value of our inventory or in the price we paid for it (Tr. 12,166).

453. Allen Toy of Hills Bros. explained the manner in which retailer coupons are used:

A. She would clip out the coupon, take it to her store, and purchase coffee and at the checkout counter she would be reimbursed for either the amount of the coupon or she would receive the coffee at whatever the reduced price is in the coupon.

* * * * * * *

A. The retailer would then give it back to the manufacturer who offered the allowance and be reimbursed for the coupon (Tr. 2010).

454. Mr. Toy testified further that it is the industry practice for manufacturers to reimburse retailers only for coupons properly redeemed and that both RECU's and consumer coupons are redeemed in the same manner:

JUDGE PARKER: Does General Foods pay the dealer money for every [118] dealer coupon he puts in his ad or is it just on the ones redeemed—returned to you?

* * * * * * *

THE WITNESS: [That] is the industry practice, yes, sir.
JUDGE PARKER: So, in that sense, it is the same as a consumer coupon, or is it? In other words, you only pay for the ones actually turned in by some consumer?
THE WITNESS: Yes, that is the practice (Tr. 2014–15).

455. When asked what effect a consumer coupon had on the price paid for coffee by the consumer, Mr. Toy answered:

The net result would be that it would enable the consumer to buy coffee at a discount from the regular price (Tr. 2015).

And, in a follow-up exchange with me, Mr. Toy responded to this question:

JUDGE PARKER: What about dealer coupons, same thing, same result?
THE WITNESS: Yes. Same result for the consumer (Tr. 2015).

456. While the fact that retail grocers may not participate in RECU's does not, in my opinion, affect the definition of "economic price,"[42] it does indicate that RECU's are not a reduction in price to them, and there is evidence that some [119] wholesalers and retailers do not always use them. Mr. Epstein of Golden Dawn Foods explained that:

[42] For, as I find above, to the extent that RECU's are used by retailers and redeemed by them, they affect the Maxwell House Division's net revenue.

... we try to balance our advertising program to include items that the consumer would want on a periodic basis and if, for example, there is a flood of coupons on a particular commodity category, we would decline to use them all because of these not being a balanced program (Tr. 12,168).

457. Mr. Engel recalled that Kroger did not participate in all RECU promotions offered by the Maxwell House Division in Cleveland and Pittsburgh following Procter & Gamble's introduction. In fact, Kroger rarely used the one pound RECU's offered on Regular Maxwell House in Pittsburgh (Tr. 12,084).

458. Mr. Metzger also testified that the Buffalo area retailers serviced by Flickingers do not use all of the retailer coupons offered:

... there are many offerings, some of them they use, some of them they don't have room for. There is really more than they can use. And it's a process of looking for the best that they can offer to get the—to attract that customer into our store each week (Tr. 11,870).

459. Mr. Keller pointed out that all customers in the Division's southern region, such as Winn Dixie and Colonial stores, do not use every RECU offered them and generally indicated that:

... quite a few customers don't take advantage of RECU's at all. They don't participate in them, don't want them, don't like them for any number of reasons: too messy, too much work, too much trouble (Tr. 6616).

460. John Mann described an "extensive list" of customers who did not participate in the Division's RECU offers (Tr. 6516), and Mr. Salesman agreed that some customers do not participate in RECU's (Tr. 5941). **[120]**

461. The refusal of retailers to eagerly embrace RECU's at all times reveals that from the point of view of the retailer, the RECU's are not price reductions to them. This, and the indisputable fact that redemption of the coupon results in no reduction in the price retailers pay requires the inevitable conclusion that RECU's should not be deducted from the Maxwell House Division's net price to arrive at the Robinson-Patman price.

(b) *Performance Allowances*

462. General Foods agrees that while RECU's do not put any money in the retailer's pocket, both non-performance and performance allowances do (RPF 10–54),[43] and complaint counsel argue that since the amount of money received by the retailer in performance allow-

[43] General Foods agrees that buying allowances, for which no performance is required, are price reductions (RPF 10–53).

ances from the Maxwell House Division far exceeds the cost of performance, performance allowances are really price reductions.

463. The Maxwell House Division performance allowances permit unlimited purchases regardless of the level of performance, for the offers provide that if the retailer performs, he will receive an allowance of a certain amount per unit on all the coffee he buys during the offer period. There is no maximum limit on the volume the retailer can buy and the amount of the discount he can receive. (CX 1148; Tr. 5846, 6003–08, 6016–18, 5635–36, 6542–45, 11,888). On most performance offers, the retailer only has to perform once to get credit for the allowance on all the volume purchased during the offer period (CX 1148; Tr. 6003–04, 6542–45, 11,899, 12,182).

464. Although there is no direct evidence as to the difference between the amount of performance allowance received by retailers and the cost of performance, it is unquestionably large in most cases, for the Division's offers do not specify the size of the advertisement the grocer has to run; for example, a retailer can run one very small advertisement, similar to the small print used in obituary columns, and still collect the allowance on all the volume purchased (CX 1148; Tr. 6005).

465. The value of performance allowances to retailers is obvious, and the rate of acceptance of such deals is very high—**[121]** around 90% (Tr. 2391, 2393, 7494). Dr. Greer testified that the rate of acceptance of performance allowances indicates that they clearly are price reductions (Tr. 11,419-21), but other matters—both factual and legal —must be considered before a decision on the status of performance offers can be given.

466. The most important matter is the intent of the offeror and the recipient. If neither the Maxwell House Division nor the retailer believe that performance is a real condition of the offer, then it can be said with confidence that the performance offer is simply a disguised price reduction.

467. That is not the case here, for the Division insists upon performance, minimal though it may be.[44] For example, Mr. Engel testified:

Q. Why do you always anticipate that you're going to perform on a performance offer?
A. One reason is to assure payment. Some we default and pay the vendor back (Tr. 1653).

Mr. Engel also stated during later testimony:

Q. What happens, Mr. Engel, if you don't perform?
A. We refund the money to the vendor.

[44] The word "minimal" refers to the cost incurred by the retailer, but I also recognize that the benefit received by the Division may well be much greater because of the exposure given to its coffee by retailer advertisements.

Q. And does General Foods check up on your performance?

A. Yes sir.

Q. Could you say [that] General Foods checks up more or less than other grocery product manufacturers? [122]

A. General Foods and Procter & Gamble are the most diligent in making sure that we perform per their contracts (Tr. 12,080).

468. Mr. Metzger and Mr. Epstein, both wholesalers, explained the manner in which they pass through performance offers to their retail customers and police performance by such retailers jointly with General Foods:

Q. Then what happens, Mr. Metzger, if a retailer does not perform in accordance with the requirements of the offer? Does he get the allowance anyway?

A. He would get the allowance initially, but at the point where the performance was not produced, we would bill him back for the cases that we sold him (Tr. 11,867).

469. After Mr. Metzger confirmed that Flickinger's had indeed billed back its retail customers for failure to perform, he described the procedure for determining performance:

Q. Is Flickinger's responsible for determining whether or not the performance has been produced?

A. We jointly with the manufacturer determine the performance (Tr. 11,867).

When asked whether the allowances under performance offers were passd on to the retail stores serviced by Golden Dawn, Mr. Epstein answered:

We do. . . . It's the nature of a voluntary group that we act as an agent for all of our stores. We see to it that they perform through advertising groups and in doing that, we pass along to them, at our billing price, all of the performance allowances up front (Tr. 12,164). [123]

470. In testimony which followed, Mr. Epstein described the policing or checking up done by General Foods to determine whether the stores served by his firm were performing in a manner consistent with the terms of performance offers and, after explaining that all those retail stores did not participate in all Regular Maxwell House performance offers, he concluded:

Q. And when you do receive the performance allowance, it's because you have decided that performance will take place?

A. That's correct (Tr. 12,167).

471. Mr. Keller of the Maxwell House Division explained the procedures followed and emphasized that if the customer fails to match the

specifications of a performance deal, "then we don't pay . . ." (Tr. 6605).

> . . . we do police all our offers to satisfy ourselves that they have occurred. The policing is done in several ways. One that I mentioned earlier was we have a retail sales organization, 120 people out there that watch and monitor every ad that occurs. . . . (Tr. 6604)

472. Mr. Keller continued, ". . . every time a customer performs, he has a responsibility of filling out a 5812 and signing a certification that he has performed. To that 5812 certification, he attaches his proof of performance that identifies this as proof of performance. He verifies that. . . . So we have that piece of document, as well as our own retail follow-up to make sure that our customers are performing . . ." (Tr. 6605).

473. Mr. Mann also described the manner in which the Division insured compliance with the performance requirements specified in its offers (Tr. 6504–6505). Mr. Mann explained that a customer who deducted performance offers before performing was billed back if the required performance was not subsequently provided:

> Q. And does the performance of the particular customer also follow the **[124]** requirements that are specified in the deal bulletin?
>
> A. If they don't they don't get paid. So yes, they must perform according to the specifications as outlined on the deal bulletin and comply with them in all of their stores, either by virtue of advertising or displaying, in order to receive the trade deal in effect by virtue of the deal.
>
> Q. Now in some instances you indicated that the allowance is taken off the invoice.
>
> A. That's correct.
>
> Q. In that case, supposing that the customer does not complete a 5812 and furnished the required proof of performance; what happens then?
>
> A. We bill the customer back. . . . (Tr. 6514)

474. Complaint counsel concede that performance allowances require "some performance" (CPF 3–254) but argue, as does Dr. Greer, that: "A price reduction when associated with some performance on the part of the buyer is still a price reduction" (Tr. 11,412). While I respect Dr. Greer's economic credentials, he is not an expert on Robinson-Patman law. When its case law is analyzed (*infra*), I come to the conclusion that the Division's performance allowances are not discounts from price, but are advertising allowances which, along with RECU's, are cognizable only under Section 2(d), not Section 2(a).

475. Since complaint counsel's price discrimination claim is based upon treatment of RECU's and performance allowances as deductions from list price, their "price discrimination" charts (CX's 924–953) do not establish that General Foods' Maxwell House Division charged

different prices for its coffee in different areas of the country. Therefore, the Robinson-Patman Act count of the complaint will be dismissed.

3. General Foods' Meeting Competition Defense

(a) *General Foods' Intent*

476. Although I will dismiss the Robinson-Patman count because complaint counsel have failed to prove that the Maxwell [**125**] House Division sold regular coffee to its customers at different prices, the parties are entitled to my views on General Foods' meeting competition defense.

477. Several General Foods employees and customers testified about its general response to Folger's entry into those sales districts where the Maxwell House Division allegedly sold at lower prices than in other sales districts.

478. Mr. Bohn and Mr. Laster testified that General Foods' policy was to meet Folger's offers but not to sell below General Foods' definition of cost in Cleveland, Pittsburgh and Syracuse (Tr. 4516, 4535, 6970, 6975). The basic principle was not to aggress:

> Q. Now, you have also said, Mr. Laster, that another principle that was laid down was the principle not to aggress. Would you state for us what the factual content was of the principle not to aggress?
>
> A. The factual content was that our policy prohibited the organization from leading in any element of the marketing mix in the Cleveland market (Tr. 6972).[45]

479. Mr. Epstein, president of Golden Dawn Foods of Sharon, Pennsylvania, recalled the entry of Folger's into Cleveland:

> . . . when Folger entered the market, they attempted to meet the lowest tier of competition which at the time was Hills Bros. Hills Bros. deal rates were the best in the industry at the time and [at the time of] the Cleveland introduction, Folger being under a consent [**126**] decree, was careful only to meet competition and the lower competition at that time was Hills Bros., as I remember.
>
> Q. How do you know Procter & Gamble was operating in a fashion which enabled them only to meet the highest deal rates offered by any competitors?
>
> A. I discussed that with their sales representative at the time (Tr. 12,168–69).

480. Mr. Epstein testified further that Regular Maxwell House responded to the "heating up of competition," and Folger's increased rates, by meeting the competition (Tr. 12,169, 12,178).

481. Mr. Lloyd Nelson, the Maxwell House Division's national sales

[45] That is,

Not to have higher trade deals than Procter & Gamble. And the same for consumer promotions and advertising (Tr. 6973).

manager, testified that exceeding Folger's trade rates "was an absolute no-no" (Tr. 5765) and that:

As I mentioned earlier, we would never exceed the competitive rate in the marketplace. Number two, we had to have what we call hard data which was an absolute clear-cut confirmation of the competitive rate. Three, we couldn't sell below cost and I guess those are kind of the three guidelines that the sales organization was operating under (Tr. 5769).

482. Mr. Engel, an executive of the Kroger Company, and a customer of both General Foods and Procter & Gamble at the time of Folger's entries into the Cleveland and Pittsburgh areas, testified that the introduction of Folger's into both areas raised the value of buying allowances, performance offers and RECUs offered by coffee manufacturers and that Folgers' initiated the escalation of these promotional offerings. He further recalled that, in Cleveland, Regular Maxwell House made no initial response to Folger's but later on in year one, met Folger's promotional activity (Tr. 12,076–77).

483. Mr. Epstein recalled that, when Folger entered Pittsburgh, Regular Maxwell House matched Folger's escalation of trade deals (Tr. 12,170) and Mr. Nelson testified that in Philadelphia and Pittsburgh the Division attempted to meet Folger's promotional programs: **[127]**

. . . in the Pittsburgh area we met them in what I would call across the board on trade deal, consumer promotions, advertising. In Philadelphia, if my memory is correct, we did not meet them on the trade deal line, again for some of the reasons that we talked about earlier, relative to trade flow (Tr. 5771).

484. Mr. Zurcher testified that Regular Maxwell House employed a "following" posture in arriving at a matching of Folger's dead nets in Pittsburgh:

So we adopted a following posture, again very similar to which we eventually got into in Cleveland where through those sources I described, I could confirm and reported neither and, of course, I had to wait until I get approval back, and then we would match their dead nets (Tr. 6289).

485. At first, the Maxwell House Division decided not to match Folger's trade deals in Syracuse (Tr. 5785–86). According to Mr. Salesman, because of the Division's response (a trade rate plus RECU as compared to Folger's straight trade rate promotion (Tr. 5952)):

We were at a significant disadvantage because we were dead netting to the consumer. We were not dead netting to the trade. In other words, our buying allowances and performance offer was not as heavy, not as high as Folger's (Tr. 5954).

486. Later, Regular Maxwell House matched Folger's trade rates (Tr. 5956); however, Mr. Salesman stated that he still had to ascertain Folger's rate before he responded:

As I said earlier, we ran a lag strategy. We followed. I could not initiate an offer, nor was an offer [128] initiated until we verified what the Folger offering was in the marketplace with hard copy of what that offering was (Tr. 5957).

(b) *Mr. MacDonald's Charts*

487. In addition to the testimony discussed above, General Foods presented two charts prepared by Mr. MacDonald (RX's 1207 and 1292) which attempt to reconstruct his employer's response to Folger in Cleveland, Pittsburgh and Syracuse, on one, two and three pound coffee for approximately a year after Folger's entry into those cities. There are, however, some problems with these charts which are so significant that they cannot be accepted as support for General Foods' claim that it was simply meeting Folger's offers in those areas.

488. RX 1207 represents Mr. MacDonald's first attempt to prove that General Foods was meeting Folger's competition, but his reconstruction suffers from the fact that the flow charts upon which he relied and which were prepared by General Foods' employees are incomplete. For example, in Syracuse, there were no flow charts from February 3 to March 31 (RX 1207K) and from April 28 through September 22 (Tr. 7200–02). Thus, for eight of the 12 months depicted in Syracuse, General Foods did not produce any records that showed its knowledge of Folger's deals at the time they were offered. During the first quarter of Folger's entry into Pittsburgh, there were also no contemporaneous documents showing General Foods' perceptions of Folger's deals (RX's 1044C, G; Tr. 7172).

489. In addition, these documents rely on a concept called "pyramiding"—which, while it reflects Mr. MacDonald's perception of Folger's offers which the Maxwell House Division was meeting, does not in my opinion, reveal the perception of Division personnel who responded to the Folger offers when they were actually made.

490. "Pyramiding" occurs when a producer "double[s] up one deal on top of another" (Tr. 7142). For example, a producer might offer a $2 trade deal in one period, and offer a $1 count and recount in the next. A retailer, aware of both offers, would purchase in one period and move the product from his warehouse to his stores in the other (Tr. 7142–43) so that he could receive a $3 discount.

491. Since offers are made continuously by producers, it is possible for one who is reconstructing dealing events to "pyramid" them and "prove" that a response which appears at [129] first blush to beat

competition did not do so because it was intended to meet "pyramided" offers.

492. I do not mean to imply that "pyramids" do not exist in the coffee industry. They undoubtedly do. The problem which I have with Mr. MacDonald's reconstruction is that he is a little too ingenious in calling pyramids which benefit General Foods. Thus, his judgment is so subjective that I simply cannot accept his reconstruction.

493. For example, in Pittsburgh, on three pound coffee in September, Mr. MacDonald pyramided Folger's deals (Tr. 7429). For this pyramid, he claimed that retailers would buy heavily on a \$3.04 buying allowance and a \$.60 count and recount, and then would pyramid that \$3.64 rate on to a \$2.04 count and recount and \$.53 retailer coupon in September, with a resulting dead net of \$1.955 (RX 1207G). However, this pyramid could not have taken place. A count and recount is an offer under which the grocer gets paid for moving product from his warehouse to his store (Tr. 6770). It is impossible for a retailer to pyramid two count and recounts in a row, as Mr. MacDonald did with these deals. A retailer cannot collect on two count and recounts on the same coffee, since he already moved the product from the warehouse into the store on the first count and recount, and therefore cannot perform on the second count and recount. Mr. MacDonald suggested on cross-examination that some fictitious retailer might have moved the product from the warehouse to the store and then moved it back to the warehouse so that he could ship it back to his store (Tr. 7596), but there is no evidence that any retailer would do this. Also, Mr. MacDonald conceded that there would be no substantial volume moved on this type of pyramid since the Division would never pay a grocer in the situation where there are two count and recounts on the same can of coffee (Tr. 7597–98).

494. Although the potential for pyramiding by Regular Maxwell House is as great as that for Folger's, Mr. MacDonald appears to have ignored many of them in RX 1207. For example, in Cleveland on two pound coffee in March, Maxwell House was running a \$2.40 advertising or display allowance (RX 1207B). In April, that allowance was reduced to \$1.20 (RX 1207C). According to Mr. MacDonald's own definition of a pyramid, grocers would have purchased heavily on the \$2.40 allowance in March and featured with Maxwell House's 32 cents retailer coupon in April (RX 1207C). Mr. McDonald did not pyramid the earlier allowance, although the situation involved a reduction in case rate and although, in a similar situation, he called a pyramid for Folger (RX 1207B, C; Tr. 7353).

495. Complaint counsel's reply findings reveal that this was not unusual and that in other instances Mr. MacDonald did not call a

Regular Maxwell House pyramid when he should have (CRF 5–31). [130]

496. Other problems exist in Mr. MacDonald's reconstruction. On RX 1207J, he reports a $6.24 buying allowance and a $3.70 advertising/display allowance for Folger running from September 30 through December 2 (RX 1207J). However, Mr. Salesman testified that according to the flow chart which he prepared for this area, Folger only had a $4.32 buying allowance and a $3.70 performance allowance upon entry. He testified that he did not learn that Folger added a $1.92 allowance until December (Tr. 6192–93). Folger reduced revenue recommendations[46] confirm his perception. They show that Folger entered Syracuse with a combination of allowances that added to $4.32 plus a $3.70 merchandising allowance (RX 1185A). These allowances expired on November 2, 1974 (RX 1185A). It was not until November 4 that Folger added the additional $1.92 allowance (RX 1185J). Thus, Mr. MacDonald ignored the testimony of a General Foods' witness, as well as corroborating evidence from Folger's business records.

497. RX 1207 shows the dates on which deals became effective, not when they were announced to the grocery trade, but Mr. MacDonald testified that Folger invariably announced its deals first. For example, in Cleveland on the two and three pound sizes, both Folger's and Maxwell House's dead net prices were effective on March 4. Mr. MacDonald stated that it was his considered opinion that Maxwell House waited for Folger to announce first (Tr. 7348). In rebuttal, complaint counsel introduced CX's 1392, 1397, and 1398 which challenge the conclusion that Maxwell House invariably announced its deals after Folger. These exhibits show that in many instances when the dead net prices were identical, Maxwell House announced its deals before Folger, and that Maxwell House could not have been responding to Folger's deals.

498. After the introduction of complaint counsel's rebuttal exhibits, Mr. MacDonald introduced a revised set of meeting competition charts. His revision, which shows that General Foods was meeting different dead net prices than those shown on its first set of charts, suggests that neither of the charts are entitled to serious consideration.

499. On RX 1292, Mr. MacDonald entered a key that supposedly indicated the Folger dead net price to which Maxwell House was responding. These assignments of Maxwell House's deals to Folger's prices were derived from Mr. MacDonald's [131] experience, but they

[46] Reduced revenue recommendations record Folger's perception of competitive offers and its response (Tr. 2768).

are unsupported by documents (Tr. 12,208, 12,314).[47] In effect, Mr. MacDonald took the dates from complaint counsel's exhibit and arranged his key in a manner most favorable to General Foods. Whenever the dates indicated that Maxwell House announced a contemporaneous price before Folger, Mr. MacDonald structured his second chart to show that Maxwell House responded to some earlier Folger deal that had already expired.

