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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

At a regular session of the Federal Trade Commission, held
at its office in the City of Washington, D. C., on the
27th day of April, A. D. 1944.

COMMISSIONERS:

Robert E. Freer, Chairman,
Garland S. Ferguson,
Charles H. March,
Ewin L. Davis,
William A. Ayres.

In the Matter of

ACME ASBESTOS COVERING AND FLOORING COMPANY,
ASBESTOS, ASPHALT AND INSULATION
MANUFACTURING COMPANY,
ATLANTIC ASBESTOS CORPORATION,
A. H. BENNETT COMPANY,
THE PHILIP CAREY MANUFACTURING COMPANY,
THE CLARK ASBESTOS COMPANY,
EMPIRE ASBESTOS PRODUCTS, INC.,
GILLEN-COLE COMPANY,
JOHNS-MANVILLE CORPORATION,
KEASBEY & MATTISON COMPANY,
L. A. RUBBER & ASBESTOS WORKS, INC.,
G. A. MacARTHUR COMPANY,
NORRISTOWN MAGNESIA AND ASBESTOS COMPANY,
W. S. NOTT COMPANY,
PACIFIC ASBESTOS & SUPPLY COMPANY,
PLANT RUBBER & ASBESTOS WORKS,
THE RUBEROID COMPANY,
SALL MOUNTAIN COMPANY,
STANDARD ASBESTOS MANUFACTURING COMPANY,
corporations; and
DONALD TULLOCH, JR.,
an individual.

DOCKET NO. 4613

FINDINGS AS TO THE FACTS AND CONCLUSION

Pursuant to the provisions of the Federal Trade Commission
Act, the Federal Trade Commission on October 10, 1941, issued
and subsequently served its complaint in this proceeding upon

the respondents named in the caption thereof; and thereafter, on December 27, 1941, issued and subsequently served its amended complaint in this proceeding upon the respondents named in the caption thereof, charging them with unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act. After the issuance of said amended complaint and the filing of respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before an examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission.

Thereafter, this proceeding regularly came on for final hearing before the Commission on said amended complaint, the answers filed thereto, testimony and other evidence, report of the trial examiner and exceptions thereto, briefs in support of and in opposition to the complaint, and oral arguments by opposing counsel; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH ONE: (a) Respondent Acme Asbestos Covering and Flooring Company (hereinafter sometimes referred to as Acme Asbestos) is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business located at Fulton and Elizabeth Streets, Chicago, Illinois. It is a winder or converter of insulating materials, and on or about October 15, 1935, became a sublicensee of respondent Tulloch under United States Patent No. 1972500, hereinafter frequently referred to as the Toohey patent.

(b) Respondent Asbestos, Asphalt and Insulation Manufacturing Company (hereinafter sometimes referred to as Asbestos Asphalt), successor to the Illinois Philip Carey Company, is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business located at 2100 West Fullerton Avenue, Chicago, Illinois. It is a winder or converter of insulating materials, and on or about October 24, 1935, became a sublicensee of respondent Tulloch under the Toohey patent.

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(c) Respondent Atlantic Asbestos Corporation (hereinafter sometimes referred to as Atlantic Asbestos) is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 2128 Westchester Avenue, Bronx, New York. It was organized on January 1, 1939, and was the successor by change of name to J. Ozurovich, Inc. It is a manufacturer of insulating materials, and on or about January 31, 1936, became a sublicensee of respondent Tulloch under the Toohey patent.

(d) Respondent A. E. Bennett Company (hereinafter sometimes referred to as Bennett) is a corporation organized and existing under the laws of the State of Minnesota, with its office and principal place of business located at 113 First Street North, Minneapolis, Minnesota. It is a winder or converter of insulating materials, and on or about March 13, 1936, became a sublicensee of respondent Tulloch under the Toohey patent.