500. During his first four days of testimony, Mr. MacDonald claimed that Regular Maxwell House's deals were responsive to Folger's deals in effect at the same time. He continually spoke in terms of "rounds" of deals. In each quarter, there would be two or three rounds of deals (Tr. 7223–24). An examination of his first testimony reveals that he analyzed the first set of charts in terms of Regular Maxwell House's response to Folger's contemporaneous rounds of deals. For example, he claimed that its first round of deals was responsive to Folger's first round of deals (Tr. 7450–53, 7231, 7385–86, 7417–23, 7445–46, 7484, 7697–98). However, on the second set of charts, Mr. MacDonald changed his approach and claimed that Regular Maxwell House was responding to Folger deals well after they took effect.

501. For example, during his first testimony, Mr. MacDonald stated that in Cleveland on the three pound size, Regular Maxwell House waited to announce its March dead net price of $1.92 until Folger announced its March $1.92 dead net price (Tr. 7348). However, Regular Maxwell House announced its $1.92 dead net price on January 11, while Folger did not announce its dead net price until January 21 (CX 1392B). Mr. MacDonald then changed his position. On RX 1292, he claimed that Regular Maxwell House's March dead net price was responsive to Folger's dead net price that expired in December (RX 1292C, deals 5D, 15H, key 2).

502. In another case, Mr. MacDonald claimed that in Syracuse in September, the $3.51 dead net price for Regular Maxwell House on three pound was responsive to a $3.51 dead net price for Folger (RX 1292I, deals 7, 17, key 7). For the same time period, he claimed that the $2.36 dead net price for Maxwell House on two pound was responsive to the $2.36 dead net price for Folger (RX 1292H, deals 5, 14, key 7). On both the two and three pound deals, both the Folger and Maxwell House announcement dates were August 26. Despite the exact same date, Mr. MacDonald claimed that Maxwell House was responding to Folger. However, Folger's contemporaneous records show that it **[132]** was responding to Maxwell House. In fact, Folger had obtained a Maxwell House deal form that specifically identified the Maxwell House dead net price during the period (CX 1379Z–32, Z–

[47] The only document to which Mr. MacDonald referred was RX 301, but this does not support his detailed reconstruction.

120). Mr. MacDonald's unsupported reconstruction simply does not outweigh the contemporaneous documents demonstrating that Folger was responding to Maxwell House.

503. Complaint counsel have fashioned a chart (following CRF 5–53) which I will not reproduce; however, it presents solid evidence that Mr. MacDonald assigned dead net prices in a manner favorable to General Foods without any consistent or logical justification. This chart lists the deal assignments made by Mr. MacDonald. The dates for Maxwell House's and Folger's deals show the dates on which the deals for both competitors became effective. The lines demonstrate the key used by Mr. MacDonald.

504. The chart reveals that when the prices and dates of contemporaneous deals favored General Foods, Mr. MacDonald aligned the deals vertically (vertical arrow). He indicated that Maxwell House was responding to the Folger deal in effect at the same time. However, when the dates or prices did not favor General Foods, Mr. MacDonald changed approach and claimed that Maxwell House was responding to a Folger deal well after the Folger deal became effective (right-slanted arrow). For example, the chart for Pittsburgh shows that the two pound dead net price for Maxwell House beginning on February 18 was responsive to the Folger dead net price that began on November 19, three months earlier. However, the same chart shows that the Maxwell House dead net price beginning on May 14 was responsive to the Folger dead net price beginning at the same time.

505. Complaint counsel's criticisms of Mr. MacDonald's charts are well founded, and I am satisfied that his use of pyramids and his assignment of deals on RX 1292, while creative and ingenious, are so subjective that they do not prove the perception of Folger's deal by General Foods employees during the relevant time periods. Thus, despite the evidence of general intent, I could not find, if it were necessary, that General Foods' has satisfied its burden of proving that it met, but did not beat, Folger's deals in Cleveland, Pittsburgh and Syracuse. **[133]**

III. Conclusions of Law

A. *The Relevant Geographic Market For Regular Coffee Is Nationwide*

1. Introduction

Complaint counsel's claim that General Foods attempted to monopolize the HFNI "markets" (CLA, p. 1) requires a finding that the relevant geographic market for regular coffee is no larger than a sales district, for they do not allege that in any larger area—either the entire HFNI or nationwide—did General Foods possess the market power to succeed in an attempt to monopolize the sale of regular coffee.

I cannot make such a finding, for the pertinent evidence on the issue reveals that the relevant geographic market for regular coffee is nationwide. Much of the evidence offered by complaint counsel relates to the marketing activities of wholesalers and retailers, but this is irrelevant in a determination of the market for the production and sale of regular coffee by roasters.

2. Market Areas And Sales Districts Are Not Relevant Geographic Markets

(a) *Transportation Costs*

The relevant geographic market for a product is the area to which customers can practicably turn for alternative sources of supply. *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320, 327 (1961).

A recent Commission case, *Pillsbury, Inc.,* 93 F.T.C. 966 (1979) applied the *Tampa Electric* test to a grocery product. The issue in *Pillsbury* was whether that company's acquisition of Fox Deluxe Foods violated Section 7 of the Clayton Act. The parties agreed that the United States was a relevant geographic market, but complaint counsel also argued that regional submarkets existed.

The Commission found that transportation costs posed no significant barrier to the distant shipment of frozen pizzas and held that geographic submarkets did not exist: **[134]**

> The test for measuring geographic market is where consumers (in this case retailers) can practicably turn for an alternative source of supply. Here the record is clear that frozen pizza manufacturers could sell virtually throughout the United States from a single plant with no significant cost disadvantage. Thus, the power of any given group of sellers serving a city or region at a given time to raise prices is limited by the capacity of virtually all other domestic manufacturers to compete on practically an equal footing in that city or region—an economic situation which requires a finding of a national market and the elimination of geographic submarkets. *Id.* at 1030.

Complaint counsel point to the Commission's statement in a footnote that "special factors, like slight economic barriers, could produce submarkets" (*Id.* n. 8; CLA, p. 108), but this record reveals no economic or legal barriers to the nationwide shipment of regular coffee (Findings 105–16).

Another Commission Section 7 case involving a grocery product emphasized the significance of transportation costs in the determination of the relevant geographic market. The complaint in *Golden Grain Macaroni Co.,* 78 F.T.C. 63 (1971), *aff'd,* 472 F.2d 882 (9th Cir. 1972), *cert. denied,* 412 U.S. 918 (1973), alleged that the relevant geographic market for the production and distribution of dry paste products was a four-state region in the Pacific Northwest. The Commission stated that:

The appropriateness of the Pacific Northwest as a geographic market in which to determine whether respondents possess monopoly power turns on the significance of transportation costs to outside producers. *Id.* at 158.

While the Commission found that the Pacific Northwest was the relevant geographic market because "freight costs constitute a barrier sufficiently high to forestall entry by firms with production facilities outside" that area, *Id.* at 159, it refused to accept complaint counsel's argument that there were **[135]** also three geographic submarkets. The reason was that "the record fails to show that transportation costs between one and another of the three areas is so great in relation to the overall cost [of dry paste] as to make these areas separate submarkets." *Id.* at 159.

The Commission in *Golden Grain* remarked on the same phenomenon that exists in this case—the shipment of products into the alleged submarkets by outside producers:

... both Major and respondents, although operating exclusively out of plants in Seattle, sell a significant amount of their products to retailers in the three alleged submarkets. *Id.* at 159.

Other cases dealing with the issue of relevant geographic market stress transportation costs. In *United States* v. *Hammermill Paper Co.,* 429 F.Supp. 1271 (W.D. Pa. 1977), the government argued that in addition to a nationwide market for paper manufacturing, New England was a relevant market because an acquired paper merchant was the largest firm of its kind operating in that area. The court rejected this argument:

Paper manufacturers located in New England compete effectively in the Midwest against manufacturers with mills located there, and mills in the Midwest compete for sales in New England. Paper manufacturers in New England do not sell primarily in New England but sell throughout the United States. Paper manufacturers do not find it necessary to build mills in New England to participate in the New England trade. *Id.* at 1278.

In *RSR Corp.,* 88 F.T.C. 800 (1976), the Commission held that the fact that secondary lead manufacturers "can and do frequently ship products into regions far distant from their plants" demonstrated substantial regional interdependence even in the face of relatively high transportation costs. *Id.* at 885. *See also International Telephone*

& Telegraph Corp. v. *General Telephone & Electronics Corp.,* 518 F.2d 913, 937 (9th Cir. 1975). **[136]**

(b) *Complaint Counsel's Argument Relies On Irrelevant Facts*

Complaint counsel's emphasis on local demand factors injects irrelevant considerations into the issue of relevant geographic market. The error in their reasoning was described accurately several years ago in *The Market: A Concept In Antitrust,* 54 Colum. L. Rev. 580, 598–99 (1954):

> Underlying much of this discussion is the premise that it is essential to distinguish between markets at different levels in the chain of sellers. This has not always been clearly discerned by the courts. An example of the resulting confusion is found in *United States* v. *National City Lines, Inc.,* where the defendants were charged with conspiring to monopolize the sale of busses and bus supplies in forty-five cities by means of exclusive dealing contracts which excluded others from selling to the transportation company that operated the busses in those cities. One defense was that Section 2 of the Sherman Act applied only to monopolization of a geographic market. Holding against the defendants, the court stressed the fact that the operating company had a monopoly in the forty-five cities, and that this constituted the geographic market which the suppliers had monopolized by excluding competitors. The court apparently regarded the forty-five cities as a geographic market for the sale of bus supplies, an absurd view in light of the fact that bus products are sold on a nationwide basis. The area in which the buyers of bus supplies do their purchasing—in this case, the whole nation—should be the geographic market for the sellers of these supplies.

The court in *Hammermill* made the same point:

> The arguments that paper merchants in New England "cannot and do not compete with paper merchants located in other sections of the country" does not establish that New England is a separate section of the country for measuring the anticompetitive effect of [**137**] Hammermill's acquisition, because the same criteria apply to all paper merchants in any section of the country. The principal function of a paper merchant anywhere is to serve the local printing trade with a variety of lines, locally warehoused, and available for quick delivery in a large range of quantities.
>
> We cannot find the facts establishing the close relationship between paper merchants and printers to be relevant to the question of the effect of this acquisition to lessen competition among manufacturers of printing and fine papers in the sale of their products to paper merchants. 429 F.Supp. at 1278–79.

Here, too, complaint counsel's claim that the retail distribution of regular coffee is contained within sales districts—whether true or not[48]—ignores the fundamental point. While this says much about the geographic market for the sale of regular coffee by retailers, it is simply irrelevant where the issue is the relevant geographic market for the sale of regular coffee by producers.

Furthermore, industry recognition that demand differs from region

[48] In fact, this confinement is breaking down (Findings 99–104).

to region and that deals must be tailored to these regions says nothing about which producers retailers and wholesalers can practicably turn to for their supplies: It merely indicates that producers who compete over a much broader area than a sales district often must take into account the different desires of customers located in different regions of the country.

Not all coffee producers compete in every city throughout the United States, and their market shares differ from city to city (Findings 117–18), but where there are no significant transportation costs, this does not mean that regional submarkets exist:

> There is considerable evidence that retail frozen pizza manufacturers often target, or [138] even confine their marketing regionally. Thus, in any particular city, only Pillsbury, Fox, and three or four other frozen pizza manufacturers might be selling at any given time. In such local markets, Pillsbury's and Fox's market shares of course would be high and perhaps sufficient to indicate anticompetitive effects under Section 7. But "[w]e do not believe the pie will slice so thinly," at least not on this record. The test for measuring geographic market is where consumers (in this case retailers) can practicably turn for an alternative source of supply. *Pillsbury,* 93 F.T.C. at 1030.

See also Golden Grain, 78 F.T.C. at 159–60.

Complaint counsel also argue that Regular Maxwell House's "product differentiation" advantage creates barriers to entry into the sales districts which, by virtue of these barriers, are relevant markets (CLA, p. 101; CRLA, pp. 24–25).

Complaint counsel's argument is a theoretical construct which finds no support in the record. Hill Bros.' entry into the HFNI in the 1960's and other roasters' expansion within the HFNI even after Folger's entry (Findings 322–24) establishes beyond question that Regular Maxwell House's "product differentiation" advantage if it exists, has not raised even modest entry barriers to other coffee roasters.

The price data relied upon by complaint counsel can be interpreted in several ways and it can be rejected as an indicator of separate geographic markets for that reason alone (Finding 130, n. 11), but it suffers from an even more fundamental defect. A relevant geographic market contains all producers and purchasers whose interactions affect price, but complaint counsel presented evidence of price differences in the sale of a single brand of coffee, Regular Maxwell House. Thus, this price data does not reflect the supply and demand forces that operate with respect to the sale of regular coffee.[49] [139]

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[49] Dr. Elzinga agreed that it is appropriate to analyze Regular Maxwell House's market power rather than that of all of General Foods' regular coffee brands (Footnote 23), but that power can only be analyzed in relationship to the relevant geographic market in which it is sold, and that market contains all regular coffee producers operating within its confines.

(c) *Conclusion*

In conclusion, complaint counsel's argument that the relevant geographic market for regular coffee is no larger than a sales district is based on irrelevant facts. The most significant fact in this record is that the relative transportation costs for regular coffee are so low that producers are able to ship their coffee anywhere in the United States. These producers compete or, if they so choose, can compete, throughout the nation, and the relevant geographic market for regular coffee is nationwide.

B. *General Foods Did Not Attempt To Monopolize The HFNI Regular Coffee "Markets"*

1. Introduction

Since complaint counsel do not claim that General Foods, through its Maxwell House Division, attempted to monopolize the relevant market—the nation—the Section 5 count could be dismissed without analyzing their claim that General Foods monopolized the sale of regular coffee in what they claim are relevant geographic markets—the Division's market areas and sales districts. However, so much effort has been devoted to the market power and sales below cost issues that the parties are entitled to my views on the evidence offered by complaint counsel in support of their argument.

2. Elements Of An Attempt To Monopolize

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, empowers the Commission to prohibit unfair methods of **[140]** competition, and this power has been construed to reach conduct that violates the prohibitions of the Sherman Act. *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 609 (1953).

The elements of the offense of attempted monopolization were described in *Swift & Co.* v. *United States,* 196 U.S. 375, 396 (1905):

> Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen.

The three elements of this offense were recently restated by the Commission in *E.I. DuPont de Nemours & Co.,* 3 CCH Trade Reg. Rep. ¶ 21,770 at 21,970–71 (Oct. 20, 1980) [96 F.T.C. 653]:

> . . . the attempt offense includes three principal elements: (1) specific intent to control prices or destroy competition, (2) exclusionary or anticompetitive conduct, and (3) a dangerous probability of success. *Id.* at 21,970.

The Commission in *DuPont* recognized that while all three elements must be satisfied:

These criteria, however, are not mutually exclusive but rather are interrelated to the extent that evidence of conduct may shed light on intent and the probability of success; conversely, evidence of a respondent's purpose may reveal the extent to which there are legitimate business justifications underpinning the respondent's conduct. *Id.* at 21,971. **[141]**

3. Specific Intent To Control Prices Or Destroy Competition

Read with an uncritical eye, some of the statements by General Foods' employees and agents might lead one to believe that they were looking forward to Folger's entry into the HFNI as an opportunity to increase Regular Maxwell House's market share and profits in that area.

The reality is different. The Maxwell House Division was aware at the time of Folger's entry into the HFNI that Procter & Gamble was a formidable competitor (Findings 218–27), and it did not look forward with satisfaction to the impending struggle for regular coffee share in the HFNI since there was no real hope that Folger's could be excluded from any area that it chose to enter (Findings 231–32).

Despite this serious threat, the Maxwell House Division's initial response to Folger's Cleveland introduction was modest (Finding 149), and it was only after management became seriously concerned that the "defend now" strategy was adopted (Findings 154–66). In fact, even as late as Folger's Syracuse entry, the Division did not match its trade rates (Findings 193–99).

While the "defend now" strategy projected losses in Year I in the HFNI as Folger's marketing expenditures were met by the Division, it was, realistically, the only strategy which had any chance of success. The adoption of alternative strategies would certainly have resulted in significant share and profit losses (Findings 228–30).

Thus, despite some suggestive statements in internal documents, the weight of the evidence—especially taking into account the nature of the competitor which the Maxwell House Division was facing—establishes that the Division's overall intent was to engage in an honest competitive struggle with the new entrant.

Since the Maxwell House Division's actions were "predominantly motivated by legitimate business aims," I cannot find that it had a specific intent to monopolize the sale of regular coffee, whether the relevant geographic market is nationwide or circumscribed by the boundaries of a market area or a sales district. *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 627 (1953); *see also Lektro-*

Vend Corp. v. *Vendo Co.,* 1981–2 CCH Trade Cases ¶ 64,258 at 74,089 (7th Cir. 1981). **[142]**

The inevitable consequence of General Foods' decision to defend vigorously its regular coffee market share and profits was losses by the new entrant and a few of its smaller competitors (Findings 240–73), but the competitive struggle inevitably involves winners and losers, and the intent to compete and succeed is not anticompetitive:

> More than an intent to win every sale, even if that would result in the demise of a competitor, is required before it can be concluded a defendant has the type of exclusionary intent condemned by the antitrust laws. *Transamerica Computer Co.* v. *IBM,* 481 F.Supp. 965, 1010 (N.D. Cal. 1979).

See also William Inglis & Sons Baking Co. v. *ITT Continental Baking Co.,* 652 F.2d 917, 932 (9th Cir. 1981): "Direct evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation"; *International Air Industries, Inc.* v. *American Excelsior Co.,* 517 F.2d 714, 719, 723 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976); III *Antitrust Law* ¶ 822a, at 314 (1978).

Complaint counsel answer, however, that the Maxwell House Division's actions were not honestly competitive, for the Division sold below average total cost in the Cleveland and Pittsburgh market areas and the Syracuse sales district, introduced a "fighting brand" into Syracuse, retaliated against Folger's in the West and copied its "Mrs. Olsen" campaign (CLA, p. 33).

In *Transamerica,* the court stated:

> A firm that prices its product at levels above marginal or average variable cost is not necessarily engaged in clearly exclusionary conduct. A firm that prices its products below those levels is. 481 F.Supp. at 989.

Complaint counsel rely on this case and statements by Areeda & Turner for the proposition that regardless of actual intent, pricing below reasonably anticipated average variable cost should be characterized as a *per se* attempt to monopolize because such pricing: **[143]**

> (1) [is] totally unrelated to competition on the merits . . .;
> (2) clearly implies the presence or prospect of some degree of durable market power . . .; [and]
> (3) has potentially significant exclusionary effects in the generality of cases . . . III *Antitrust Law* ¶ 820, at 313.

Furthermore, Areeda & Turner:

> . . . would not permit a monopolist to price below marginal cost in order to meet the lawful price of a rival. III *Antitrust Law* ¶ 717, at 178.

On the other hand, the Commission held in *Golden Grain,* 78 F.T.C. at 165 that, with respect to the pricing of a firm which one could characterize as dominant in the relevant market:

> even if we should find that respondent's sales were below cost, if we find further that they acted defensively in reaching such a pricing level, their conduct will not be illegal because of the absence of the requisite predation. *See also United Fruit Co.,* 82 F.T.C. 53, 162 n. 43 (1973):
>
> Although predatory intent may be inferred from sales below cost, this inference does not arise when there is evidence that the below-cost level was reached defensively.

The Maxwell House Division did sell below cost in the Cleveland and Pittsburgh market areas and the Syracuse sales district (Finding 423), but I cannot infer from this fact alone a specific intent to monopolize since it ignores the reason for the Division's actions. **[144]**

The Division sold below average variable cost as a direct result of the significant threat posed by its much larger rival, Procter & Gamble. The Division could have, as complaint counsel suggest, responded less vigorously to Folger's entry, but this would have been disastrous. The Division, in my opinion, chose the only possible response—head-to-head competition. And, although General Foods was unable to satisfy me that it could establish a meeting competition defense to the Robinson-Patman charge, I am convinced, once the more rigorous requirements of Section 2(b) are set aside, that while there may have been instances of leading Folger's in promotions, the Division's general intent was to meet, and not beat, Folger's prices and promotions (Findings 476–86).

Futhermore, Procter & Gamble's proven track record—in addition to providing the impetus for the Division's vigorous response—and the absence of market power establishes that there was no likelihood that the Division could use its Regular Maxwell House brand to successfully monopolize a market area or sales district (*infra*). Thus, this is not "the generality of cases" which Areeda & Turner refer to in their *per se* rule, and I will not infer specific intent to monopolize from the Division's defensive, below cost pricing for if I were to do so, it would amount to a holding that a large firm (as opposed to a monopolist or one with substantial market power) would not be able to compete with equally large or larger firms.[50] *See United Fruit, supra,* 82 F.T.C. at 163:

> Certainly the logic of complaint counsel's argument would require companies con-

[50] Complaint counsel argue that under the rationale of *Borden, Inc.,* 92 F.T.C. 669, 798–802 (1978), the Maxwell House Division's prices cannot be defended on the ground that it was meeting competition (CLA, p. 62), but *Borden* involved a monopolist. Regular Maxwell House's shares in its sales districts never approached monopoly proportions (Finding 377).

cerned with competitive threats in the marketplace to sit back and wait until they become a reality before taking action. This is surely not the aim and purpose of our competitive marketplace nor the role of competition which this Commission was created to promote. [145]

4. Exclusionary Or Anticompetitive Conduct

In *DuPont,* the Commission held that the conduct element of the offense of attempted monopolization is satisfied by proof that "unreasonable" means were used to control prices and restrict competition. 3 Trade Reg. Rep. at 21,972. Other cases suggest that conduct which is "unfair or unreasonable" *Northeastern Telephone Co.* v. *American Telephone & Telegraph Co.,* 651 F.2d 76, 85 (2d Cir. 1981), or which is "without legitimate business purpose" *Janich Bros., Inc.* v. *American Distilling Co.,* 570 F.2d 848, 853 (9th Cir. 1977), *cert. denied,* 439 U.S. 829 (1978), is exclusionary or anticompetitive.

Even monopolists are allowed some freedom to respond to competitive threats. In *SuperTurf, Inc.* v. *Monsanto Co.,* No. 80–1484 (8th Cir., Oct. 2, 1981), Monsanto, a monopolist in the artificial turf market, was alleged to have priced below cost in an effort unlawfully to eliminate competition. Evidence indicated that Monsanto engaged only in competitive defensive pricing and that SuperTurf, Inc. had initiated the price warfare. The Eighth Circuit held that:

> Even if Monsanto is a monopolist, it was within its rights to respond to the lower prices of its competitors while still pricing above its marginal costs. Slip Op. at 14.

Of course, Regular Maxwell House has not had nor does it have monopoly or market power in the relevant market—the nation—or in any of the sales districts or market areas. It has never even approached such power in these areas, contrary to complaint counsel's claim (CLA, pp. 109–10).

Because it has never had monopoly power or even approached it in the sales districts or the nation, the sale of Regular Maxwell House below average variable cost in two market areas and one sales district (again, assuming that they are relevant geographic markets) was not anticompetitive or exclusionary; it was, instead, legitimately defensive behavior. *Golden Grain, supra; United Fruit, supra.*

While the use of the Horizon brand in Syracuse had no purpose other than to respond to Folger's entry (Findings 425–27), and in that sense was not "legitimate", I do not believe [146] that the use of a fighting brand by a company lacking monopoly power in one sales district against a larger rival was inherently anticompetitive. *Compare United States* v. *American Tobacco Co.,* 221 U.S. 106 (1911). The

Division's western retaliation (Findings 428–30) and its "Cora" campaign (Findings 431–35) were legitimate defensive acts.

My conclusion with respect to Horizon and the western retaliation is not altered by the claims that Horizon was sold below cost (CPF 4–35 to 4–37) and that Regular Maxwell House's trade rates equalled contribution margin in Kansas City and Dallas (CPF 5–20 to 5–26), for Horizon was a new entrant into Syracuse, and Regular Maxwell House's western retaliation was similar to Folger's expensive Cleveland entry.

5. Dangerous Probability Of Success

Whether a dangerous probability of success exists requires a definition of the relevant geographic market in which the challenged conduct took place, and an assessment of the accused's power to exclude competition or control prices within the market. *Richter Concrete Corp.* v. *Hilltop Basic Resources, Inc.,* 1981–1 CCH Trade Cases ¶ 63,947 at 75,891 (S.D.. Ohio 1981); *General Communications Engineering, Inc.* v. *Motorola Communications & Electronics, Inc.,* 421 F.Supp. 274, 292 n. 42 (N.D. Cal. 1976).

The cases dealing with this issue generally look to a company's market share to determine whether it has the ability to succeed in attaining monopoly power in the relevant market. *See, e.g., Hiland Dairy, Inc.* v. *Kroger Co.,* 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied,* 395 U.S. 961 (1969). *See also,* III *Antitrust Law* ¶ 831, at 336:

> Perhaps as an aid to predicting dangerous future probability, the cases also require that the defendant possess a measure of present proximity to completed monopoly—a measure of power in a relevant market. As with monopoly, the requisite market position is normally measured through an analysis of market share. Although precise definition of the requisite position is no easier here than in the case of monopoly itself, it is clear that the basic thrust of the classic rule is the presumption that attempt does not occur in the absence of **[147]** a rather significant market share. The defendant need not have present market power, but its position must be sufficiently "proximate" to monopoly that the challenged conduct threatens success. Moreover, the presumption resting on market share may be overcome on a showing that the market is so narrowly defined, or entry so free, that "success" would not yield the *substantial* market power needed for the offense of completed monopolization (emphasis in original).

No particular market share can be said to evidence the market power needed to succeed in an attempt to monopolize: Complaint counsel suggest that a 40% absolute market share is enough, citing, for example, *Broadway Delivery Corp.* v. *United Parcel Service,* 1981–1 CCH Trade Cases ¶ 64,068 at 74,469 (2d Cir. 1981). Since Regular Maxwell House's share exceeded this figure in some HFNI sales districts, they argue that there was a dangerous probability that the Maxwell House Division would acquire monopoly power (CLA, p. 113).

General Foods naturally disagrees, citing *Hoffman* v. *Delta Dental Plan,* 1981-1 CCH Trade Cases ¶ 64,138 at 76,838 (D. Minn. 1981), which held that a 40% share of market was insufficient as a matter of law to permit the inference of dangerous probability of success.

Given the divergence of opinion on this issue, I cannot find that Regular Maxwell House's market share in the nation, the HFNI or in any of the HFNI sales districts was so large that, as a matter of law, it possessed the market power which would make it dangerously probable that the Division could succeed in monopolizing the sale of regular coffee in those areas (Finding 377).

Other facts of record beside market share convince me that the Division could never have succeeded in acquiring monopoly power in the HFNI sales districts—that is, the power to control prices or exclude competition, *United States* v. *Grinnell Corp.,* 384 U.S. 563, 570-77 (1966); *United States* v. *E.I. DuPont de Nemours & Co.,* 351 U.S. 377, 391 (1956).

Barriers to entry into the HFNI sales districts are minimal (Findings 321-24), and if the Division attempted to raise prices to the monopoly level, new entrants would be attracted into the districts (Finding 440). [148]

Futhermore, because of a decline in demand, the regular coffee industry had substantial excess capacity (Findings 20-24), and the Maxwell House Division could not, therefore, restrict its output and raise prices in the sales districts, for other roasters would simply increase their output. *See* II *Antitrust Law* ¶ 501, at 322; *Transamerica Computer Co.* v. *IBM,* 481 F.Supp. 965, 974-75 (N.D. Cal. 1979). Finally, Folger's greater staying power must be considered.

Considering all of these facts, I find that the Division's sales below average variable cost in the Cleveland and Pittsburgh market areas and the Syracuse sales district were not predatory. III *Antitrust Law* ¶ 711b, at 151-52:

> . . . predation in any meaningful sense cannot exist unless there is a temporary sacrifice of net revenues in the expectation of greater future gains. Indeed, the classifically feared case of predation has been the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition. Thus, predatory pricing would make little economic sense to a potential predator unless he had (1) greater financial staying power than his rivals, and (2) a very substantial prospect that the losses he incurs in the predatory campaign will be exceeded by the profits to be earned after his rivals have been destroyed.
>
> As for the first prerequisite, it should, of course, be recognized that predation cannot be successful, and therefore is unlikely to occur, when the predator's rivals possess resources comparable to his own. Even when an alleged predator has greater staying power, however, attention must also be given to the second prerequisite, which is less likely to occur. Although a predator may drive competitors into bankruptcy, their

durable assets may remain in the market in the hands of others. Moreover, a firm can anticipate monopoly profits for only so long as its monopoly prices do not attract new entry. [149] Losses incurred through predation could be regained in markets with very high barriers to entry. In many markets, however, and especially in those having a number of small rivals, entry barriers may be non-existent or at least too low to preclude entry. Admittedly, a demonstrated willingness to indulge in predatory pricing might itself deter some smaller potential entrants, but it is unlikely to inhibit firms with resources comparable to those of the predator.

Complaint counsel argue, nevertheless, that the Division's ability to achieve high profits for Regular Maxwell House despite the decline in demand reveals that brand's market power (CRF's 4–27 and 4–28). The problem with this argument is that I cannot accept Professor Dearden's computations and their comparison with Dr. Mann's benchmark as evidence that Regular Maxwell House's profits were higher than normal. Furthermore, even assuming that Regular Maxwell House's profits were high, there might well be reasons for this other than market power. *See Transamerica, supra,* at 981:

> . . . the inference that a defendant that enjoys healthy profits only does so because of an unhealthy market structure is not a strong one. Good management, superior efficiency and differences in accounting provide explanations that are just as plausible, and none of those explanations is inconsistent with an effective competitive market.

In *Boise Cascade Corp.,* 91 F.T.C. 1 (1978), *rev'd on other grounds,* 637 F.2d 573 (9th Cir. 1980), the Commission stated that: "The persistence of supra-normal profits over some period of time may signal the existence of anticompetitive conduct . . ." but, "Recognizing the uncertainties that are likely to attend the use of profit data as evidence of anticompetitive conduct, and the additional uncertainties as to the particular data introduced in this case" placed little reliance on the data. *Id.* at 97. Similar uncertainties exist in this case (Finding 376).

Thus, it is simply inconceivable, given Procter & Gamble's marketing expertise and its financial resources and Regular [150] Maxwell House's lack of market power, that the Division could succeed in monopolizing the sale of regular coffee in the HFNI sales districts. In fact, Folger is now the number one regular coffee in the United States and has succeeded in reducing Regular Maxwell House's share in the HFNI sales districts (Findings 276–79), and other companies have been able to survive and prosper in the HFNI.[51] *Nifty Foods Corp.* v. *Great Atlantic & Pacific Tea Co.,* 614 F.2d 832, 841 (2d Cir. 1980); *Lektro-Vend Corp.* v. *Vendo Corp.,* 500 F.Supp. 332, 356 (N.D. Ill. 1980); *aff'd,* 1981–2 Trade Cas. (CCH) ¶ 64,258 (7th Cir. 1981); *Dia-*

[51] Complaint counsel state that the success of one company, Chock Full O'Nuts, occurred after the alleged predation in Syracuse (CRLA, p. 11, n. 9), but there is no reason why the success or failure of allegedly predatory tactics must be measured solely during the time such practices supposedly occurred. *See Lektro-Vend, supra,* at 74,087.

mond International Corp. v. *Walterhoefer,* 289 F.Supp. 550, 578 (D. Md. 1968). *See also, Berkey Photo, Inc.* v. *Eastman Kodak Co.,* 603 F.2d 263, 273 n. 11 (2d Cir. 1979), *cert. denied,* 444 U.S. 1093 (1980) (noting that jury could consider significance of decline in market share).

6. Conclusion

Assuming that the Maxwell House Division's HFNI sales districts are relevant geographic markets, its sales of Regular Maxwell House below average variable cost in the Cleveland and Pittsburgh market areas and the Syracuse sales district, and its use of the Horizon brand in that sales district do not reveal specific intent to control prices or destroy competition, nor was its conduct exclusionary or anticompetitive. In view of Regular Maxwell House's lack of the necessary market power, the Division's conduct was, instead, legitimately defensive. Furthermore, the lack of market power, the ease of entry into the sales districts, the declining demand for regular coffee, and the nature of its chief rival for market share in the HFNI sales districts establishes that there was no dangerous probability that the Division could succeed in monopolizing the sale of regular coffee in those districts. In conclusion, General Foods did not, through its Maxwell House Division, attempt to monopolize the sale of regular coffee in the nation, the HFNI or in the HFNI sales districts, nor were its acts "so inherently anticompetitive that they constitute unfair methods of competition" (CLA, p. 142), for they are lawful under Sherman **[151]** Act standards, they do not amount to an incipient violation of the antitrust laws, *FTC* v. *Motion Pictures Advertising Service Co.,* 344 U.S. 392, 394–95 (1953), and they do not violate the "spirit" of any antitrust law or important public policy. *FTC* v. *Sperry & Hutchinson,* 405 U.S. 233, 244 (1972). Therefore, the Section 5 count of the complaint will be dismissed.

C. *General Foods Did Not Violate The Robinson-Patman Act*

1. RECU's Are Not Discounts From List Price

According to complaint counsel, the Robinson-Patman Act price "must include a subtraction for all offers made available to retailers" (CLA, p. 152). *Kapiolani Motors, Ltd.* v. *General Motors Corp.,* 337 F.Supp. 102 (D. Hawaii 1972), one of the cases they cite, defines Robinson-Patman price as "the actual amount paid to the supplier for goods furnished." *Id.* at 104.

This case does not however, support the claim that RECU's are an element of price, for it is clear that RECU's do not affect the price paid by a retailer to the Maxwell House Division, and the Division does not make RECU's "available to retailers." They are, rather, made available to the consumer through retailers, for they differ in no significant way from consumer coupons which complaint counsel agree are not an element of Robinson-Patman price (Findings 447–49).

Thus, I agree with General Foods that the recent decision in *Indian Coffee Corp.* v. *Procter & Gamble Co.,* 482 F.Supp. 1104 (W.D. Pa. 1980) is persuasive here, for even though it dealt with consumer coupons rather than with RECU's, no "principled basis exists" for distinguishing between them (RLA, p. 154).

In *Indian Coffee,* a local coffee producer charged Procter & Gamble with unlawful price discrimination arising from Folger's entry into the HFNI. The court agreed with Procter & Gamble, which argued that consumer coupons were not reductions in price under Section 2(a):

[I]t is clear to us that Folger's consumer coupons reduced the price solely to the ultimate *consumer* and not to Folger's customer, who under § 2(a) are the retailers, since those [152] retailers received absolutely no price concession and served merely as redemption agents for Folger (emphasis in original). *Id.* at 1109.

The Commission's decision in *Fred Meyer, Inc.,* 63 F.T.C. 1 (1963), *rev'd in part and enforced,* 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968), which the court in *Indian Coffee* refused to follow, is, nevertheless, cited by complaint counsel as support for their claim that retailer coupons are price reductions. The decision does so hold, but the facts which led to the Commission's decision are different from those of the present case.

In *Fred Meyer,* respondent, a retailer, had been conducting since the mid 1930's annual coupon book promotion under which it published and sold books to consumers which contained some 72 coupons featuring an article sold by Fred Meyer. Consumers could redeem those coupons and purchase the featured items at a reduced price.

Fred Meyer's suppliers participated in its program by selling to it "at specially reduced prices a quantity of merchandise necessary to cover expected redemption, or by giving free merchandise, and/or by paying respondent a fee of $350." 63 F.T.C. at 12. The Commission held that these redemption payments were price reductions:

The only possible "service" that respondents performed in return for the $4,814 is that they resold the goods at the same 1/3 price reduction that they had received from the supplier. (They actually agreed to do so.) But this "passing on" of the discriminatory lower price is the very worst of the vices involved in price discrimination. . . . Thus, it would be a strange result indeed if we were to hold that a buyer, by passing on to his own customers a price discrimination he has received from his supplier, has merely performed a "promotional service" for that supplier! 63 F.T.C. at 33.

An administrative law judge's decision which was not appealed to the Commission also found that a program similar to General Foods' involved a price reduction. *Purex Corp.,* 51 **[153]** F.T.C. 100, 103 (1954). *See also National Tea Co.,* 46 F.T.C. 829, 833–34 (1950), *order modified,* 47 F.T.C. 1314 (1951).

Despite the language cited by complaint counsel, there are important differences between *Fred Meyer* and this case. Fred Meyer induced payments from its suppliers and set up the ground rules under which they were made, and it is apparent that the Commission viewed the whole arrangement as a sham designed by that company to induce price concessions:

> Where money or something of value is given by a seller to a buyer without even the contemplation of promotional services by the purchaser there has been no payment 'as compensation or in consideration' for such services and Section 2(d) is therefore not applicable. 63 F.T.C. at 33.

The Maxwell House Division's RECU's had a different inception and a different purpose. There is no evidence that any customer induced the Division to develop its RECU program. The Division, rather than its customers, sets the conditions under which it will redeem its RECUs, and the purpose of the Division's coupons, whether they are RECUs or consumer coupons is identical—to promote its coffees, not to give retailers a hidden price concession.

One final fact convinces me that RECU's are not price concessions, and that is their reception by retailers. One would be surprised if Fred Meyer, after arranging its coupon program with suppliers, failed to take full advantage of it, for its purpose was to benefit Fred Meyer. On the other hand, retailers do not always participate in the Division's RECU programs, a convincing demonstration that they do not view them as price reductions (Finding 456). I therefore find that the Maxwell House Division's RECU's are not deductions from the price paid by retailers to the Division and are therefore not cognizable under Section 2(a).[52] **[154]**

2. Performance Allowances Are Not Discounts From List Price

Complaint counsel argue that the Maxwell House Division's performance allowances are price reductions because the performance required is much less than the benefit received by the retailer.

The *Fred Meyer* Guides state:

> Allowances that have little or no relationship to cost or approximate cost of the service provided by the retailer may be considered to be in violation of Section 2(d) or subject

[52] This finding is not inconsistent with my decision in the Section 5 part of these findings that RECU's affect the "economic price" for that price is the revenue received by the Division, and the Division's revenue is reduced to the extent that RECU's or consumer coupons are redeemed by retailers.

to the prohibitions of Section 2(a) of the amended Clayton Act, such as an allowance of $1 per case of goods purchased if the retailer furnishes a display or provides shelf space . . . 16 C.F.R. 240.9 n. 2 (1981).

There is no dispute that the Maxwell House Division requires its customers to perform if they receive promotional allowances (CLA, p. 156), and the case which gave rise to the Guides emphasized that because this element was lacking, the allowances in question were price reductions. *Fred Meyer, supra,* 63 F.T.C. at 33.

Complaint counsel argue nevertheless that the Division's promotional allowances should be treated here as offering discounts from its list prices because the Division's customers retain much more of the allowance than they spend in performance.

While General Foods argues that complaint counsel have not met the burden imposed on them by the *Fred Meyer* Guides (RLA, p. 160), I am willing to concede that many retailers receive a substantial benefit from the monies which are left after their cost of performance is deducted from the allowances they receive. I also concede that some authorities have chosen to view allowances similar to the Division's as price reductions. *See Continental Baking Co.* v. *Utah Pie Co.,* 349 F.2d 122, 130 **[155]** (10th Cir. 1965), *rev'd on other grounds,* 386 U.S. 685 (1967); *Borden, Inc.,* 92 F.T.C. 669, 797 (1978).[53]

Despite the cases cited above, I believe that the Division's promotional allowances should not be treated as price concessions, but as Section 2(d) payments. I agree that promotional allowances which are "promotional" in name only should be treated as price concessions. One must not forget that the Commission in *Fred Meyer* held that Section 2(d) was not applicable because the payments were made "without even the contemplation of promotional services by the purchaser" 63 F.T.C. at 33, and it is with this in mind that one must read the subsequent *Fred Meyer* Guides.

Thus, Rule 9, footnote 2 of the Guides was designed to eliminate from serious consideration as Section 2(d) allowances those programs which required trivial performance—*i.e.,* programs which are not truly promotional. The Division's advertising allowances were designed to promote the resale of its products (see *Rickles* and *Kirby, infra*),[54] not to give hidden price concessions to its customers.

[53] On the other hand, since *Borden* was not a Robinson-Patman case, its precedential effect is questionable.

[54] Compare the Maxwell House Division's "buying allowances" where the only performance required is the purchase of coffee. This is clearly a price concession under the *Fred Meyer* rationale.

3. Treating RECU's And Performance Offers As Discounts From List Price Would Subject Manufacturers To Unwarranted Liability For Price Discrimination

Assuming that the Maxwell House Division offers its RECU's and performance allowances to all competing customers on proportionally equal terms, *Fred Meyer* Guides, 16 C.F.R. 240.7 (1981), treating them as discounts from list price could result in liability for secondary line injury, for customers who did not choose to participate in these offers would be paying a higher "price" than those who did (RLA, p. 164). This suggests, contrary to complaint counsel's argument, that a true advertising allowance should not be subject to scrutiny under Section 2(a). *See Rickles, Inc.* v. *Frances Denney Corp.*, 508 F.Supp. 4 (D. Mass. 1980), in which the court dismissed allegations that promotional payments and services were Section **[156]** 2(a) price reductions because the payments were provided in connection with projected resale of the product: "The alleged discriminations in this case properly are subsumed exclusively under Sections 2(d) and 2(e), rather than Section 2(a)." *Id.* at 6.

In *Kirby* v. *P.R. Mallory & Co., Inc.*, 489 F.2d 904 (7th Cir. 1973), *cert. denied,* 417 U.S. 911 (1974), the court rejected the position now being advocated by complaint counsel, stating that the "theory that Sections 2(d) and 2(e) proscribe acts which are themselves prohibited by Section 2(a) is not supported by either the legislative history or scheme of the [Clayton] Act." *Id.* at 910.