(e) Respondent The Philip Carey Manufacturing Company (hereinafter sometimes referred to as Carey) is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business located at Lockland, Ohio. It is a manufacturer of insulating materials, and on or about October 12, 1935, it became a sublicensee of respondent Tulloch under the Toohey patent. The Philip Carey Company, a New Jersey corporation, was a wholly owned subsidiary of and had common officers with Carey, and was engaged in the sale and distribution of products manufactured by Carey. It was dissolved by its parent in June 1941 for tax reasons and its parent corporation took over its business, its assets, and its obligations. Because of this relationship, no effort is made hereafter to distinguish between acts performed by Carey and those of its wholly owned and controlled subsidiary.

(f) Respondent The Clark Asbestos Company (hereinafter sometimes referred to as Clark Asbestos) is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business located at 1893 East 55th Street, Cleveland, Ohio. It is a winder or converter of insulating materials, and on or about January 22, 1936, became a sublicensee of respondent Tulloch under the Toohey patent.

(g) Respondent Empire Asbestos Products, Inc., (hereinafter sometimes referred to as Empire Asbestos) is a corporation organized and existing under the laws of the State

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of New York, with its office and principal place of business located at Atlas Terminal, Glendale, Long Island, New York. It is a manufacturer of insulating materials, and on or about September 23, 1935, became a sublicensee of respondent Tulloch under the Toohey patent.

(h) Respondent Gillen-Cole Company (hereinafter sometimes referred to as Gillen-Cole) is a corporation organized and existing under the laws of the State of Oregon, with its office and principal place of business located at 714 S. W. Front Avenue, Portland, Oregon. It is a winder or converter of insulating materials, and on or about November 17, 1936, became a sublicensee of respondent Tulloch under the Toohey patent.

(i) Respondent Johns-Manville Corporation (hereinafter sometimes referred to as Johns-Manville) is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 22 East 40th Street, New York, New York. It is a manufacturer of insulating materials and is owner of the Toohey patent. On or about September 11, 1935, it granted an exclusive license under said patent to respondent Tulloch carrying the exclusive right to sublicense others, and coincidentally therewith it received a sublicense under said patent from respondent Tulloch.

(j) Respondent Keesbey & Mattison Company (hereinafter sometimes referred to as Keesbey & Mattison) is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business located at Ambler, Pennsylvania. It is a manufacturer of insulating materials, and on or about September 20, 1935, became a sublicensee of respondent Tulloch under the Toohey patent.

(k) Respondent L. A. Rubber & Asbestos Works, Inc., (hereinafter sometimes referred to as L. A. Rubber) is a corporation organized and existing under the laws of the State of California, with its office and principal place of business located at 124 East Third Street, Los Angeles, California. It is a winder or converter of insulating materials, and on or about November 23, 1936, became a sublicensee of respondent Tulloch under the Toohey patent.

(l) Respondent G. A. MacArthur Company (hereinafter sometimes referred to as MacArthur) is a corporation organized and existing under the laws of the State of Minnesota, with its office and principal place of business located at 2387

Hampden Avenue, St. Paul, Minnesota. It is a winder or converter of insulating materials, and on or about March 14, 1936, became a sublicensee of respondent Tulloch under the Toohey patent.

(m) Respondent Norristown Magnesia and Asbestos Company (hereinafter sometimes referred to as Norristown) is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business located in Norristown, Pennsylvania. It is a manufacturer of insulating materials, and on or about October 9, 1935, became a sublicensee of respondent Tulloch under the Toohey patent.

(n) Respondent W. S. Nott Company (hereinafter sometimes referred to as Nott) is a corporation organized and existing under the laws of the State of Minnesota, with its office and principal place of business located at Second Avenue North and Third Street, Minneapolis, Minnesota. It is a winder or converter of insulating materials, and on or about February 6, 1936, became a sublicensee of respondent Tulloch under the Toohey patent.