In holding that promotional allowances covered by Section 2(d) were not elements of price for purposes of Section 2(a) price discrimination, the court focused on the different statutory standards governing price discrimination and promotional discrimination, and the fact that the payments and services under consideration were provided in connection with "projected resales":

> Congress . . . imposed stricter standards of legality respecting promotional discriminations than price discriminations. Price discrimination is lawful if it can be justified under several exculpatory provisos or has no effect on competition. In contrast, promotional discrimination is illegal per se, irrespective of competitive impact and without resort to statutory justification. *Id.* at 910.

The court went on:

> [Plaintiff's] argument would have us collapse the distinction in schemes and standards and would have us find that the two sections are mere surplusage. This we decline to do. In view of the strict standards of §§ 2(d) and 2(e), which focus on resale, it appears quite clear that Congress carefully considered the deficiency in the original law proscribing price discrimination in the supplier-customer sale and drafted §§ 2(d) and 2(e)

to apply exclusively to promotional discriminations like [157] those alleged in this case. *Id.* at 910–11.

Complaint counsel argue that neither *Rickles* nor *Kirby* are controlling here since they are secondary line cases (CRLA, p. 36, n. 33), but I know of no authority for the proposition that, or any logical reason why, "price" should be defined differently in primary and secondary line cases. The court in *Indian Coffee,* agrees. 482 F.Supp. at 1109, n. 11.

Finally, treating reductions in the producer's revenue (such as are caused by RECU redemptions) as price discounts is not dissimilar to the old "mill net" theory.[55] While I have accepted "mill net", or revenue received by the seller, as a price which can be used to analyze the Section 5 charge, this definition of price is no longer acceptable in Robinson-Patman cases. *See National Lead Co.,* 49 F.T.C. 791 (1953):

> . . . the amended complaint, in Count II, alleges that each of the respondents discriminates in the price of its lead pigments as between different purchasers, in violation of section 2(a) of the amended Clayton Act. Certain of the discriminations, it is alleged, occur as a result of the use of the zone method of pricing and selling to competing customers in the same zone. As stated in the conclusion appended to the findings, the Commission is of the opinion that on this phase of the case the complaint fails to state a cause of action. This is because the allegations are that each of the respondents sells its products in accordance with a delivered pricing system, but the alleged discriminations [158] occur as a result of differing net prices received by each of the respondents at its factory. Thus, the complaint does not show that the alleged unlawful discriminations as between purchasers located in the same zone occur as the result of differences in actual prices at which the respondents' products are sold. *Id.* at 881–82.

More recently, in *Kapiolani,* it was argued that Section 2(a) price should be defined as "the amount the seller actually and ultimately receives from the sale, *i.e.,* net receipts rather than money initially paid out by the buyer for the product." 337 F.Supp. at 104. The court rejected this argument, holding that there is no authority to support a "net receipts" approach to Section 2(a). According to the court, price under Section 2(a) means "the actual amount paid to the supplier for the goods furnished." 337 F.Supp. at 104, *citing Corn Products Refining Co.* v. *FTC,* 324 U.S. 726 (1945). And in *Robbins Flooring, Inc.* v. *Federal Floors, Inc.,* 445 F.Supp. 4 (E.D. pa. 1977), the court defined price for purposes of Section 2(a) as "the amount actually paid or laid out for goods by the buyer." *Id.* at 8.

Since neither RECU's nor performance allowances are elements of Section 2(a) price, complaint counsel have not proved that General Foods has, through its Maxwell House Division, discriminated in

[55] Complaint counsel argue that they are not espousing a return to the "mill net" theory since they do not deduct transportation costs (CLA p. 161, n. 570), but their proposed findings on the Section 5 price emphasize that RECU's reduce the Division's revenue: "General Foods sponsors the coupons, absorbing the financial loss" (CPF 3–206). "General Foods, the seller, thus experiences a reduction in the price it receives" (CPF 3–226).

price in the sale of its regular coffee and the Section 2(a) count will be dismissed.

4. Assuming That General Foods Discriminated In Price, It Has Not Established That It Was Meeting Folger's Competition In Good Faith

If complaint counsel's price definition is accepted, the Maxwell House Division's response to Folger's entry injured some of its smaller competitors in Cleveland, Pittsburgh and Syracuse (Findings 255–73), and I do not believe that General Foods could successfully meet its burden of proving that the prices it charged in those cities were offered in good faith to meet the equally low prices of Folger's.

The Division's overall approach to Folger's entry was not to aggress and I believe that it intended not to beat Folger's competition. However, General Foods has a greater burden than **[159]** proving intent; it must satisfy me with reasonable accuracy that its intentions were carried out, and Mr. MacDonald's reconstruction does not provide that kind of proof, for he did not have personal knowledge of each transaction he charted, and much of his reconstruction was based upon unproven assumptions, such as the times of deal announcements (Findings 500–05). *See Corn Products Refining Co.* v. *FTC,* 324 U.S. 726 (1945):

> The only evidence said to rebut the prima facie case made by proof of the price discriminations was given by witnesses who had no personal knowledge of the transactions, and was limited to statements of each witness' assumption or conclusion that the price discriminations were justified by competition. *Id.* at 741.

IV. Summary

A. General Foods, through its Maxwell House Division, has sold and is selling regular coffee in interstate commerce and the Commission has jurisdiction over the acts and practices of General Foods which are challenged in the complaint.

B. The relevant market for the production and sale of regular coffee by roasters to wholesalers and retailers is nationwide.

C. General Foods has not, through its Maxwell House Division, attempted to monopolize the production and sale of regular coffee in the relevant market, the HFNI, or in any of its market areas or sales districts, nor has it engaged in any other unfair methods of competition in those areas.

D. The Maxwell House Division's RECUs and performance allowances are not elements of Robinson-Patman price and General Foods has not, through the Division, sold regular coffee to purchasers at different cognizable prices. **[160]**

V. Order

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

Opinion of the Commission

By Miller, *Chairman:*

I. Introduction

General Foods Corporation ("General Foods") was charged with violations of Section 5 of the Federal Trade Commission Act[1] and Section 2(a) of the Robinson-Patman Act[2] in connection with the marketing of Regular Maxwell House Coffee. The complaint alleged that General Foods—by selling its regular ground coffee below cost or at unreasonably low prices, by engaging in excessive promotional activities, by using a "fighting brand" to impede entry, and by discriminating geographically in prices and promotions—monopolized or attempted to monopolize the sale of regular ground coffee in a national market and in several regional submarkets.

After almost two years of hearings, Administrative Law Judge Lewis F. Parker dismissed the complaint. He concluded that complaint counsel had failed to establish the existence of any submarkets smaller than the United States as a whole. On the national level, and even in the proposed submarkets, he determined that General Foods' market share was too small to admit of a reasonable probability of successful monopolization. He found nothing inherently anticompetitive about a company lacking market power pricing below average variable cost or using a so-called fighting brand in response to competition. The ALJ also rejected the Robinson-Patman Act price discrimination [2] charge, finding that the coupons and performance allowances, which formed its basis, were not elements of price.

Complaint counsel appeal the initial decision on essentially three grounds. First, they urge that the ALJ erred in concluding that the evidence on interregional price variations failed to establish the existence of relevant regional submarkets in which respondent held market power. Second, they contend that sustained sales below average variable cost and selected use of a "fighting brand" to deter local entry and preserve profitability constitute at least unfair methods of competition, if not attempted monopolization. Finally, they argue that certain coupons and performance offers should be calculated as price differences under Section 2(a) of the Robinson-Patman Act.

[1] 15 U.S.C. 45.

[2] 15 U.S.C. 13a.

For the reasons discussed below, we reject these arguments and affirm the Initial Decision.

II. The Regular Ground Coffee Industry

A. *The Product*

The parties stipulated the relevant product market to be all regular ground coffee packaged for sale at retail, including caffeinated, decaffeinated and extended ground coffee products. This definition excludes instant coffees and institutional sales (those to offices and hospitals, for example), as well as tea and other possible coffee substitutes. [3]

B. *The Major Sources of Supply*

1. General Foods - Maxwell House

General Foods is one of the leading manufacturers of processed foods, with over 30 major brand names in distribution.[3] (IDF 1.) For many years General Foods' Maxwell House Division has been the leading seller of regular ground coffee in the United States, marketing it under the Regular Maxwell House (RMH), Yuban, Sanka, Brim, Max-Pax and Mellow Roast labels. In the most recent twelve-month reporting period in the record, fiscal 1980, the Maxwell House Division accounted for almost 32 percent of national ground coffee sales. Its Regular Maxwell House brand accounted for 22 percent of national sales, drawing most of its strength from the eastern United States. (RX 1279–80).

2. Procter & Gamble - Folger's

The Procter & Gamble Company became the nation's second largest seller of regular ground coffee with its purchase of The Folger Coffee Company in 1963. The Folger's brand was then the best selling coffee in the West, but had limited sales east of states bordering the Mississippi River. (RX 1106.) By fiscal 1980, Folger's had expanded throughout the East and had surpassed RMH to become the leading national brand with 26 percent of [4] sales. (RX 1279–80.) Procter & Gamble also sells a decaffeinated coffee under the High Point label. (IDF 10.)

[3] The following abbreviations are used in this opinion:

ID	-	Initial Decision Page Number
IDF	-	Initial Decision Finding Number
Tr.	-	Transcript of Testimony Page Number
CX	-	Complaint Counsel's Exhibit Number
RX	-	Respondents' Exhibit Number
CAB	-	Complaint Counsel's Appeal Brief Page Number

3. Copersucar - Hills Bros.

The Copersucar Company is a Brazilian conglomerate that owns the Hills Bros. Company. (IDF 10.) At the close of the record, Hills Bros. coffee was sold in all but the southeastern portions of the nation and accounted for approximately 7 percent of national ground coffee sales. (RX 1117.)

4. Miscellaneous Suppliers

The remaining roughly 35 percent of national sales went to regional roasters' brands and the stores' "private label" brands. (RX 1107.) Among the major regional brands in the East are Savarin, Chock Full O'Nuts (CFON), and Chase & Sanborn (owned by Nabisco Brands, formerly Standard Brands). (IDF 10 and 12; CX 1072.) The private labels, also called "chains-own-brands" (COB) or "controlled group," include Kroger's, Safeway and A&P, among others, and have been more successful in the eastern United States than elsewhere. (Compare Tables 1 and 2 below.) Table 1 presents a year-by-year tabulation of national market shares by brand since 1971. [5]

Table 1
Market Shares of the Leading Brands of Regular Ground Coffee in the United States: Fiscal Years 1971 to 1981°

	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981+
Total General Foods	29.8	31.2	33.6	34.4	35.1	33.4	32.8	33.3	31.1	31.5	31.9
(Regular Maxwell House)	(24.0)	(24.0)	(24.4)	(24.7)	(25.2)	(23.9)	(24.3)	(24.2)	(22.0)	(22.1)	(21.9)
Folger's	19.1	20.3	21.3	22.4	22.9	22.6	21.6	21.4	26.9	26.2	25.1
Hills Bros.	10.2	9.1	8.0	7.8	8.0	7.4	7.7	6.9	6.7	6.7+	NA
Chase & Sanborn	5.1	5.0	4.7	4.1	4.1	3.2	2.3	NA	NA	NA	NA
Chock Full O' Nuts	6.3	6.2	6.0	6.2	6.4	7.2	6.2	NA	NA	NA	NA
Savarin	1.3	1.3	1.2	1.3	1.1	1.3	1.2	NA	NA	NA	NA
Store Brands	14.0	12.4[1]	11.8[2]	11.7	11.0	13.3	17.2	16.9	14.9	14.9	NA [6]

Source: 1971—CX1072A; 1972-1977—CX1072 B-G, and RX 1279-80; and 1980-81—RX 1107A and 1117, 1279-80. Data for Chock Full O'Nuts are taken from the entry in CX 1072A-F for "Closed Group." (*See* CPF 11-13).

° A fiscal year begins in April of the previous calendar year—e.g. fiscal 1971 runs from April 1970 to March 1971.

+ Data are for first seven months of the fiscal year.

1 13.0 according to RX 1107A.

2 12.5 according to RX 1107A.

C. *Competition in the Regular Ground Coffee Industry, 1971–1980*

The events giving rise to this case began with Procter & Gamble's campaign to bring Folger's into the Maxwell House eastern sales area—that portion of the nation roughly east of a line extending from the Illinois/Indiana border on the north to the Mississippi/Alabama border on the south. (IDF 34; CX 1077A.) Procter & Gamble chose Cleveland for its first test in October 1971.[4] Cleveland, where RMH held nearly 45 percent of sales, was one of Maxwell House's most successful markets. (IDF 150, 235.) Procter & Gamble's goal was a sustainable share of 20 percent by the end of the year. (CX 493B & C.)

Folger's employed a marketing mix of media advertising, incentives for retailers' promotions, consumer coupons, assorted in-pack gifts, and home-delivered free samples to introduce its coffee to Cleveland consumers. (Zurcher, Tr. 6226–7; CX 491–499, 528A.) Maxwell House responded with 50 cent mailed coupons to combat Folger's 35 cent coupon, and in-pack coupons beating Folger's inserts by 4 cents to 10 cents per can. Maxwell House [7] also increased its promotional incentives for retailers, but stopped short of giving away samples. (*See* IDF 175.)

In its first year Folger's garnered 15 percent of Cleveland sales, while RMH grew by five share points to 50 percent. (RX 1111–12.) By early 1973 Procter & Gamble detected that General Foods' defensive efforts in Cleveland had subsided, but found that aggressive discounting by Hills Bros. was limiting further gains. Once again, Procter & Gamble increased its consumer coupon activities, began to "compete directly with Hills for [grocers'] feature support," and, as a result, increased its Cleveland share to 18 percent for the last six months of 1973, displacing Hills as the second leading brand. (CX 528B.)

In the Spring of 1972, executives in the Maxwell House Division concluded that Folger's was "disturbingly successful" in Cleveland, and that similar successes could easily recur throughout the East. (IDF 149–155; CX 122.) The Maxwell House division sought authority from General Foods to mount a strong defense to Folger's eastern expansion. According to Maxwell House a so-called "defend now" strategy—immediate discounts, coupons and promotional allowances in each test area—could limit Folger's share in the East to 10 percent, while increasing RMH's market share from 39 to 42 percent. Otherwise, Maxwell House predicted Folger's would ultimately gain 20

[4] Folger had entered some eastern areas prior to its purchase by Procter & Gamble. (CX 11Z–28.) The brand held substantial shares of Cincinnati, Indianapolis and Jacksonville. Procter & Gamble's delay in resuming Folger's eastern expansion was partly the result of a Commission investigation begun shortly after Procter & Gamble purchased The Folger Coffee Company in 1963 and 1967 consent decree which forbade Procter & Gamble from any promotional price discrimination for a five year period. (*See* CX 570D; RX 1106, and *Procter & Gamble Company,* 71 F.T.C. 135, 147 (1967).) Until 1974 Folger avoided the Baltimore/Washington area out of concern for possible Commission responses. (CX 522, 507C; Hunter, Tr. 3085–6.)

percent of the entire eastern region and RMH would decline by 9 share points. (IDF 157, 165; CX 130C.) General Foods concurred in the strategy with two restrictions: sales of RMH were not to fall below reasonably anticipated variable costs, and consumer [8] promotions were not to exceed Folger's levels. (IDF 163–64, 166, 173.)

In February 1973, 16 months after Folger's Cleveland entry, Procter & Gamble introduced Folger's into Philadelphia.[5] One month later Folger's came to Pittsburgh. In both cases Procter & Gamble emphasized free samples to consumers and discounts to retailers. (IDF 181–85.) The Maxwell House Division responded again with advertising coupons and promotional allowances, matching some, but not all, of Folger's discounts to retailers. (IDF 183.)

Maxwell House also introduced its Horizon brand, which had been developed to appeal to consumers preferring a "milder" blend such as Folger's, into a portion of the Philadelphia district. It was packaged in a can resembling Folger's (CX 109F–H, 115B, 120A.), but failed to have a significant impact. (CX 541B.)

In April 1974, Procter & Gamble noted that two and one-half years after Folger's introduction into Cleveland and just over a year following its Philadelphia and Pittsburgh introductions the brand was "a solid number 2" in each area, but below objectives in the latter areas and "only now approaching the going 20 percent share objective in Cleveland." (CX 528A.) Folger's had [9] gained 9 percent of sales in Philadelphia and 11 percent of sales in Pittsburgh.[6] (CX 651G; RX 1113.)

For its entry into the Syracuse district in the fall of 1974 Folger switched from free samples to retailer discounts and promotional incentives (such as those used by Maxwell House). (CX 538A, B.) Its retailer discounts ranged from four to five times the traditional allowances. Maxwell House did not match Folger's trade deals, and soon discovered the consequences. Retailers offered Folger's at a lower price than RMH. In less than a year RMH dropped from 41.5 percent to 30 percent of area sales, while Folger's captured 27 percent. (IDF 191, 198; RX 1114A.) Not until Maxwell House decided to meet Folger's discounts "dollar for dollar" did RMH sales begin to recover. (IDF 199; CX 1072F.) Nevertheless Folger's was able to maintain

[5] A Brazilian frost in July 1972 was an "overruding [sic] preemptive condition" regarding Folger's decision not to go ahead with a simultaneous expansion ("roll out") of the remaining eastern area at that time. (Hunter, Tr. 3103.)

[6] Procter & Gamble attributed Folger's shortfall in Pennsylvania to several factors. The brand had struggled for the first nine months in Philadelphia, as local retailers sold the coffee as a premium price brand. (CX 521B.) Likewise, Folger's suffered from weak efforts by Pittsburgh retailers to feature the brand in sales. (CX 528B.) In both areas Folger perceived an "unprecedented level of Maxwell House defensive activity," in terms of media advertising and consumer coupons. (CX 528A.) There was also increased competition from local roasters and the store brands. (CX 105D,E.) Finally, both Maxwell House and Folger independently concluded that Folger's sales had suffered from inadequate emphasis on retailer promotions, and repeat-purchase incentives. (CX 105D, 535E, 540D–F.)

roughly 20 percent of the Syracuse area's sales throughout the latter 1970's. (RX 1279.)

In addition to Folger's new sales strategy, Procter & Gamble attributed its "very strong Syracuse progress" to a "less intense [10] Maxwell House defensive activity." (Hunter, Tr. 3075–77; CX 541A–B.) A November 1975 Folger memo concluded:

> We think it is realistic to anticipate similar restrained defensive activity in the remaining northeastern expansion area. We will no longer be testing, so there will be no motivation to cloud our test results and discourage our expansion. Further, Maxwell House will be under considerable economic pressure from the breadth of our introduction into its high share territory. (CX 541B.)

However, Folger's expansion plans into the remainder of the East were suspended when crop damage from a winter freeze in Brazil increased costs and created an unstable pricing environment. (Hunter Tr. 3078; CX 538B.) Folger's "roll out" was begun in October 1977, being completed in February of 1978. (RX 1107B.) The results are displayed in Table 2. [11]

Table 2
Market Shares of the Leading Brands of Regular Ground Coffee in the Maxwell House Eastern Sales Area: Fiscal Years 1971 to 1981

	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981 +
Total General Foods	42.8	43.9	47.6	48.9	49.3	46.4	43.7	44.8	41.4	40.0	39.9
(Regular Maxwell House)	(38.1)	(38.5)	(38.9)	(39.5)	(39.8)	(37.4)	(36.1)	(36.4)	(33.6)	(32.5)	(31.9)
Folger's	5.4	5.8	6.7	8.3	9.3	9.9	10.3	10.7	16.2	17.4	15.9
Hills Bros.	8.6	7.9	6.8	5.7	6.6	6.0	5.9	NA	NA	NA	NA
Chase & Sanborn	9.1	8.6	8.1	6.6	6.7	5.3	3.9	NA	NA	NA	NA
Chock Full O' Nuts	3.4	3.7	3.6	3.9	5.1	5.3	4.1	NA	NA	NA	NA
Savarin	2.6	2.6	2.3	2.4	2.1	2.6	2.4	NA	NA	NA	NA
Store Brands	16.4	14.9	13.5	12.6	12.5	15.3	21.3	NA	NA	NA	NA

[12]

Source: 1971—CX1072A; 1972-1977—CX1072 B-G, and RX 1279-80; and 1980-81—RX 1107A and 1117, 1279-80. Data for Chock Full O' Nuts are taken from the entry in CX 1072A-F for "Closed Group." (*See* CPF 11-13).

+ Data are for first seven months.

By fiscal 1980 Folger's accounted for just over 17 percent of sales in the Maxwell House eastern sales area and had become the nation's best-selling brand. (*See* Table 1.) Folger's share of sales in the eight Maxwell House sales districts it entered since October 1971, ranged from just under 12 percent in New York City to just under 22 percent in Syracuse. (RX 1279.) Meanwhile RMH's share of its total eastern area fell from 38 percent in fiscal 1971 to 32.5 percent by fiscal 1980. All General Foods' coffees combined fell from 43 to 40 percent of sales.

D. *The ALJ's Findings*

The ALJ found that following Folger's introduction into Cleveland, RMH was sold there below average variable cost[7] for 4 of 12 consecutive quarters, dropping below unit cost by 1.4 cents per pound (1.6 percent of price) from October 1973 to September 1974. (IDF 384.)

Following Folger's introduction into Pittsburgh, the ALJ concluded, RMH prices dropped below average variable cost for 7 of 8 consecutive quarters, by 7.1 cents per pound (in effect, 9.5 percent of price) from April 1973 to March 1974 and by 2.4 cents [13] per pound (2.7 percent of price) from April 1974 to March 1975. (IDF 385.)

For Maxwell House's entire Youngstown sales district, which contains Cleveland and Pittsburgh, the ALJ found that RMH was sold at a price 2.7 cents per pound (3.5 percent) below average variable cost from April 1973 to March 1974. (IDF 385.) And he found that following Folger's introduction into Syracuse RMH was sold below average variable cost for 7 of 9 consecutive quarters, by 4.3 cents per pound (5.2 percent of price) from October 1974 to September 1975 and by 3.1 cents per pound (2.4 percent of price) from October 1975 to September 1976. (IDF 386; CX 1389.) However, the ALJ found that Maxwell House generally failed to match the levels of Folger's discounts and promotions in each of the areas where RMH was priced below cost. (IDF 175–201.)

The ALJ also found that Maxwell House employed its Horizon brand as a "fighting brand" in Philadelphia and Syracuse. He found that Horizon was introduced, at prices far below average variable cost, solely for the purpose of disrupting Folger's introductory efforts. (IDF 424 to 427.)

The ALJ, nonetheless, found the evidence of below-cost sales insufficient to support liability for an antitrust violation. Maxwell House's pricing in Cleveland, Pittsburgh, and Syracuse could not have been

The ALJ adopted complaint counsel's method of computing the relevant revenues and costs. Specifically, he puted net revenue as gross revenue less cash discounts and all product promotions to retailers as well as sumers; he computed variable cost as the sum of the costs of materials (valued at current prices), labor, sportation, warehousing and media advertising, which he expensed in the period incurred; he computed fixed as the sum of the costs of selling, plant depreciation, administration and central corporate overhead. (IDF 147, 379–413, 415.) For the reasons discussed in Section III.C. *infra*, we cannot accept the judge's findings of w-cost sales in these areas.

predatory, he found, since Maxwell House had no prospect of driving the experienced and financially strong Folger's out of these areas during the periods of below-cost pricing, and could not block the entry of others during any subsequent periods of recouping profits. (IDF 440.) He [14] concluded that despite Maxwell House's below-cost pricing there was no evidence of intent to monopolize, exclusionary behavior, or a dangerous probability of successful monopolization. (ID at 150.)

III. The Elements of an Attempted Monopolization Offense

A. *Introduction*

The issue raised on appeal under the Sherman Act is whether Maxwell House is guilty of attempting to monopolize interstate trade or commerce.[8] The nature of the charged violations requires us to determine which occurred—rivalry that benefited consumers, or conduct that threatened competition.

Making the distinction necessitates a careful examination of the facts. To err in either direction—either by permitting anticompetitive conduct or by chilling the rivalry that is the essence of dynamic competition—would be to stifle the very competition the antitrust laws are intended to foster.

The Commission recently set out the legal elements of an attempted monopolization offense in *E.I. DuPont De Nemours & Co.,* 96 F.T.C. 653, 725 (1980). Finding the courts to be virtually unanimous on the issue, the Commission has held that a violation consists of three elements:

(1) specific intent to control prices or destroy competition;
(2) exclusionary or anticompetitive conduct; and [15]
(3) a dangerous probability of success.[9]

We consider each in turn, then proceed to an analysis of the facts of this case.

B. *The Intent Element*

To be liable for attempted monopolization, an offender must be shown to possess specific intent to achieve monopoly power by predatory means.[10] As the Commission made clear in *DuPont,* this element is not satisfied by ambitious and aggressive plans to compete, even with the goal of taking business from competitors or vanquishing

[8] The monopolization charge was abandoned on appeal.

[9] 96 F.T.C. at 725. The Ninth Circuit, which, the Commission noted, had appeared to depart from the requirement of a dangerous probability of success, has reiterated the necessity of the third element of the attempt offense. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.* 668 F.2d 1014 (9th Cir. 1981), *cert. denied,* S.Ct. 58 (1982).

[10] *Times Picayenne Publishing Co. v. United States,* 345 U.S. 594, 626–27 (1953).

troublesome rival.[11] The antitrust laws provide no protection from such designs, where the means to effectuate them amount to no more than vigorous competition.

> Direct evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation.[12] [16]
>
> To conclude otherwise would contravene the very essence of the competitive marketplace which is to prevail against all competitors.[13]

Thus, inherent in the concept of intent is the need to consider the means used to achieve the goals. Moreover, the ambiguities associated with motives, combined with the difficulties inherent in proving subjective state of mind, have further limited the independent significance of the intent element.[14] The Commission has, accordingly, narrowly circumscribed the context within which intent may be considered:

> Intent is a barren issue without consideration of the means contemplated for acquiring monopoly power.[15]

Thus, while essential to a finding of attempted monopolization, the element of intent inevitably entails the element of conduct. **[17]**

C. *The Conduct Element*

The issue in cases of attempted monopolization that has drawn by far the most attention from adjudicators and commentators is the boundary between permissible aggressive competition and anticompetitive predatory conduct.[16]

While there may be reasonably obvious cases of objectionable means toward monopoly—enforcing a patent fraudulently obtained, 'or example—most such activities present a difficult task of line drawng. Aggressive pricing is just such an activity.

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11 *E.I. DuPont DeNemours & Co.*, 96 F.T.C. 653, 726–7 (1980).

12 *William Inglis & Sons v. ITT Continental Baking Co.*, 668 F.2d 1014, 1028 (9th Cir. 1981), *cert. denied*, 103 Ct. 58 (1982).

13 *Id.* at 1028, n.7 (quoting *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 670 (9th Cir. 1980).) *Accord*, *ayes v. Solomon*, 597 F.2d 958, 977 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980) (threats to compete, and to ve out of business if necessary in the absence of unfair, anticompetitive or predatory conduct, is not enough .); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 273 (7th Cir. 1981) ("We agree with the Fifth Circuit's irmation in *Hayes* v. Solomon [just quoted] . . ."); *Agreshell, Inc. v. Hammons Products Co.* 479 F.2d 269, 285 ı Cir.), *cert. denied*, 414 U.S. 1022 (1973) (Court attaches little significance to defendants' assertion that plaintiff d no right" in a market that defendant claimed as "my domain").

MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1113 n.41 (7th Cir. 1982), *cert. denied*, *erican Tel. & Tel. Co. v. MCI Communications Corp.*, 104 S.Ct. 234 (1983) (Blaming excessive reliance on the ent for burdening litigation and encouraging inconsistent results.)

E.I. DuPont DeNemours, & Co., 96 F.T.C. 653, 727.

Id. at 726–38.

Predatory pricing has long been condemned by the courts,[17] while at the same time its anticompetitive potential has been questioned by economists.[18] More recently, debate over the issue has centered around a rule proposed by Professors Areeda and Turner, who advocate that predation be conclusively presumed when a monopolist's price falls below "reasonably anticipated" average **[18]** variable cost.[19] Conversely, their argument holds that a price at or above that level would prove lack of predatory pricing.

Areeda and Turner reason that no manager trying to maximize the net worth of a firm would voluntarily incur those costs that could be avoided by halting production unless the sacrifice generated future profits above the competitive norm. Simple economic models of the firm suggest that the most likely explanation for such behavior is the expectation that setting price below average variable cost will eliminate enough competition to allow supra-competitive pricing later.[20]

In a dynamic setting, however, where competition involves more than the selection of one product's price and quantity for the current period, both the measurement and meaning of price-**[19]**cost comparisons can be far more difficult to interpret. An obvious problem is the allocation of joint costs among different products in the multi-product firm.[21] Where a firm produces several brands of a product from the same plants, with the same workers and with some of the same raw materials, the precise allocation among brands of even the variable production costs can be arbitrary.[22] Similar difficulties attend the

[17] A classic treatment of predatory pricing is contained in *Standard Oil Co. of N.J. v. United States,* 221 U.S. 1 (1911).

[18] *See, e.g.,* McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case,* 1 J. Law & Econ. 137 (1958).

[19] Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act,* 88 Harv. L. Rev. 697 (1975). Among the other significant contributions to the commentary, are Posner, *Antitrust Law* 184–96 (1976); R. Bork, *The Antitrust Paradox* 144–60 (1978); the collected articles in *Strategic Predation and Antitrust Analysis* (S. Salop ed. 1981); Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy,* 89 Yale L.J. 213 (1979); and McGee, *Predatory Pricing Revisited,* 23 J.L. & Econ. 289 (1980). Calvani and Lynch summarize literature that has become too voluminous to described here. *See* Calvani and Lynch, *Predatory Pricing Under the Robinson Patman and Sherman Acts: an Introduction,* 51 Antitrust L.J. 375 (1982).

[20] While Areeda & Turner speak in their treatise of a monopolist's pricing practices, they also think their rule relevant to attempted monopolization:

> Predatory pricing is a particularly good example, for such pricing is itself proof that the firm, if not already possessing a degree of market power, anticipates obtaining it. Otherwise it would not be able to recoup its losses by monopoly profits earned after the target firms are extinguished. III *Antitrust Law* at 353.

[21] As the Ninth Circuit stated in *TransAmerica Computer Co., Inc. v. IBM Corp.,* 698 F.2d 1377, 1387 (1983):

> The uncertainty and imprecision inherent in determining "costs" counsel against basing conclusive presumptions on the relation between prices and costs. Assessing those relations for the products of a multi-product firm requires allocating known and estimated costs and revenues among various products. While accounting problems do not warrant ignoring cost figures completely, they do make it unwise to rely exclusively on such figures.

See also, George J. Benston, *Accounting Numbers and Economic Values,* The Antitrust Bulletin (Spring 1982), pp 161–215.

[22] The difficulty in allocating respondent's marketing outlays is perhaps best evidenced by a close correlation between sales of instant and regular ground coffee for both Folger and Maxwell House—which means that promotion of one type of coffee can generate revenues for others. (CX 640M.)

allocation of costs and revenues related to advertising and promotion that span different geographic areas.

Even more difficult is the challenge we face in this case: the allocation of costs attributable to and revenues derived from advertising and promotion over time. Promotional outlays or reduced prices that cause current accounting losses may represent an investment in long-lived information and goodwill that will [20] pay off with enhanced future revenues.[23] If so, the investment component should be amortized over the life cycle for which respondent expected it to endure.[24]

Given the correct measurement of costs and prices, it is possible to find that pricing below average variable cost presents no threat to competition. Substantial discounting or giving away samples may be the most efficient way for a new firm to establish goodwill that might sustain greater sales in the future. Such reductions might also be justified where it is less costly for existing firms to incur current losses than to close and later reopen.[25] These are examples of a general proposition that is already well accepted. As even Areeda recognizes:

> If the market prerequisites for antisocial predation are absent, then prices below cost—however defined—would be serving a different and presumably competitive function.[26] [21]

In short, "price" below "cost"—especially as "price" and "cost" are conventionally estimated—can be an ambiguous signal.

The limitations of the Areeda & Turner rule have not escaped the attention of the courts, where it has gained but qualified acceptance.[27] Judges have recognized the advantage of the rule as providing a more objectively measurable standard to guide pricing decisions than the traditional standards of "unreasonably low," "below cost," or "ruinous competition" that have been employed in the past.[28] However, the trend in court decisions is drawing away from relying on price/cost comparisons as conclusive. Prices above average variable costs raise a strong, often conclusive, presumption of legality. Conversely, prices

[23] *See* Nagle, *Do Advertising-Profitability Studies Really Show that Advertising Creates a Barrier to Entry?* 24 J. Law. Econ. 333 (1981).

[24] The ALJ, in computing General Foods' revenues and costs, treated all such promotional incentives as straight price reductions, without recognizing any investment value. Likewise, he expensed all outlays for advertising in the period incurred and made no assessment of their long-lived effects on consumer goodwill. The record does not support that approach. (IDF 379 to 387; *see* note 52 below.)

[25] Areeda, *1982 Supplement to Antitrust Law* 120–21, 150–2 (1982). Costs of reentry can include investments in goodwill as well as investments in plant and equipment: each can result in several periods of losses before yielding compensating revenues.

[26] *Id.* at 149–50.

[27] *See, e.g., O. Hommel Co. v. Ferro Corp.* 659 F.2d 340 (3d Cir. 1981), *cert. denied,* 102 S.Ct. 1711 (1982) (inclined to accept the basic premise); *Northeastern Telephone v. AT&T,* 651 F.2d 76 (2d Cir. 1981), *cert. denied,* 102 S.Ct. 1438 (1982) (adopting marginal costs); *William Inglis & Sons v. ITT Continental Baking Co.,* 668 F.2d 1014 (9th Cir. 1981), *cert. denied,* 103 S.Ct. 58 (1982) (price-cost relationships raise presumptions of legality or illegality).

[28] *See e.g., MCI Communications v. American Tel. and Tel. Co.* 708 F.2d 1081, 1113 (7th Cir. 1981), *cert. denied, American Tel. & Tel. Co. v. MCI Communications Corp.,* 104 S.Ct. 234 (1983).

below average variable costs can raise a presumption of predation, but that presumption is rebuttable.[29]

Thus, the courts are leaving one principle undisturbed: low prices alone, including prices below some measures of variable [22] cost, do not by themselves mean the seller has violated the antitrust laws.

D. *The Dangerous Probability Element*

The third element of the attempted monopolization offense is the dangerous probability of success. However objectionable the intent or conduct may be, there must also exist a dangerous probability that the defendant will achieve the power to control price or exclude competition in the alleged market(s).[30] The courts have attempted to quantify the probability of success by measuring the market share of the alleged offender. Market shares in the range of 40 to 60 percent, if corroborated by other evidence, have been found close enough to monopoly to support an [23] inference that success was dangerously probable.[31] Nevertheless, the decisions have consistently held that market shares standing alone, even in this range, do not provide an adequate springboard to monopoly.[32]

The Commission is on record as rejecting a narrow marketshare approach:

> [O]ur disposition of this matter should not depend on a showing that DuPont's market position exceeded some magic market power (as measured by market share) criterion.[33]

The test for market power depends on all the relevant characteristics of a market: the strength and capacity of current competitors; the potential for entry; the historic intensity of competition; and the impact of the legal or natural environment, to name just a few. Accordingly, courts view evidence on the dangerous probability of success "as

[29] *See* Calvani and Lynch, *supra,* note 19, at 306; *see also* Hurwitz and Kovacic, *Judicial Analysis of Predation and the Emerging Trends,* 35 Vand. L. Rev. 63, 113–39 (1982).

[30] Within the range from pure competition to unfettered monopoly, it is necessary to define that degree of freedom from competitive pressure which amounts to legally cognizable monopoly power. The Supreme Court has held that the requisite power must be substantial:

> [W]e have monopolistic competition in every non-standard commodity with each manufacturer having power over the price and production of his own product. However, this power that, let us say, automobile or soft drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly.

United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377, 393 (1956) (footnote deleted).

On the other hand, the Court has noted that one need not possess "unfettered power to control the price" of goods or services to cross the illegal threshold. *United States v. Grinnell Corp.,* 384 U.S. 563, 574 (1966).

[31] *E.g., Kearny & Trecker Corp. v. Giddings & Lewis, Inc.* 452 F.2d 579, (7th Cir. 1971), *cert. denied,* 405 U.S. 1066 (1972) (33 percent, with patent, "impressive").

[32] *E.G., Lektro-Vend Corp. v. Vendo Co.,* 660 F.2d 255, 270–71 (7th Cir. 1981) (33 percent, without entry barriers, insufficient); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.,* 614 F.2d 832, 841 (2d Cir. 1980) (54.5% dropping to 33% insufficient); *United States v. Empire Gas Corp.,* 537 F.2d 296, 305 (8th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977) (50% insufficient).

[33] *E. I DuPont de Nemours & Co.,* 96 F.T.C. 653, 726, n.16 (1980).

a whole" to determine "the firm's actual or threatened impact on competition [24] in the relevant market."[34] The Commission will follow this precedent.

E. *Our Analytical Approach*

As our review of the legal elements reveals, most of the purported improvements to the law of attempted monopolization have not involved rejection of basic rules. Rather, the evolution of the law has advanced through their clarification.[35]

Cost-based rules of conduct are not new, but the developments inspired by the Areeda & Turner proposal have permitted a more consistent and logical application of the standard for conduct in predatory pricing cases. Intent remains an element of the offense, but the capricious condemnation of any strategy to succeed has ended. Similarly, recent improvements in our understanding of competition have provided the setting for proposals to refine the analysis of competitive effects.[36]

Nevertheless, an explicit methodology has failed to emerge from the decisions dealing with alleged attempts to monopolize. The reported cases show as many starting points as there are [25] elements. Some courts have begun with intent.[37] Others, eschewing the intent element as an unreliable signal, have commenced with conduct.[38] The Commission, however, is among those tribunals that have approached attempted monopolization by addressing the probability of success before proceeding to the other two elements.[39]

Our approach is guided by two related objectives: the desire to improve the accuracy of our decisions and the concern for efficient use of prosecutorial and adjudicative resources.

Improvements in the efficiency of enforcing a rule need not sacrifice the accuracy of adjudication. Indeed, it is possible to enhance simultaneously the confidence in and efficiency of decision making by observing some basic priorities. Where the allegations raise a number of issues, the inquiry should focus first on those that may permit an early and efficient resolution of the case.

For potentially complex predatory pricing cases, this principle sug-

[34] *Lektro-Vend Corp. v. Vendo Co., supra,* 660 F.2d at 271, quoting *Kearny & Trecker Corp. v. Giddings & Lewis, Inc., supra,* 452 F.2d at 598.

[35] *See e.g.,* Areeda & Turner, *supra,* note 19 at 709–13; Posner, *supra,* note 19; Joskow & Klevorick, *supra,* note 19.

[36] *See e.g.,* Posner, *supra,* note 19 at 182–98; Areeda & Turner, III *Antitrust Law* 353–54 (1978); Joskow & Klevorick, *supra,* note 19.

[37] *See, e.g., William Inglis, & Sons v. ITT Continental Baking Co.,* 668 F.2d 1014 (9th Cir. 1981), *cert. denied,* 103 S. Ct. 58 (1982); *United States v. Empire Gas Corp.,* 537 F.2d 296 (8th Cir. 1976), *cert. denied,* 429 U.S. 1122 (1977).

[38] *See, e.g., Chillicothe Sand & Gravel v. Martin Marietta Corp.,* 615 F.2d 427 (7th Cir. 1980); *Northeastern Tel. Co. v. American Tel. & Tel. Co.,* 651 F.2d 76 (1981), *cert. denied,* 455 U.S. 943 (2d Cir. 1982).

[39] *E.I. DuPont de Nemours & Co.,* 96 F.T.C. 653 (1980). *See Lektro-Vend Corp. v. Vendo Co.,* 660 F.2d 255 (7th Cir. 1981); *Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co.,* 614 F.2d 832 (2d Cir. 1980).

gests certain possibilities for preliminary consideration. The evidence may be clear and free of ambiguity [26] with respect to a particular element. It may become readily apparent, for example, that the alleged predatory price remained above the relevant measure of cost. Alternatively, there may be a complete failure of proof with regard to intent or effect. Accordingly, it is appropriate, as a preliminary test, to seek satisfaction that the record contains sufficient evidence at least to raise material questions with respect to all issues.

If a more detailed factual inquiry is required, the next step should be to examine the competition in the alleged market. It may be relatively clear, for example, that resources of the alleged predator are no match for the endurance of its competitors. Only if the examination confirms the vulnerability of a market to predation should the inquiry proceed to the conduct and intent of the alleged predator, the final steps of the analysis.[40]

This approach shares the advantages of narrowing the initial inquiry and perhaps most importantly, starting out on ground well suited to the kind of objective analysis familiar to the [27] Commission. A methodology grounded in analysis of competitive effects promises simultaneously to reduce the probability of incorrectly condemning vigorous competition and to save the time and resources that might otherwise be wasted on an unfocused inquiry. The more elusive assessment of conduct and intent can be avoided where no dangerous probability of successful predation is present. Moreover, the prohibited conduct and intent, as we have stated, are firmly rooted in the expectation of success. Thus, where a high probability is found, the analysis of these elements can proceed on a much firmer basis.[41]

IV. The Attempted Monopolization Charges

At the outset we note that this record does not reveal any obvious grounds for preliminary disposition. Evidence of each material fact is genuinely disputed. Accordingly we shall proceed to an assessment of

[40] Areeda & Turner describe this approach as an "intermediate position" in their treatise:

> An intermediate position would seek to identify easily proved facts without which predation is most unlikely to occur and then to address such facts before the antitrust tribunal is forced to embark upon the complex inquiry into price-cost relationships. III *Antitrust Law* at 354.

Joskow & Klevorick call the first step a "structuralist approach" although the inquiry they describe goes far beyond the simple concentration calculations typically associated with the "structural" approach, *supra* note 19 at 219.

[41] The basic approach of proceeding from the competitive setting to the challenged conduct has been standard in other antitrust adjudications. The prevailing characterization of the monopolization offense calls for a two stage analysis: first determining the existence of monopoly power, and then examining for the exercise of it. Joskow & Klevorick, *supra*, note 19 at 265, citing *United States v. Grinnell Corp* 384 U.S. 563 (1966). Similarly, in merger cases market definition is a necessary first step of the competitive analysis. *United States v. Marine Bancorporation*, 418 U.S. 602, 618 (1974). Examination of the strengths and weaknesses of competition in markets affected by a merger focuses the competitive analysis and reduces the uncertainty of drawing the correct conclusions. *See generally*, Joskow & Klevorick, *supra*, note 19 at 213–269.