(o) Respondent Pacific Asbestos & Supply Company (hereinafter sometimes referred to as Pacific Asbestos) is a corporation organized and existing under the laws of the State of Oregon, with its office and principal place of business located at S. W. Front and Clay Streets, Portland, Oregon. It is a winder or converter of insulating materials, and on or about November 17, 1936, became a sublicensee of respondent Tulloch under the Toohey patent.

(p) Respondent Plant Rubber & Asbestos Works (hereinafter sometimes referred to as Plant Rubber) is a corporation organized and existing under the laws of the State of California, with its office and principal place of business located at 537 Brannan Street, San Francisco, California. It is a winder or converter of insulating materials, and on or about November 20, 1936, became a sublicensee of respondent Tulloch under the Toohey Patent.

(q) Respondent The Ruberoid Company (hereinafter sometimes referred to as Ruberoid) is a corporation organized and existing under the laws of the State of New Jersey, with its office and principal place of business located at 500 Fifth Avenue, New York, New York. It is a manufacturer of insulating materials, and on or about October 7, 1935, became a sublicensee of respondent Tulloch under the Toohey patent.

(r) Respondent Sall Mountain Company (hereinafter sometimes referred to as Sall Mountain) is a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business located in Rockdale, Ohio. It is a manufacturer of insulating materials, and on or about December 18, 1935, became a sublicensee of respondent Tulloch under the Toohey patent.

(s) Respondent Standard Asbestos Manufacturing Company (hereinafter sometimes referred to as Standard Asbestos) is a corporation organized and existing under the laws of the State of Illinois, with its office and principal place of business located in Chicago, Illinois. It is a manufacturer of insulating materials, and on or about October 15, 1935, became a sublicensee of respondent Tulloch under the Toohey patent.

(t) Respondent Donald Tulloch, Jr., is an individual with his office and place of business located in Philadelphia, Pennsylvania. On or about September 11, 1935, he was granted an exclusive license by respondent Johns-Manville under the Toohey patent, with the exclusive right to grant non-exclusive sublicenses thereunder to others. Pursuant to this exclusive license, respondent Tulloch sublicensed the corporate respondents as aforesaid.

PARAGRAPH TWO: The corporate respondents named in Paragraph One, except as otherwise specifically set forth therein, are engaged in the manufacture, processing, sale, and distribution of insulating materials, and in the course thereof each competes with others of said respondents to the extent that competition has not been restrained, lessened, or destroyed as hereinafter set forth. Pursuant to sales made in the course and conduct of its business, each such corporate respondent (with the possible exception of Gillen-Cole) regularly transports insulating materials, or causes such materials to be transported, across State lines to purchasers thereof at locations outside the State in which such shipments originate. Said corporate respondents have maintained, and now maintain, a constant course of trade and commerce in insulating materials among and between the several States of the United States. Respondent Donald Tulloch, Jr., is not individually engaged in the production, sale, or distribution of insulating materials, but has participated in, aided, assisted, and cooperated with the other respondents in planning, doing, and performing the acts and practices hereinafter set forth.

PARAGRAPH THREE: (a) The principal products involved in this proceeding are asbestos paper, asbestos rollboard,

wool felt paper, and sponge felt paper, which are made in various weights or thicknesses; corrugated asbestos paper, which consists of a sheet of flat paper to which a sheet of corrugated paper has been cemented; and pipe coverings, boiler jackets, sheets and blocks, consisting of several plies of corrugated paper. Pipe coverings are made by rolling corrugated paper spirally so as to form a cylinder, then cut into short sections which are split longitudinally with one side open and the other hinged to facilitate fitting the two halves around a pipe. Pipe covering is made in varying numbers of plies of corrugated paper and in varying inside diameters to fit different sizes of pipe. The more common forms of pipe covering are low-pressure coarse corrugated, low-pressure fine corrugated, low-pressure laminated, wool felt, sponge felt, antisweat, frostproof, and high-pressure laminated. Pipe covering is usually sold in three-foot lengths, accompanied by staples and metal bands for use in holding it in position when placed around pipes. Some pipe covering is wrapped with canvas, and this canvas may be of varying weights or strength. Waterproof jackets are sold for use with pipe covering which, when installed, will be exposed to the elements. These jackets may be attached to the pipe covering when sold or furnished separately for attachment at a later time. There are numerous modifications and variations with respect to the above products not necessary to describe here, and the record contains more detailed descriptions of the various products mentioned above. There is a substantial market for both plain and corrugated paper entirely apart from its use by respondents as a material in producing pipe covering, sheets, or blocks.