Maxwell House's prospects of success in monopolizing the alleged markets. [28]

A. *Definition of the Relevant Market*

To determine whether a firm has the means to raise price and maintain it above a competitive level, *i.e.* monopoly power, antitrust analysis generally begins with the definition of the relevant market. According to complaint counsel, the relevant market in this case consists of Maxwell House's individual sales districts—areas roughly centered around metropolitan areas such as Cleveland, Pittsburgh, Philadelphia and Syracuse.

The Commission, in previous cases has made clear what kinds of evidence we consider most valuable in the definition of a relevant market. Most direct, but rarely available, are reliable measures of supply and demand elasticities.[42] Of the indirect evidence, especially probative is the level of entry barriers surrounding a market.[43] We also have recognized the inferential value of evidence revealing price disparities, transportation costs, and transshipments between locations, as well as the perceptions firms have about the competitive threat posed by outsiders.[44]

With regard to entry barriers, we find the record consistent and clear. There is virtually no support for the contention that significant economic boundaries exist among the sales districts alleged to be relevant markets. Evidence on transportation [29] costs, shipping patterns (including transshipments), and the perceptions of competitors all point to markets that reach far beyond the geographical divisions Maxwell House drew for the purpose of marketing coffee. Perhaps most persuasively, the record shows repeated examples of successful entry by other firms into district after district. By comparison, the evidence on which complaint counsel rely to prove markets and monopoly power—price disparities, profits, advertising and product differentiation—is ambiguous and incomplete.

1. Evidence of Transportation Costs and Shipping Patterns

There is no dispute over the insignificance of transportation costs, compared to the value of the product in this case. For example, from 1971 to 1977 transportation costs for all Maxwell House Division ground coffee averaged 1.2 percent of wholesale price for distances of 500–1,000 miles, 2.2 percent for distances of 1,000 to 1,500 miles and 3.7 percent for distances exceeding 1,500 miles. (RX 1224.) On aver-

[42] *The Grand Union Company,* III Trade Reg. Rep. (CCH) ¶22,050 at 22,703 (1983).
[43] Federal Trade Commission, *Policy Statement on Horizontal Mergers* (June 14, 1982).
[44] *See Id.*

age, the transportation cost for all distances amounted to 1.2 percent of retail price. (RX 1224.)

That transportation costs imposed no more than trivial burdens, even on long distance shipments, is reflected in the shipping patterns of the major manufacturers. Maxwell House produced coffee at only four plants, located in New Jersey, Florida, Texas and California. (IDF 105.) Shipments from those plants were not confined to their surrounding areas; the Florida facility produced 50 percent of the RMH distributed in the United **[30]** States, 60 percent of all ground coffee, and 100 percent of the Max-Pax brand (IDF 106, 107.) Mellow Roast was produced only in New Jersey and distributed nationally. Maxwell House's other coffee brands traveled equally far. (IDF 108.)

Folger's has only three regular coffee plants—in California, Louisiana and Missouri. For its entry into the East, Folger's added no new capacity, (IDF 111.), and there is no evidence that transportation costs figured in its selection of any specific targets.[45]

Hills Bros. used two plants, and sometimes only one, to produce coffee shipped coast to coast. (IDF 114–15.) Chase & Sanborn had been shipping to all its sales areas from only one plant, in New Orleans, since the early 1970's. (IDF 113.) Even the tiny Euclid Coffee Company of Cleveland serviced accounts in several of respondent's sales districts—in Ohio, western Pennsylvania, western New York and throughout the State of Michigan. (Repak, Tr. 2602.) Presented with similar evidence in a recent case, the Commission rejected regional geographic markets.

> The test for measuring geographic market is where consumers (in this case retailers) can practicably turn for an alternative source of supply. Here the record is clear that frozen pizza manufacturers could sell virtually throughout the United States from a single plant with no significant cost disadvantage. Thus, the power of any given group of sellers serving a city or region at a given time to raise prices is limited by the capacity of virtually all other domestic manufacturers to compete on practically an equal footing in that **[31]** city or region—an economic situation which requires a finding of a national market and the elimination of geographic submarkets.[46] [citations omitted.]

The record also reveals patterns of transshipment and trade flow that belie the existence of significant barriers separating the markets complaint counsel attempt to prove. Trade flow is the shipment of product from a retailer or wholesaler's warehouse located in one sales district to a retail outlet located in another, while transshipment is the cross-district movement of product among warehouses.[47] (L. Nel-

[45] Complaint counsel's witness, H. Michael Mann, testified that transportation costs are "negligible" in terms of the optimal location of roasting plants. (Tr. 3568–72.)

[46] *Pillsbury, Inc.* 93 F.T.C. 966, 1030 (1979).

[47] Transshipping is not only done by the grocery trade, but there are people that we have referred to as "bandit brokers". . . . They know what the going trade [rate] is, and they can buy that coffee in that area and still pay the freight and make a profit on it. (Salesman, Tr. 5934–5).

son, Tr. 5729.) Such movements are evidence of arbitrage, prompted by price differences that offer profits from the shipment of low price coffee among regions.

Trade flow had been a problem for RMH before Folger's entry into the east. (CX11–Z18.) Maxwell House referred to the Boston, New York and Philadelphia sales districts as "the complex" because beginning in the late 1960's trade flow made it difficult to limit deals to retailers to just part of the area. The complex has grown in recent years to include part of the Syracuse district and now runs from Maine to Virginia. (IDF 103, J. Mann, Tr. 6454–5; L. Nelson, Tr. 5730–1; *see also,* CX 705B.) With similar problems throughout the East, Maxwell House took **[32]** such cross-district product movement into account when structuring its promotional incentives in each district.

Neither Folger's nor Maxwell House was immune from arbitrage as Folger's moved east. Soon after coming to Cleveland, Folger's impact on supply began to spread beyond the areas in which it was introduced. Folger's coffee appeared on the shelves in Kroger's and several independent stores in Pittsburgh as a result of "spill-over from [the] Cleveland" trade.[48] (Cleveland and Pittsburgh are alleged to be in separate markets, although both are in Maxwell House's Youngstown sales district.) (CX 919F; Zurcher, Tr. 6288.) Similarly trade flow required Folger to offer the same promotional allowances in Cincinnati and Columbus—two areas outside the Youngstown district—that it offered coffee retailers in Cleveland. (Hunter, Tr. 3094–5; CX 497A; *see also,* IDF 101, 104.)

The Maxwell House Division's response to Folger's entry into both the Philadelphia and Syracuse sales districts was constrained by the prospect of trade flow. (CX 105E, 192F, 634C, 63–Z11, 705B.) In Philadelphia, fears that discounts would spread throughout the eastern complex kept Maxwell House's promotions and discounts much smaller than Folger's. (CX 649F; Laster, Tr. 6982.) Maxwell House at first took the risk of allowing higher shelf prices than Folger's in Syracuse, rather than seeing discounted RMH cut into sales in other districts. (CX 649G.) **[33]** When substantial sales losses prompted a price reduction in the Syracuse district after all, fears of trade flow problems were confirmed. (IDF 99.) Maxwell House had introduced a fresh-lock lid in that area for monitoring purposes, and cans with the new lid showed up in significant quantities as far West as Portland and Los Angeles and as far south as Jacksonville. (Salesman, Tr. 5933–6; *see also,* Keller, Tr. 6584–6.) Folger's, which had chosen to do its test

[48] Retailer coupons, which can be limited more effectively to specific geographic areas, were used more extensively in the Youngstown sales district than elsewhere. (See *CX* 86H, 87C, 89B, 187Z, 710A.) Their use in Cleveland failed to prevent arbitrage.

expansion in Syracuse partly in order to avoid trade flow (CX 539B), also experienced transshipment out of that area. (CX 541A-B.) Overall, the record shows a trend towards increased trade flow and transshipment throughout the East in the period following Folger's 1975 entry into Syracuse. (J. Mann, Tr. 6450–51, 6462–4; IDF 98–104.)[49]

The implication of this evidence is inescapable. If an economic barrier exists between any domestic coffee producer and any other producer's marketing area, that barrier is not distance. The cost of transportation is unlikely to deter either a producer of ground roast coffee or a reseller, no matter where [34] located, from considering profitable opportunities in distant regions. Accordingly, the putative monopolist of a sales district must look beyond transportation costs for the insulation from competition that permits monopoly power.

2. Evidence of Price Differentials

Complaint counsel claim there are other signs of entry barriers that outweigh the evidence of shipping patterns. The best indicators of geographic markets, argue complaint counsel, are price differences among regions. (CAB 9–13.) We recognize that significant, persistent differences can indeed be persuasive. However, the quantity and quality of evidence showing price differences on this record is far from substantial.

First, as the ALJ observed, the record is virtually devoid of any evidence on the overall wholesale or retail price of regular ground coffee. As a result, definitive comparisons among brands or across areas are impossible. The only company for which cross-district price data are offered is Maxwell House. Even there, however, actual transaction prices at which Maxwell House sold coffee were not introduced. Rather, Maxwell House's prices were calculated by deducting from total annual revenues, cash allowances and expenditures for allowances and promotions *other than* advertising. (CX 1081.)

This method of calculating prices results in some level of distortion because some consumer promotions and trade incentives have both price-reducing and advertising effects. A year-by-year comparison of RMH prices in the Youngstown district with those in [35] the Syracuse district between 1971 and 1977 illustrates this problem. If price is calculated by deducting the cost of all retailer and consumer incentives from gross revenues, the price differences between the two dis-

[49] Although Maxwell House was able in some instances to mitigate trade flow problems by assigning prices according to historical resale patterns among areas (Keller, Tr. 6670–71), there is no evidence of any such ability to control the prices of transshipped coffee by the wholesale arbitragers (colorfully called "bandit brokers"). (*See* Salesman, Tr. 5934–5, J. Mann, Tr. 6468–9.) Moreover the very reluctance to reduce wholesale prices in some areas for fear of trade flow into others is itself inconsistent with a complete ability to prevent trade flow from equalizing prices among areas. For example, the Maxwell House response to Folger's Philadelphia entry was constrained by fears that wholesale price reductions there would spread to the New York, Boston, Baltimore and Washington areas owing to "trade flow throughout [the] eastern complex." (CX 705B.)

tricts range from 2.6 percent of price in one year to 18.1 percent of price in another. (CX 1081.) If only non-performance retailer incentives (those requiring no advertising or display function) are deducted, the range is from 0.2 to 10.8 percent of price. (RX 1141A, 1142A; Elzinga, Tr. 9464.)

Complaint counsel argue that deducting both performance and non-performance incentives from total revenues gives a more accurate calculation of price. Respondent contends that performance incentives should not be deducted, as they are not price reductions, but promotional costs. Neither party offers sufficient evidence to support either extreme.[50]

Second, to find that a specific area is a separate market there must be a demonstration of the ability to *raise* prices above those prevailing in contiguous areas without attracting substantial entry. Complaint counsel offer no evidence of any such ability by respondent or any other roaster in the alleged markets. At best, their evidence suggests the ability to lower **[36]** prices in periods of intense price competition below those of surrounding areas. For example, both before and even, more significantly, after the alleged predation in the Youngstown district, the wholesale price of RMH (as calculated by complaint counsel) was lower than in the contiguous districts and than the average price for the nation as a whole. (CX 1081.) Thus, Maxwell House's prices were, on average, the lowest in Youngstown of any of its eastern districts, despite the fact that it was in Youngstown that Maxwell House had the largest market share. (RX 1279–80.)

Third, leaving aside the issue of which costs to subtract and how much, we have just described the transshipping and trade flow that occurred repeatedly during Folger's expansion to the eastern regions. One would expect outbreaks of transshipment when price differences between regions were large, and this is indeed what happened here. Substantial reshipment will tend to reduce or even eliminate such differences, as the retail trade in the higher-price areas buys coffee from the trade (retail or wholesale) in the lower-price areas.

The average revenue figures offered by complaint counsel, which were taken from Maxwell House's records, do not account for those trades. Some quantities of lower-price coffee that were reshipped to higher-price areas are erroneously attributed in complaint counsel's evidence to the lower-price area. Accordingly, prices that were actually paid by the retail trade in the allegedly high-price areas are overstated (and quantities understated), while the opposite holds in the

[50] There is no dispute that Maxwell House enforces the requirement that retailers provide services in order to obtain a performance allowance. (IDF 462-474.) The question concerns the extent to which some allowances may exceed the cost of performances. No direct evidence was offered on this issue. (IDF 464.) Thus, we cannot justify allotting any specific portion of the allowances to price reductions. Complaint counsel's argument, that none of the cost of performance be considered, is clearly contrary to the evidence.

alleged areas of [37] predation. It is impossible to determine the extent to which reshipments caused the actual price prevailing in an area to vary from the calculated average revenue on Maxwell House's books.[51] Most likely the effect was the greatest when the revenue figures show the largest disparities, because that's when incentives to reship are at their peak.

For these reasons we must agree with the ALJ's findings on the meaning and relevance of the price comparisons to the geographic market. With insufficient evidence of overall ground coffee prices or of supra competitive RMH prices, with price differences that change substantially between respondents' and complaint counsel's calculations, and with the failure of the evidence to account for arbitrage, the price data in this record are "so complex and ambiguous that [they are] of little practical utility in resolving the issue of relevant geographic market." (IDF 130, citing Elzinga at Tr. 11,992.)

3. Evidence of Product Differentiation

Complaint counsel contend that product differentiation—by respondent and by others—erected cross-district entry barriers. Specifically, they argue that different levels of [38] product promotion and consumer acceptance among the competing brands constitute barriers that establish each sales district or specified area therein (*e.g.*, the Cleveland and Pittsburgh portions of the Youngstown district) as a separate market. (CAB 16–19.) The argument suffers both from logical inconsistences and a basic misunderstanding of entry barriers.

The contention that product promotion can create differential brand preferences among areas runs squarely into the claim that advertising and promotion are expensable items that should not be amortized over extended periods of time. If promotional effects are quickly dissipated, then advertising should not delay entry or raise entrants' costs above those of established firms. Each firm presumably would begin from the same position, with no goodwill remaining from prior promotions, at the start of each period. If the claim is that the effects are only gradually dissipated, which finds more support in the record,[52] then complaint counsel's price-cost calculations [39] er-

[51] Complaint counsel commissioned a study of the extent of trade flow for all grocery products combined among Maxwell House's sales districts in calendar 1971 and 1973. (CAB 14.) (IDF 73–84, CX 1029A-C; Lysaker, Tr. 1762, 1795.) Since it ignores transshipping, does not break out coffee flows and does not cover the period after 1973 in which both trade flows and transshipping of RMH and Folger's were increasing, we must agree with the ALJ that it tells us little about the actual extent of arbitrage of coffee across districts as Maxwell House responded to Folger's entry.

[52] The record in this case distinctly reveals an investment component in the costs of advertising and promotion. Respondent expected the benefits from its advertising and promotional defense to occur over a period of many years. (IDF 157–171.) For example, a memo dated seven months after Folger's initial expansion into the East from the Maxwell House president to the General Foods executive in charge of that division indicated the expectation that respondent's defensive efforts would generate additional costs over a two-year period and additional benefits over a subsequent three-year period. (CX 130 F,G.) Other Maxwell House documents utilize a ten-year period for estimating the benefits of stepped up advertising and promotional outlays. (IDF 168; RX 518 C-E; CX 640 M, 636Q.)

roneously expense advertising in the year incurred and overstate the relevant costs.[53]

Accepting that real or perceived differences among products can build a loyal following of consumers does not amount to an acknowledgement of entry barriers. There is no dispute that the effective use of every element of the "marketing mix"—including the maintenance of consistently desirable product quality as well as the selection of a proper balance of the various types of advertising and promotion—contributes to the identity and success of a brand. Indeed, a company may reap the benefits of both marketing as well as superior quality by charging retailers a higher price than its less successful competitors. (*See* below, Section IV.C.) But, in and of itself, this fact is no more a barrier to entry than the requirement that every coffee producer must make an efficient investment in plant and equipment and must roast an acceptable mix of green coffee beans in order to remain profitable. We cannot accept product differentiation and price disparities as entry barriers without an explanation of how product differences bar entrants. The question is whether product differentiation imposes substantial non-recurring outlays that raise the threshold entry level of potential competitors so high as to enable respondent and/or any of the established firms in any of the alleged markets to **[40]** restrict output and raise prices for a significant period of time.[54]

We can find no substantial evidence of any non-recurring costs of advertising and promotion that enabled respondent or any of the established firms to raise consumer prices in any of the alleged markets without attracting significant entry. As we have found, Folger's sales responded immediately and dramatically to introductory promotions. In fact, Folger was able to achieve nearly 3 percent of sales in both the Charlotte and Atlanta districts with minor marketing efforts. (CX 539C-D, 1072F; RX 1107A.) Numerous local store brands were able to take hold and compete in each area with minimal marketing efforts. In Philadelphia, during the intense competition following Folger's entry, store brands doubled their sales share to just over 30 percent of the total in four years. (CX 1072 D,G.) For the entire Maxwell House eastern sales area, the sales share of those brands grew from less than 15 percent in 1972 to just over 21 percent in 1977—a 40 percent gain. (Table 2.)

Moreover, the record reveals that changes in the relative intensity

[53] The relevant costs would be understated if, contrary to the record, (*Compare* RX 1141A and B, RX 1142A and B.) there had been a heavy increase in respondent's promotional outlays before Folger's entry and a reduction thereafter. The record shows no such attempts to anticipate Folger's introduction by heavy investments in advertising.

[54] As Posner succinctly defines it, an entry barrier is a "condition that imposes higher long run costs . . . on a new entrant than are borne by competitors." *Antitrust Law* 59, (1976).

of promotion among coffee brands did not insulate any of the established firms from the threat of entry. Rather, such changes resulted in sharp and sudden swings in sales shares among them. (*See* below, Section IV. B.2. & C.) In short, support for **[41]** a connection between product differentiation and entry barriers is lacking in this record.

4. Actual Entry

The failure of the record to establish entry barriers into Maxwell House's eastern sales districts suggests that the evidence might show instances of successful entry. Indeed, that is so, with the most obvious example being Folger's, whose successful entry into the alleged markets precipitated this case. In addition, both Chock Full O'Nuts and Savarin were expanding into the Pittsburgh portion of the Youngstown sales district as the record was closed. Indeed, Chock Full O'-Nuts, which was expanding generally throughout the East, extended its distribution to include the entire Syracuse sales district where it increased its share of sales from 3 percent in fiscal 1971 to 10 percent in fiscal 1980. (CX 1072A; RX 1278; Salesman, Tr. 5993; CPF 11-13 identifies Chock Full O' Nuts as "Closed Group" in CX 1072A.)

There was also significant entry before 1971. The most notable example came in 1962, when Hills Bros. Co. began a marketing campaign to enter the eastern sales regions of RMH. Like Folger nine years later, Hills Bros. began within Cleveland. General Foods responded there, and in every other area Hills Bros. entered, with stepped up promotional and advertising expenditures on its RMH brand. (CX 11-Z118.) In spite of these efforts, which spawned rounds of general discounting, Hills Bros. first-year penetration of each of the **[42]** five areas it entered from 1962 to 1967—Cleveland, Pittsburgh, Syracuse, Boston and Philadelphia—exceeded 10 percent. (CX 8-Z48, 11-Z144, 1070 G-H.) According to the 1967 Maxwell House "marketing plan":

> Hills has probably become a major factor . . . for the foreseeable future. . . . If [they are] willing to spend in future introductions as they have in Boston, it will be extremely difficult for RMH to prevent them from becoming a major market factor (*i.e.*, over 10 percent share). (CX 8-Z47.)

As of fiscal 1971, the year preceding Folger's entry into the Cleveland area, Hills Bros.' shares of Maxwell House's sales districts stood at 10 percent in Boston and Philadelphia, 16 percent in Youngstown (Cleveland plus Pittsburgh) and 17 percent in Syracuse. (CX 1072A.) Hills viewed its eastern expansion as successful (Toy, Tr. 2130.), as did Maxwell House. A Maxwell House memo dated October 1971 reviewed the "results" of Hills' eastern expansion just as Folger's was starting its entry into the Cleveland area:

> Significantly, Hills has been able to maintain respectable shares in all of the eastern areas, except for the New York district. This could certainly provide ample encouragement for Folger's—especially in view of the fact that Hills is strictly a coffee company, with considerably less in the way of resources or marketing expertise than Folger's or its parent, Procter and Gamble. (CX 642B.)

Such expansion left a distinct impression on manufacturers as well as retailers. They perceived the eastern sales districts [43] as vulnerable to the entry of the other roasters, especially Folger.[55]

It is clear, therefore, that the eastern sales regions alleged by complaint counsel to be distinct markets—Cleveland, Pittsburgh, Philadelphia and Syracuse—had experienced significant entry before Folger's successful introductions there. In addition, there was substantial expansion of local and regional roasters following Folger's entry. As the ALJ, concluded, all this taken together is "convincing evidence that the Maxwell House Division could not exclude competitors from" the eastern sales areas. (IDF 321.)

5. Conclusion

In conclusion, virtually every characteristic of the market for ground roast coffee contradicts complaint counsel's contention that barriers to entry exist in the eastern sales districts of RMH. The low cost of transportation put every area in the country within the economic reach of a single production plant. Price disparities between areas prompted the transshipment of coffee from discounted regions to premium-priced locations. Two major brands, Folger's and Hills Bros., [44] successfully entered each of the areas in which attempted monopolization is alleged. Folger's became established in some areas with minimal promotional support. Regional roasters and supermarket chains also entered some areas and successfully expanded their shares of sales in others. Thus, the evidence upon which we typically rely to define relevant markets indicates that those markets are larger than complaint counsel claim they are.[56]

B. *Indices of Monopoly Power*

A firm whose unilateral output decisions substantially affect the prevailing price of a product is said to possess monopoly power. If such a firm restricts its output, the result will be a permanent increase in price. This can only happen if other firms do not respond by expand-

[55] The testimony of the head of Maxwell House's Youngstown district (which includes Cleveland and Pittsburgh) may be most descriptive:

> The Cleveland trade said that they [Folger's] are coming in and they are going to take number one—the number one coffee and the number one brand at our expense. . . . (Zurcher, Tr. 6293.)

[56] Complaint counsel do not allege attempted monopolization in any market larger than a sales district. Lacking such an allegation, we are constrained on review from finding that respondent attempted to monopolize some larger market.

ing their output to make up the shortfall. If, however, other firms do respond to attractive prices and fill in the shortage, there is no monopoly power.

Complaint counsel rely on evidence we have not yet addressed to argue that Maxwell House possessed or could attain monopoly power in certain of its sales districts. While our findings with respect to relevant markets cast serious doubt on whether monopoly power can be shown in the sales districts, the **[45]** possibility remains.[57] Therefore, we will review the allegations going directly to Maxwell House's monopoly power.

1. Market Shares

Complaint counsel point first to Maxwell House's high sales shares in the alleged markets. Maxwell House accounted for the largest portion of sales in each of these districts, with shares exceeding 40 percent during the period. Such high shares, according to complaint counsel, establish that Maxwell House possessed market power. If not already within its grasp, the successful monopolization that can break the law was dangerously close to Maxwell House's reach. (CAB 19-20, 44-45.)

While the definition of monopoly power has gained general acceptance among legal and economic practitioners, the measure of that power has not. The gauge most frequently used has been the market share that firm commands. This measure has the advantage of being easily quantifiable, albeit after the appropriate units of account (revenue, volume, capacity, etc.) have been determined and the relevant markets (geographic and product) have been drawn. The disadvantage is that this gauge does not directly measure market power, but is at best a rough proxy for it. That proxy has been increasingly questioned on both theoretical and **[46]** empirical grounds for its correspondence to actual monopoly power.[58]

At best a high market share can be said to be a necessary but not a sufficient condition of monopoly power, since it is unlikely that a firm with a small share can affect market output and price significantly by adjusting its own output. Even with a large market share, however, a firm cannot safely presume that its own attempts to restrict output will go unanswered by competitors in the market or potential entrants outside the market. Thus, as we have already noted, market concentration indices standing alone, tell us little about

[57] A firm, for example, may possess market power throughout a market that completely encompasses an area incorrectly identified as the relevant market.

[58] A critical review of economists' attempts to document the correspondence can be found in Goldschmidt, Mann & Weston, Industrial Concentration: The New Learning (1974). *See also Ethyl Corp.*, D. 9128 (Dissenting Opinion of Chairman Miller), *rev'd sub nom. E. I. Dupont de Nemours & Company*, Docket Nos. 83-4102, 83-4106 (2d Cir. Feb. 23, 1984).

competition or monopoly power.[59]

Our previous discussion of the relevant market undermines the competitive significance of complaint counsel's evidence on market share within a district. Since, as we have found, the relevant market is larger than a sales district, a firm with as much as 100 percent of the sales in a district could still lack monopoly power. This is because it is inherent in our finding as to the relevant market that customers in the district have access to suppliers outside it. The record reveals that this is true with respect to the Maxwell House eastern sales districts. **[47]** Retailers have access to supplies from roasters, wholesalers and warehouses outside each area.

A more fundamental flaw further diminishes the utility of evidence on market shares here. Even supposing insuperable barriers to entry by new firms, the existing firms' shares of sales in each district do not reveal the full pressure they exerted on Maxwell House or any other producer. No less important than current shares is the ability of the competition to augment its output in response to a price increase. This ability derives from the productive capacity of competing firms, not merely their current production. Sales may sometimes serve as a proxy for capacity, but when the relationship between sales and capacity breaks down—for example when production falls short of capacity or a firm outside an area ships in only a portion of its production—current sales shares lose their significance.[60]

Excess capacity has haunted the coffee industry throughout the 1970's. (*See* above, Section II.A. and IDF 22.) With each individual sales district accounting for a minor portion of sales, undoubtedly the national firms and probably the larger regional firms could expand their shipments enough to serve every **[48]** customer in any sales district.[61] For the major firms like Folger, doubling sales in one dis-

[59] *See* section IIID, *supra.*

[60] This principle has been recognized in both the courts and the commentaries. *See e.g., United States v. General Dynamics Corp.*, 415 U.S. 486, 502 (1974) ("A more significant indicator of a company's power effectively to compete [than its sales] lies in the state of a company's uncommitted reserves [*i.e.* capacity]"); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 963-64; Areeda & Turner, II *Antitrust Law* ¶523a (1978).

[61] The fate of the smaller roasters provides some indirect evidence of their immunity to the intense competition in various sales districts. The record contains no evidence that any of respondent's competitors were unable to operate their roasting plants at any time because of respondent's activities. None of those cited by complaint counsel has departed any of the cited areas, let alone halted operations; even the least successful (Paul De Lima and Euclid) have remained viable. Still others, including Chock Full O'Nuts and Savarin as well as Folger's, expanded into additional Eastern areas. (*See* above, Section IV.A.4.)

Although for some of the roasters allegedly injured by respondent's actions the sale of regular ground coffee in specific areas did become unprofitable for a time, none ever decided to cease plant operations. For example, Paul De Lima, a local roaster in the Syracuse area, narrowed its regular ground coffee marketing radius from the Greater Syracuse area to the city itself in response to the increased competition. However, it then extended its marketing efforts to include institutional and office buyers and in 1979 reported an overall profit. (De Lima, Tr. 2535 and 2590.) Moreover, it later reexpanded to its original marketing radius of regular ground coffee. (Salesman, Tr. 5944.) Euclid, a roaster based in Cleveland, also distributed in western New York and Pennsylvania and all of Michigan, Ohio and West Virginia, so that respondent's activities in Cleveland were unlikely to have threatened its existence. Thus, the record strongly suggests that sales of ground roast coffee are unlikely to be disciplined by an outbreak of intense competition, price or non-price, within any Maxwell House sales district. (De Lima, Tr. 2535 and 2590.)

trict while entering others was accomplished without building new plants. Under these circumstances, it is doubtful whether market shares, however measured, can yield any useful information about the monopoly power of a firm or the probability of achieving it in any of General Foods' sales districts. **[49]**

2. Prices and Profits

Complaint counsel maintain that high market shares in the alleged markets distinguished RMH from other brands and facilitated higher prices and profits for General Foods—a sign of market power. (CAB 16-18.) We have already noted our reservations regarding the evidence on prices. Whether the source is higher wholesale prices, lower promotional costs, or some combination of the two, the record does show that Maxwell House enjoyed greater profits in sales districts where it was more popular. (IDF 283-302.) Whether we can infer market power from this evidence depends upon RHM's power over ultimate consumers. Product differentiation does not permit the restriction of output and maintenance of prices above competitive levels unless the producer can restrain ultimate buyers from turning to other brands.[62] If General Foods enjoys monopoly prices and profits in coffee sales, it should be visible at the retail counter in the price of RMH.

The evidence in the record indicates otherwise. Retailers view coffee as a "board item," a product which is among the "most price sensitive items that we carry. . . ." (Engel, Tr. 1707.) Sales volumes and relative shares in the RMH sales districts fluctuated widely as consumers responded to price changes and promotional features of various brands. There are **[50]** numerous examples of this extreme share sensitivity to relative prices in every area in which predation is alleged and it is corroborated in testimony by witnesses for both parties.

Prior to Folger's October 1971 entry into the Youngstown sales district (Cleveland and Pittsburgh areas), the first focus of Folger's eastern expansion, RMH average retail prices had previously tended towards close parity with its major competitor, Hills Bros. (IDF 318-20; CX 89D; Toy, Tr. 2149-2150; Trone, Tr. 1462-3; Engel, Tr. 1648, 12067-8, 12070, 12095-6; Epstein, 12161-2.) But the average parity obscured frequent differences among brands depending on which one was being featured by local retailers. As described in Maxwell House's documents, Youngstown was a "hot" features area. First one brand and then another would reduce price or increase promotions in efforts to gain share. The moves proved successful—but only for temporary

[62] In that regard, a differentiated brand may offer a higher level of consumer satisfaction and hence a higher level of output than a lower price brand. In that case the higher output and not market power explains the higher price. *See* Bork, *supra,* note 19 at 313.

sales gains; in the 1960s and early 1970s RMH penetrations had varied from 33 to 52 percent, Hills from 14 to 37 percent, and Chase and Sanborn from 6 to 15 percent. (CX 85B, 86F; *see also,* Engel, Tr. 12070.)

Folger's was repeatedly sold at a retail price above that of RMH in Youngstown (CX 528B, F.) Then, in 1976, for the first time since Folger's entry, retailers began to sell the brand at lower prices than RMH. (CX 689A.) In March of that year Folger's temporarily gained 10 percentage points as RMH lost 16 points. (CX 683B.) Over the course of the year Folger's gained and RMH lost 3 points apiece.

Thus, in the most successful area for RMH, where it held a **[51]** 3-to-1 advantage over the number two brands, its fortunes fluctuated with its relative retail price. When comparable brands were priced at a discount compared to RMH, it lost sales. When RMH regained a pricing advantage, it gained sales. The same held true for Folger's, Hills Bros., and, earlier, Chase & Sanborn.

When Folger entered its second Maxwell House sales district, Philadelphia, in February 1973, RMH was being priced as much as 3 to 4 cents per pound *below* its closest major competitors, Hills and Chase & Sanborn. (CX 89A-C.) Folger's was priced for three months at a premium of 3 to 5 cents per pound above the other major brands. (CX 521A.) At that time, a Folger's document noted the extreme price sensitivity of coffee consumers, calling its pricing disparity with RMH and others the major problem with its introductory efforts. The Folger's memo said:

> We view our Philadelphia pricing disadvantage as a potentially crippling problem which may well preclude our attaining a reasonable franchise. Our overall experience in the coffee business is that consumers are keenly price sensitive. So much so, in fact, that parity pricing is a basic strategic objective in the Folger area. Adherence to that objective is regarded as critically important, despite our market leadership position.[63] [52]

In fiscal 1977, RMH prices in the Philadelphia district rose above Folger's and those of its other major competitors, whereupon RMH lost 15 per cent of its share of sales. (CX 691B-C; CX 1072.) With rapidly escalating coffee bean prices that same year, RMH also lost significant ground in the Boston and New York sales areas (not yet entered by Folger's) to Chock Full O'Nuts and the store brands, as

[63] CX 521B. The memo noted two similar experiences outside the eastern area:

> In two instances in the recent past in which any major brand has been out of line in the Folger area, both underscore coffee pricing sensitivity. In our Portland district Maxwell House gained a [3.5 cents per pound] advantage over Folger in the 2-lb. size in early 1972 [and within 6 months had] . . . increased its 2-lb. share by 13 percent, while Folger's . . . declined by 10 percent. [In Kansas City a 4 cents per pound Maxwell House advantage on the 3-lb. size caused a similar shift to RMH.] It should be noted that both these districts are long-established Folger districts in which we are the dominant brand with shares of 36 percent and 54 percent respectively, vs. Maxwell House at 6 percent and 16 percent respectively. (CX 521B.)

RMH prices rose more rapidly than those of its competition. (CX 687A, 689B, 691B, 192B.)

Folger's on the other hand, got the benefit of a lower retail price in Syracuse, "the first expansion [district] where Folger achieved a shelf price advantage" (*i.e.,* a lower retail price than RMH). (CX 20-Z94; *see also* CX 528F). Within two months of Folger's entry, it had attained a 31 percent share against 36 percent for RMH. (CX 710E.) Two quarters after its entry, Folger's was at a 22 percent share and RMH had declined to 34 percent or 8 points below its base level. (CX 709D, E.) Two years later a Maxwell House memo recommended that RMH match a Folger's price cut in order to retain retail shelf price parity and thereby avoid "a loss of 10 share points." (CX 160A.) The RMH Fiscal 1977 marketing plan stated:

> Consumers have been educated to buy ground coffee on price. Ground coffee shares are dramatically responsive to changes in price levels vs. competition. (CX 20-Z38; *see also* CX 193B.)

In sum, there is no evidence that indicates either RMH, Folger's, or any other brand could sustain retail prices above the major branded competition without incurring "dramatic" share **[53]** losses in any area of the country and in the nation as a whole. (*See also,* IDF 302-329.)[64] To the contrary, retail price premiums appear to have had the same debilitating impact regardless of length of a brand's establishment or level of success in an area. No major brand could increase price without losing substantial retail sales.[65] Nowhere does the evidence support a finding that any brand held or was threatening to gain the kind of market power that gives rise to antitrust concerns.[66]

In sum, the extreme consumer sensitivity to coffee prices caused a strong tendency towards retail price parity among the leading brands in every area, with diversions from such parity occasioning sharp swings in relative sales. We cannot find evidence of a competitive breakdown at the consumer level. The evidence at the wholesale level suggesting a positive correlation **[54]** between prices, profits, and sales shares does not, therefore, demonstrate either Maxwell House's monopoly power or the probability of achieving it in ground roast

[64] This much has largely been conceded by complaint counsel. (*See* CPF 10-13.)

[65] Thus, while there may be a loyal consumer following for each major brand, the record suggests that these dedicated consumers are not the ones determining the prevailing retail price of coffee. A major portion of each brand's franchise apparently comprises consumers ready to take advantage of a relatively minor discount in another brand; and the loyalty of even the dedicated consumers seems less than absolute. *See* Bork, *supra,* note 19 at 312-13; Nutter, *The Plateau Demand Curve, and Utility Theory,* J. Pol. Econ. 525 (1955). As we noted earlier, the law does not demand "perfect" price competition. The ability of some roasters to compete on the basis of quality or reputation, and charge a higher price for their efforts, does not signify unhealthy market power. To the contrary, such competition meets a demand and will persist only so long as its results are valued by consumers.

[66] *United States v. E. I. Du Pont de Nemours & Co.,* 351 U.S. 377, 391 (1956).

coffee at the wholesale level. The source of that correlation must lie elsewhere.

C. *Efficiency and Profits*

Crucial to the competitive motivations of respondent and its rivals is the existence of larger gross profits generated by the leading regular ground coffee brand in an area. This phenomenon derives from the frequent use of regular ground coffee as a loss-leader by the grocery trade to generate store traffic. Except in periods of extreme price escalation or of price controls, coffee is valued very highly by grocers as a loss-leader, because it results in substantial store traffic. (CX 191B, 193B, 205A; Toy, Tr. 2027; Salesman, Tr. 5937-9; Epstein, Tr. 12187.) Indeed, nationally, as much as 50 percent of coffee is purchased on a reduced price basis as a result of store features, manufacturer's coupons, or some other promotion. (CX 191B.)

The record also contains many examples of the disproportionate use of the leading coffee brand as a loss leader. Prior to the July 1972 Brazilian frost, respondent's documents state, for example, that in the eastern area RMH was the only coffee brand priced at retail below retailer's cost. (CX 69M, 109H, 111C.) Before Folger's February 1973 entry into the Maxwell House Philadelphia sales district, RMH was being sold substantially below wholesale cost throughout the eastern complex [55]—including the Boston and New York City districts as well as Philadelphia.[67] (CX 89B.) This was also the case in part of the Syracuse district prior to Folger's entry in October 1974, where RMH had been the only brand that grocers were selling below cost. (CX 539C.)

In the western area, the roles were reversed, but the story was the same. RMH was considerably less successful there, and Folger's was the leading brand. Maxwell House found it necessary to offer larger incentives to retailers than Folger's did (*i.e.,* lower wholesale prices) in order to achieve retail pricing parity. (CX 3-Z33; CX 8Z.)

In short, the proximate source of superior profits for leading regular coffee brands in an area was their exceptional ability to generate store traffic when sold at a discount from normal retailer profit margins.[68] Our concern with this phenomenon is whether it ultimately results from output-enhancing or output-restricting behavior.

The record shows that in the regular ground coffee industry, differences in the degree of promotion and quality (or its consistency) among brands explain the greater willingness of merchants to feature the leading brands in an area and to pay more for that opportunity.

[67] Even after Folger's entry in Philadelphia, RMH was sold at lower retailer margins than Folger's. (CX 106P, 521A,B, 532F.)

[68] Put another way, leading brands carry a lower cost of distribution than their less successful competitors. That lower cost is equal to the value retailers attach to the traffic-generating ability of the leading brand.

Consumers respond not only to changes [56] in relative prices, but also to changes in the intensity of advertising, the kind of product promotion and the level of perceived quality or taste.

Like price changes, the mix of marketing elements appears to have an extremely important influence on sales. For example, one of complaint counsel's retailer witnesses testified that at the time of Folger's expansion, RMH was a more valuable item to him than either Hills or Chase & Sanborn because of its "greater customer acceptance," which he attributed to Maxwell House's superior "quality and promotion against the ultimate consumer." (Engel, Tr. 1714-16.) Quality and taste depend upon a number of factors, including the kind of bean and the grinding and roasting processes used.

In part, at least, one leading brand suffered from what suppliers and retailers regarded as an inconsistent and confused marketing effort.[69] (IDF 271.) There is also substantial evidence of quality problems for a number of other roasters. As early as 1968, Maxwell House's documents indicated that the quality of one of its major competitors was "highly variable" and [57] "poor compared to Maxwell House, Folger's and Chase & Sanborn," attributing this result to a periodic mixing-in of cheaper, poorer quality coffee bean blends. (RX 973-4.) One of complaint counsel's retailer witnesses confirmed the existence of a serious consistency problem for that product in the early 1970's—a problem so severe as to preclude continued success in the Cleveland area. (IDF 271, 272; Engel, Tr. 1698-1700.) Similar quality problems troubled other major brands. (Engel, Tr. 1713; Graham, Tr. 10570.)

Although there is no evidence of any problems with the quality element of Folger's marketing methods, there is evidence of an inefficient initial choice among its advertising and promotion policies. Both Folger's and Maxwell House attributed Folger's superior results in the Syracuse district, its third district target, in part, to a major shift in its marketing strategy (from sampling and retailer coupons to direct mail consumer coupons and straight cash allowance incentives to retailers.) (CX 540A, D, 710A, F; *see also,* Metzger, Tr. 11,870-79.)

In short, the record indicates that the leadership position of the RMH brand in the eastern sales areas stemmed in large part from respondent's superior efficiency in advertising, promoting and maintaining the quality of that brand in those areas. Through these efforts, coffee consumers gained valuable information from Maxwell House

[69] Six months after Folger's 1971 Cleveland area entry, a 1972 Maxwell House document indicated:

> The only *major* competitor in the mild segment [now in the East] is Hills Brothers. There are several indications this brand is in trouble, and is highly *vulnerable* to a *competitive* introduction. . . . [I]t has evolved into primarily a price brand, with no solidly established consumer franchise. With an inferior product (loses significantly to RMH) and no consumer image (six campaigns in past several years) Hills will be severely hurt by the first major entry into the 'mild' segment. (CX 109 F, emphasis in original; *see also,* Laster, Tr. 7076-8.)

promotions and attention to quality. Retailers capitalized on consumer acceptance of the brand by using it as an advertising tool to build store [58] traffic. For these features, retailers were willing to pay a premium to Maxwell House (or other leading brands). But it was not passed on to the coffee consumer. Nor was it safe from capture by other rivals. Hence, we cannot find respondent's attempt to maintain or enhance its sales position to be anticompetitive by effect or design.

D. *Conclusion*

We agree with the ALJ that the evidence in this record indicates the relevant markets are, at the very least, larger than those alleged by complaint counsel. In the face of the substantial entry shown in the record, neither price differences, transportation costs, nor different levels of product acceptance by consumers among any of respondent's sales districts or portions thereof are sufficient to establish the requisite entry barriers for a finding that they are separate markets. We need not, however, reach the question of whether the record supports the United States as the relevant market.

We agree with the ALJ that complaint counsel have not shown respondent to possess any ability or prospect thereof to control price or exclude competition from any of the alleged markets. Respondent's sales, as well as those of its competitors, are simply too responsive to changes in price and product promotions to support an inference of monopoly power. We also conclude that at least a major source of the superior profitability of the more successful firms in the alleged markets has been their superior efficiency in marketing regular ground coffee and in giving retailers and consumers what they want. [59]

For all these reasons, we must find that Maxwell House did not come dangerously close to gaining monopoly power as a result of any of its challenged conduct in any of the alleged markets. Quite to the contrary, its actions were output-enhancing and procompetitive—the kind of conduct the antitrust laws seek to promote. Therefore, we dismiss complaint counsel's charge of attempted monopolization under Section 2 of the Sherman Act.