(b) Some of the respondents in this proceeding produce paper, corrugate it, fabricate it into pipe covering, sheets, and blocks; some do not produce paper, but carry out the other processes; and some merely convert corrugated paper into pipe covering, sheets, and blocks. Those who only fabricate paper purchased from others are known in the trade as winders or converters.

PARAGRAPH FOUR: (a) An NRA Code for the asbestos industry was approved November 1, 1933, with provision for establishing five divisions of the asbestos industry. The division pertinent to this proceeding was the Asbestos Paper and Allied Products Division, of which respondent Tulloch, who had previously been secretary of a trade association in the asbestos industry and who had been connected with that industry since about 1922, was made manager. The Code provided for the filing of prices and for adherence thereto until other prices were filed. In addition, it authorized the members of

each division to prepare simplification and standardization specifications and a merchandising plan which, subject to review by the administrator, became binding upon the members of the industry when approved by three-fourths of the members of the division to which it applied.

(b) Under the Code provision mentioned the members of the Asbestos Paper and Allied Products Division established a merchandising plan for their products the third revision and correction of which, dated December 21, 1933, became effective. The nature and particularity of the plan is illustrated by its provisions relating to pipe covering. It covered all sales of pipe covering by members in all parts of the United States except a Pacific Coast zone the limits of which were specified. It established and defined classes of buyers, required members to submit the names of customers to a merchandising committee of the division, and after approval by such committee, for the compilation therefrom of a master classified list to be available to members of the Code, with provision for additions or deletions subject to final decision by the Code manager. Definitions were established of carload, mixed car, stopover car, and less-than-carload shipments, with prohibition against hiring the trucks of customers or renting trucks to customers or making allowance for trucking charges where the material was picked up at the factory or warehouse by customers' trucks. Factory points, metropolitan areas, and manufacturers' warehouses were defined. Units of sale were established. Sales were required to be made at prices derived from one standard list price. Price differentials were fixed as between different thicknesses of coverings and different types of construction, as between the different geographical zones, and as between the various classifications of purchasers. Price differentials were fixed for differences in weight of canvas used on pipe coverings, for waterproof jackets, and for various types of bands. Procedures were established for many details of the handling of quotations and shipments, as well as the treatment of different classes of customers following an advance or decline in price. The method of determining warehouse prices was specified; the terms of payment, including cash discounts to different classes of buyers, were fixed; and important features of contracts were standardized. Consignment stocks were prohibited. Substandard materials could not be offered below the normal selling schedule of the manufacturer. Territorial zones were defined for purposes of determining freight allowances. Similarly detailed schedules applied to other products.

(c) Before NRA there were a few practices such as zoning, customer classification, freight equalization, and the use of

a standard price list, which were in general use in the industry, but with differences in detail as among different companies. The merchandising plan, a portion of which is briefly described above, was a composite and elaboration of these more or less general practices, supplemented by numerous other provisions, all of which were fitted together into a detailed and definite written document. This merchandising plan was continued in operation until the Schechter decision, and in general was used thereafter until it was replaced in November 1935 by a patent-licensing system, though with departures therefrom by individual manufacturers, the distinction being that it was not rigidly followed in all its details after the Schechter decision.