V. Unfair Methods of Competition Charge

Complaint counsel contend that, even if Maxwell House did not violate Section 2 of the Sherman Act, the company's responses to Folger's eastern expansion were unfair methods of competition, under Section 5 of the Federal Trade Commission Act. (CAB 46-49.) By this argument, pricing below cost and employing a "fighting brand" are anticompetitive tactics that can injure competition when employed by a firm with substantial market power. Section 5, according to complaint counsel, was intended to be prophylactic in its effect and to prevent antitrust violations in their incipiency; therefore, under Section 5, the degree of market power need not reach the Sherman Act threshold to establish a violation. In short, we are asked to expand the reach of the prohibition against attempted monopolization in the Sherman Act by condemning less offensive conduct under the purview of the Federal Trade Commission Act.

It is true that the broad language of Section 5 of the Federal Trade Commission Act permits the Commission to supplement **[60]** the more specific terms of the antitrust laws.[70] Exactly how far that authority extends, however, is an issue the Commission should treat cautiously. While Section 5 may empower the Commission to pursue those activities which offend the "basic policies" of the antitrust laws,[71] we do not believe that power should be used to reshape those policies when they have been clearly expressed and circumscribed. Senator Cummins, a principal sponsor of the Act, explained the words, "unfair competition," to his colleagues as follows:

> It will be the duty of the Commission to apply those words in the sense precisely as it is now the duty of the court to apply the words "undue restraint of trade" in the sense in which we commonly understand that phrase. 51 Cong. Rec. 13048 (1914).

The record in this case does not offer a rationale for using the Federal Trade Commission Act to graft an extension onto Section 2 of the Sherman Act. We have dealt at length with evidence of the charge that Maxwell House illegally attempted to monopolize the regular ground roast coffee market. Complaint counsel refer to the same evidence to support their claim of an unfairness violation of Section 5. We believe our earlier analysis applies with equal force now. **[61]**

The qualitative differences among the products and the consumers' loyalty to certain brands in the market for ground roast coffee do not indicate the kind of market power the antitrust laws were intended to address. The failure of Folger's to reach the local sales volumes of RMH is not an injury to the competitive process, but a result of healthy competition. Complaint counsel's assertion that Maxwell House managed to postpone Folger's introductions into eastern markets is not supported by the evidence. Finally, we do not think that the use of a product design or advertising theme which bears a resemblance to that of a competitor, without more, rises to a violation of Section 5. There is no evidence of consumer confusion or deception under any accepted legal standard that could form the basis for a finding of unfair competition.

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[70] *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 320-21 (1966).
[71] *Id.* 384 U.S. at 321.

What the record does reveal is an episode of intense competition that allowed consumers to purchase the kinds of coffee they prefer at attractive prices. There is no evidence that this advantage came with the risk of future price premiums through a monopolist's recoupment of lost profits. Accordingly, we reject complaint counsel's argument that Maxwell House violated Section 5 of the Federal Trade Commission Act. As the Commission observed in *United Fruit Co. et al.:*

> Certainly, the logic of complaint counsel's argument would require companies concerned with competitive threats in the marketplace to sit back and wait until the threat becomes a reality before taking action. This is surely not the aim and purpose of our competitive marketplace nor the role of competition which the Commission was created to promote. (82 F.T.C. at 163.) **[62]**

The proscription against attempted monopolization in Section 2 of the Sherman Act does not require a showing of monopoly power or injury to competition—a dangerous probability is sufficient. We do not believe this standard should be changed when a case is brought under Section 5. To distinguish between an attempt to monopolize and an incipient attempt on the basis of potential market power is to engage in such fine distinctions as to challenge the legal philosopher, let alone the competitor trying to conform its conduct to the law. If the conduct at issue here cannot reach the early threshold of doubt under the Sherman Act, we will not condemn it under the Federal Trade Commission Act.[72]

VI. Price Discrimination Charge

Complaint counsel argue that Maxwell House violated Section 2(a) of the Robinson-Patman Act by countering Folger's eastern moves with discriminatory prices. (CAB 49-56.) Specifically, confining RMH coupons and performance allowances to selected areas is alleged to have resulted in price differences that are prohibited by the Act. The ALJ concluded that incentives and coupons for consumers to redeem are not elements of the wholesale price of coffee. Accordingly he dismissed the Robinson-Patman count for failure of proof. **[63]**

We need not examine the record for support of discriminatory prices, however defined, for we have already found a dispositive failure of the evidence on other grounds.

Section 2(a) of the Robinson-Patman Act prohibits price discrimination when its 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. . . ." (15 U.S.C. 13(a).) The requirement that price discrimination pose potential harm to

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[72] Because we based our decision on the finding of probability of success, it is unnecessary to determine whether Section 5 would require the same proof of intent as does the Sherman Act.

competition has been upheld consistently by the courts. As the Ninth Circuit recently stated, "[S]ection 2(a) does not prohibit mere price discrimination.... [Plaintiff must prove that the] price discrimination produced a requisite effect on competition."[73] The Supreme Court has defined this effect as "a reasonable possibility that a price difference may harm competition."[74]

The requirement of proving competitive effects has recently provided for a reconciliation between Section 2(a) of the Robinson-Patman Act and Section 2 of the Sherman Act in cases involving attempted monopolization. The same facts that reveal a dangerous probability of successful monopolization will indicate a lessening of competition or a tendency to create a monopoly. Since both statutes are directed towards the same goal—the **[64]** protection of competition—it follows that the inquiries under each should be the same. We agree with the Ninth Circuit that:

> In primary-line Robinson-Patman Act cases, such as this one, the distinction between vigorous, but honest, price competition and predatory assaults on the competitive process is just as important as it is to Sherman Act cases brought under its Section 2. Under these circumstances the analytical standards should be no different.[75]

We have just conducted an extensive analysis of the competitive effects of General Foods' activities. We were unable to find any prospect of injury to competition from the events described in this record. Indeed, our reading of the evidence indicates that competition in General Foods' market is healthy and virtually invulnerable to the assaults of any one firm. The principal effect of the heated rivalry between Folger and Maxwell House has been to reduce the prices consumers pay for coffee and promote product quality. Competition in this industry has thrived, as both firms, and the other producers, have battled for the customers' franchise.[76] While there may be a lower threshold of competitive harm under the "reasonable possibility" standard of the Robinson-Patman Act than under the "dangerous probability" **[65]** standard of the Sherman Act, it is clear that the evidence in this record satisfies neither one. Healthy competition does

[73] *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1040 (9th Cir., 1981), *cert. denied*, U.S. 103 S.Ct. 58 (1982) [Citation omitted].

[74] *Falls City Industries, Inc. v. Vanco Beverage, Inc*, 103 S.Ct. 1282, 1288 (1983) (Citing *Corn Products Refining Co. v. FTC* 324 U.S. 726, 742 (1945)).

[75] *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1042 (9th Cir. 1981), *cert. denied*, U.S. 103 S.Ct. 58 (1982); *Accord, D.E. Rogers Associates, Inc. v. Gardner Denver Co.*, 718 F.2d 1431 (6th Cir. 1983).

[76] The fact that some firms have gained ground and some have lost in the battle does not determine injury to competition. "Certainly the mere fact that [plaintiff] suffered losses and eventually ceased operations is not sufficient to establish a section 2(a) Robinson-Patman violation." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., supra*, at 1042; *Accord, Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835 (7th Cir. 1961) (other competitors losing market share does not demonstrate injury).

not violate the Robinson-Patman Act.[77]

CONCURRING OPINION OF COMMISSIONER MICHAEL PERTSCHUK

I concur in the Commission's decision to dismiss the complaint in this matter. On this record I cannot conclude that respondent General Foods engaged in predatory pricing or other conduct in violation of the antitrust laws.

The essential element of predatory pricing that is missing in this case is the "dangerous probability of success." *E.I. DuPont de Nemours & Co.,* 96 F.T.C. 653, 725 (1980). While I conclude that General Foods possessed sufficient market power[1] in at least some geographic markets to engage in effective predatory pricing, I am unable to conclude, on the basis of the facts of this case, that General Foods did engage in illegal predatory pricing.

A necessary element of predatory pricing is the likely effect of a pricing policy "that somehow restricts competition by driving out existing rivals or by excluding potential rivals from the market." Joskow and Klevorick, "A Framework For Analyzing Predatory Pricing Policy", 89 Yale L.J. 213, 219 (1979). It would theoretically be possible for a large, well-funded competitor to price below some measure of its costs for the [2] period of time necessary to drive a smaller competitor out of the market or to deter one from entering the market. The larger company would then be free to raise prices and gain market share. This scenario is only possible, however, where the larger competitor has a reasonable expectation of driving a smaller competitor out of the market or discouraging new entrants in the market. In other situations, pricing below some measure of cost will only result in aggressive price competition. Predatory pricing, like aggressive price competition, benefits consumers in the *short run.* The difference between them is that in the *long run* consumers are the losers when predatory pricing occurs.

The situation the Commission faces in General Foods has more in common with aggressive competition than predatory pricing. Even though General Foods priced below some measure of costs and had market power to influence prices in geographic markets considerably smaller than the entire U.S.,[2] it still did not have the ability to succeed

[77] Because the requisite effect on competition has not been shown in this case, we need not decide the questions surrounding the proof of discriminatory prices. We should record, however, our reservations over the sufficiency of that evidence.

[1] General Foods' market share in its sales districts over the period 1971-77 ranged from a low of 34.9% to a high of 61.4%, averaging nearly 50%. IDF 278. I have no trouble in concluding that such market power could result in illegal predatory pricing in other circumstances.

[2] I disagree with the ALJ's conclusion that the relevant geographic market is the entire United States. The ALJ dismissed substantial evidence of General Foods' supra-competitive profits (IDF 330-333) in areas significantly smaller than the entire U.S. as well as substantial barriers to entry such as advertising costs and competition for scarce shelf space. Furthermore, there is substantial evidence that General Foods' pricing and marketing policies assume that distinct geographic markets much smaller than the entire U.S. exist. (IDF 283-302)

at monopolization when dealing with a competitor as formidable as Procter & Gamble. As the Administrative Law Judge concluded, "it is simply inconceivable, given Procter & Gamble's marketing expertise and its financial resources . . . [that General Foods] could succeed in [3] monopolizing the sale of regular coffee in the [relevant] sales districts." Initial Decision at 149-50. *See also* IDF 231-32. I believe this conclusion is required, not because the activities of General Foods could not constitute predatory pricing, but because the record does not demonstrate a dangerous probability that General Foods could succeed at driving a determined and well-funded competitor such as Procter & Gamble out of the market. Nor is there any credible evidence that General Foods' pricing activities created a dangerous probability of driving any smaller competitors out of the market or deterring their entry.

While much of the text of the majority's opinion is mere dicta, I am compelled to register my disagreement on several important points. First, the majority's opinion suggests that pricing below "cost" is an "ambiguous signal," (Maj. Op. at 21) and that "prices below some measures of variable cost do not by themselves mean the seller has violated the antitrust laws." (Maj. Op. at 22). But prices at that level are highly suspect if not *per se* predatory.[3] More importantly, however, prices above some measure of average variable cost can also be predatory.[4] [4] Courts are increasingly examining the effect of pricing in the market in which it occurs rather than merely adhering to strict cost/price accounting principles to determine whether pricing is predatory.[5] Some of the factors that might lead the Commission to conclude that illegal predatory pricing exists even when pricing is above average variable cost include the existence of significant barriers to entry, the use of limit pricing, the existence of excess capacity in the market, the use of non-price predation, and other competitive factors.[6] The Commission and the Courts should retain the flexibility

[3] *See e.g., Northeastern Tel. Co. v. AT&T,* 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied,* 455 U.S. 943 (1982); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 668 F.2d 1014, 1036 (9th Cir. 1981), *cert. denied,* 103 S.Ct. 58 (1982).

[4] *See* generally, Brodley and Hay, "Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards," 66 Cornell L. Rev. 738 (1981); Joskow and Klevorick, "A Framework for Analyzing Predatory Pricing Policy," 89 Yale L. J. 213 (1979).

[5] *See International Air Industries Inc. v. American Excelsior Co.,* 517 F.2d 714, (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976) *Superturf Inc. v. Monsanto Co.,* 660 F.2d 1275 (8th Cir. 1981); *Transamerica Computer Co. v. IBM Corp.,* 698 F.2d 1377, (9th Cir. 1983); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.,* 615 F.2d 427, (7th Cir. 1980); *Pacific Engineering Prod. Co. v. Kerr-McGee Corp.,* 551 F.2d 790 (10th Cir.), *cert. denied,* 434 U.S. 879 (1977), *California Computer Products v. IBM,* 613 F.2d 737 (9th Cir. 1979); *ILC Peripherals Leasing Corp. v. IBM,* 1458 F.Supp. 423, (N.D. Cal. 1978) aff'd. 636 F.2d 1188 (9th Cir. 1981).

[6] *See Transamerica Computer Co., Inc. v. IBM Corp.,* 698 F.2d 1377, 1387 (9th Cir.) *cert denied* 104 S.Ct. 370 (1983) ("prices exceeding average total cost might nevertheless be predatory in some circumstances" including limit pricing and temporary reductions by a monopolist to a level "above average total cost but below the profit-maximizing price whenever a new entrant appears ready to enter the market."); *ILC Peripherals Leasing Corp. v. IBM, supra* (barriers to entry should be considered in addition to price/cost analysis); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., supra,* 668 F.2d at 1035 (standard for determining illegality of predatory pricing not based on "rigid adherence to a particular cost-based rule").

to condemn predatory pricing as illegal where an examination of a firm's pricing and other actions in the competitive environment demonstrate the requisite predatory intent, market power, and dangerous [5] probability of successful monopolization even if prices are above the level of average variable cost. This accords with the judicial trend to employ a more flexible test than that proposed by Professor Areeda and Turner, a test which has the distinct disadvantage of holding "dominant firm pricing per se legal."[7]

Second, I disagree with the implication in the majority opinion that the standard of liability for attempted monopolization under the Sherman Act is the same as the standard for price discrimination under Section 2(a) of the Robinson-Patman Act. (Maj. Op. at 62-65). Under Section 2(a) of the Robinson-Patman Act the Commission need only prove that the effect of price discrimination "may be substantially to lessen competition." This should not be confused with the need to demonstrate a dangerous probability of successful monopolization to prove predatory pricing under the Sherman Act.[8] Similarly, while the majority pays lip service to the notion that Section 5 of the FTC Act has a broader reach than the Sherman Act (Maj. Op. at 59-62), I think it is important to state unequivocally that Section 5 gives the Commission important powers to prohibit conduct that does not fall squarely within either the Sherman Act or the Robinson-Patman Act.[9] For example, the use of strategic, [6] below cost pricing which harmed competition by significantly delaying or permanently deterring entry of potential competitors could constitute an unfair method of competition even if General Foods was unlikely to achieve a monopoly position.

CONCURRING OPINION OF COMMISSIONER PATRICIA P. BAILEY

I concur in the dismissal of this case, but perhaps on narrower grounds than the majority and certainly without endorsing much of the overbroad and unnecessary theory which is introduced into the opinion.

My reason for dismissing the case is simply a demonstrated lack of anticompetitive effects. In all the proposed submarkets General Foods lost market share by the end of the alleged periods of predation. Moreover, no competing roasters were forced to halt operations or were driven from the market; some even expanded business.

As to the appropriate geographic market definition, I agree that the price data are not clear enough to support complaint counsel's chosen

[7] Brodley and Hay, *supra*, 66 Cornell L. Rev. at 793.

[8] *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co., supra*, 668 F.2d at 1042.

[9] *See e.g., FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966); *Grand Union v. FTC*, 300 F.2d 92 (2d Cir. 1960). *See also* Handler and Stever, "Attempts to Monopolize and No-Fault Monopolization," 129 v. Pa. L. Rev. 125, 177-180 (1980).

submarkets of General Foods' sales districts. Moreover, evidence on significant levels of transshipments tends to disprove those specific markets. On the other hand, I would emphasize that the transshipment evidence, standing alone, could not establish anything close to a national coffee market. For one thing, evidence on product differentiation as an entry barrier and market-definer is a good deal stronger than the opinion acknowledges. All the major coffee wholesalers' promotional strategies are tailored to meet the differing demand characteristics of some local area. (IDFs 38–67) The trouble is, the borders of a market can be defined by grocery retail and distributional patterns, by television broadcast limits, or by [2] coupon redemption limitations. (*e.g.,* IDFs 69–72, 82–84, 88–89) No one of these variables stands out as the consistent and direct equivalent of General Foods sales districts; nor is it possible, on this record, to use these factors to draw more accurate local markets. This does not mean, however, that product differentiation can never be an entry barrier,[1] merely that in this instance there has been an inexact showing of its scope and effect. I must therefore disassociate myself from that part of the opinion which so strongly suggests that the term "entry barriers" can never be applied to any cost faced by both current market participants and potential entrants. This "Stiglerian" definition is flawed by failure to recognize that firms already in the market often spend far less to get the same result as the entrant, whether that result be scale economies, know-how, promotional and distributional efficiencies, or consumer acceptance. Established firms build on previous investments in market knowledge whereas their new rivals face significant information costs. *See, e.g.,* Demsetz, *Barriers to Entry,* 72 Amer. Econ. Rev. 47, 50 (1982); Schmalensee, *On the Use of Economic Models in Antitrust: The ReaLemon Case,* 127 U. of Pa. L. Rev. 994, 1021 (1979). Thus in this case, over the last twenty years, before Procter & Gamble there were only two major entrants into General Foods' eastern sales districts, and [3] much evidence linking their success to substantial promotional efforts. Procter & Gamble's own experience shows how successful entry turns on stimulating local consumer demand, and that such efforts are both difficult and expensive. The nation's second largest coffee producer found it neither quick nor easy to erode General Foods' dominance of the east coast and any submarkets therein.

I applaud the time-saving analytical approach taken in the opinion, with its emphasis on doing no more than is necessary to resolve the case. I regret, therefore, that having mapped out such an efficient course, the opinion then immediately strays into a wholly unneces-

[1] *See, e.g.,* Caves and Porter, "From Entry Barriers to Mobility Barriers: Conjectural Decisions and Contrived Deterrence to New Competition," 91 *Q.J. Econ.* 241 (1977); Spence, "Entry, Capacity, Investment, and Oligopolistic Pricing," 8 *Bell J. Econ.* 534 (1977).

sary discussion of the correct cost standard for predation. I will reserve my full comments on this subject until they are relevant to a Commission decision.[2] I will note briefly, however, that a majority of the Commission apparently feels that pricing above average variable cost is protected by a strong presumption of legality whereas pricing below average variable cost produces a fairly weak presumption of illegality. I believe the relative weights of the presumptions should be reversed.

I believe the opinion does not sufficiently emphasize that there is a lower threshold for competitive harm under the Robinson-Patman Act than under the Sherman Act. Although the Sherman Act and Robinson-Patman Act march together on proof of [4] anticompetitive conduct and intent from below cost pricing, they part company when it comes to proof of injury to competition. The offense of attempted monopolization requires proof of a dangerous probability of success, while Section 2(a) of the Robinson-Patman Act requires only a showing that a price discrimination "may" substantially lessen competition. By phrasing the prohibition prophylactically, Congress intended to prevent the results of full scale anticompetitive behavior by catching price discrimination in its incipiency and preventing its growth. *FTC v. Morton Salt Co.,* 334 U.S. 37, 43–47 (1948). Moreover, while Section 2 of the Sherman Act requires attempted monopolization of a "part" of commerce, and therefore looks to general competitive conditions in the line of commerce affected, Section 2(a) of the Robinson-Patman Act requires only an impermissible effect upon competition among the price-discriminating seller's competitors or customers. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 668 F.2d 1014, 1042 (9th Cir. 1981, as amended on denial of rehearing and rehearing *en banc,* 1982), *cert. denied,* 103 S.Ct. 58 (1982). Taken together, I interpret these two provisions of the Robinson-Patman statute to allow somewhat more latitude for a determination of competitive injury that does the Sherman Act.[3] This does not mean that the injury standard is inevitably satisfied by mere diversion of business from a competitor, or [5] even by one competitor's exit from the market due to alleged predatory pricing. On the other hand, the standard can be met by a showing of below-cost pricing which has severely weakened a class of competitors and augmented the predator's market power, albeit not to the very high levels which may be needed to prove a dangerous probability of success. In this case, however, I agree that injury to competition—in any quantum—has not been shown.

[2] I have discussed predation previously, in my February 28, 1983, dissenting statement of the final order in *Borden, Inc.,* Docket No. 8978. [48 FR 9023 at 9030 (March 3, 1983)]

[3] *See generally,* Marasco, Tracing an Antitrust Injury in Secondary Line Price Discrimination Cases, 50 Fordham L. Rev. 909, 911–18 (1982).

FINAL ORDER

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion, the Commission has determined to sustain the initial decision.

It is ordered, That the complaint is dismissed.