PARAGRAPH FIVE: (a) In September 1931, application for patent was made by certain employees of Johns-Manville and pursuant thereto U. S. Patent No. 1972500 was granted on September 4, 1934, and became the property of Johns-Manville. Without reference to the technical details of this patent, the change effected by its use in the manufacture of asbestos paper and insulating fabrics is the addition of a small proportion of melted paraffin and other ingredients to the mixture of water and asbestos or other fibers while in the paper beater being prepared for felting into paper. This is claimed to reduce the ability of the fibers so treated to absorb moisture from the air without resulting in a paper in which the pores between the fibers are closed. Also described is a means of treating the surface of the insulating fabrics with water-repellent materials to decrease the capillarity of the surface fibers for water. The claims of the patent, ten in number, cover various insulating materials, including those heretofore described, in which the wax treatment mentioned has been used.

(b) When pipe covering made in the ordinary way is exposed to moisture-laden air it absorbs moisture and expands slightly, and when thereafter it is applied to pipes carrying hot gases or liquids, the heat from such pipes drives the moisture from the covering and some shrinkage results. In instances where this occurs the shrinkage tends to create separations between sections of the pipe covering, thus exposing small sections of pipe and detracting from the appearance and in some degree the efficiency of the insulation. Pipe covering made pursuant to the Toohey patent is said not to shrink, or to shrink but little, thus overcoming or substantially reducing the effects of shrinkage as described above. The experimental and developmental costs of this patent to Johns-Manville were about \$20,000.

PARAGRAPH SIX: (a) There is conflicting testimony as to whether or not respondent Tulloch approached a member of

the industry in 1933, prior to the NRA Code, with a plan to use a patent for preshrinking asbestos paper as a means of stabilizing the price and merchandising conditions in the industry through a patent-licensing system. It is clear, however, that while Mr. Tulloch was manager for the Asbestos Paper and Allied Products Division of the Asbestos Code he was engaged upon a licensing plan for the industry under the Toohey patent. Within a month after the issuance of the Toohey patent Mr. Tulloch, with the cooperation and assistance of the larger and more important members of the industry, was promoting and developing a licensing system and merchandising plan. Under date of October 11, 1934, Mr. Tulloch wrote the general sales manager of Keasbey & Mattison:

General - J. M. Patent No. 1,972,500
on Insulating Material

I am enclosing a copy of the above Patent for your perusal and to be turned over to Mr. Blagden if he cares to read it (Com. Ex. 358).

These patent-licensing proposals were being considered as an industry project for the common benefit of the members of the industry. Illustrative of this, on December 7, 1934, Mr. Tulloch, in his capacity as manager of the Asbestos Paper and Allied Products Division of the Code, wrote to Mr. Herbert Abraham, president of The Ruberoid Company, as follows:

Meeting - Re: Patents

I would like to arrange a meeting Thursday, December 13th in New York City, to discuss the Low Pressure Situation particularly in connection with certain new patents.

Would it be possible for you to attend such a meeting?

If not would Friday, the 14th, meet your conveniences.

The matter is vital to the paper and aircell division and your cooperation will be appreciated (Com. Ex. 32).

On December 11, 1934, Mr. Tulloch, in his capacity as manager under the Code, wrote A. S. Blagden, president of Keasbey & Mattison, as follows:

Re: Low Pressure Patents

Referring to my letter of the 10th, the meeting on the above subject, originally called for the Johns-Manville Conference room, has been transferred to the Commodore Hotel New York City, at the same time, 10:30 A.M., Thursday, Dec. 13th.

The room will be reserved in my name and posted on the bulletin board (Com. Ex. 361).

Counsel for Johns-Manville wrote that company on December 12, 1934, enclosing

* * * three copies of a draft agreement between Johns-Manville Corporation and Mr. Tulloch and three copies of a draft of sub-license agreement to be entered into by Mr. Tulloch and various members of the trade. * * * I am sending them to you now so that you may look them over before the meeting tomorrow morning * * * (Com. Ex. 348).

After the above meeting was held, Mr. Tulloch, under date of December 26, 1934, wrote Mr. Abraham of Ruberoid, who had been unable to attend because of absence from New York:

Re: License Agreement.

I attach copy of revised license agreement.

This is submitted for your consideration and I will be glad to have any comments you care to make (Com. Ex. 51).

The enclosure accompanying this letter (Com. Ex. 52-A to N, inclusive) is a draft of a proposed license under the Toohey patent showing respondent Tulloch as licensor. This draft is significant in indicating what the negotiating parties had in mind. It provided that the licensor could establish minimum selling prices and maximum terms and conditions of sale to the various classes of trade, and further:

The right and license granted hereunder is granted upon the express conditions and limitations that the Licensee shall not make, use or sell any sectional Asbestos Paper Pipe Covering, Sheets or Blocks, Rag Felt or Wool Felt Sectional Pipe Covering, Sheets or Blocks or other similar product used for the same or similar purpose, which does not embody, employ and

contain the invention patented by said Letters Patent; that the Licensee shall not sell to any manufacturer of sectional Asbestos Paper Pipe Covering, Sheets or Blocks, Rag Felt or Wool Felt Sectional Pipe Covering, Sheets or Blocks or such other similar product, any paper or other product useful for any purpose for which paper embodying, employing and containing the invention patented by said Letters Patent is useful, unless such paper or other product embodies, employs and contains the invention patented by said Letters Patent; and that the Licensee shall not sell any paper or any such other product embodying, employing and containing the invention patented by said Letters Patent to persons or corporations which are not Licensees in good standing under a license granted by the Licensor under the said Letters Patent as herein provided.

When finally executed, the license did not contain the provision quoted above. Evidently Mr. Tulloch sent similar drafts of the proposed license to other important manufacturers. A letter dated February 8, 1935, from Keasbey & Mattison to Mr. Tulloch refers to Mr. Tulloch's letter of December 26, and states: " * * * we have given consideration to the agreement which accompanied it proposing a license under U. S. Patent No. 1,972,500, and have the following comments to make." The letter continues by criticizing the possibility that under one of its provisions Keasbey & Mattison might be required to pay double royalty, suggested that provision be made for an interval to afford a licensee time to change schedules when changes are required by the licensor, and concludes by stating:

If manufacturers and small winders representing a sufficient percent of the output of the products coming within the scope of this patent, agree to become Licensees, and you will make the changes we have suggested in the proposed agreement, we shall be pleased to give the matter further consideration (Com. Ex. 35).

Under date of January 5, 1935, Mr. Tulloch wrote Mr. A. K. Burgstresser, president of Norristown:

General - Meeting - Wed. 1/9
(Toohey Patent)

I would like you to act as a member of an Advisory Committee on a merchandising plan under the Toohey Patent.

Will you please advise whether you could attend a meeting of this committee Wednesday, January 9, at 10:30 A.M. at the Hotel Commodore, New York. Unless I hear from you to the contrary, will expect you to attend (Com. Ex. 4).

The Committee referred to in the above letter to Norristown included representatives of Johns-Manville, Carey, Ruberoid, Norristown, and Keasbey & Mattison. From his long experience in the industry, Mr. Tulloch considered the volume producers to be Johns-Manville, Carey, Ruberoid, Norristown, Keasbey & Mattison, and Sall Mountain.

(b) While these negotiations were in progress, the Schechter decision was handed down and members of the Asbestos Code, including many of the respondents in this proceeding, prepared and submitted a so-called voluntary agreement to continue many features of the Code, including the filing of prices with the administrative agency and adherence to the prices and terms so filed, and with provisions looking to the preparation of a merchandising plan. The agreement was prepared in June and July of 1935 but was never approved by Governmental authorities and never became operative.

(c) During all this period, meetings were held by Mr. Tulloch with representatives of the more important of respondent manufacturers at which the proposed licensing plan, the terms of the license from Johns-Manville to Mr. Tulloch, the terms of the sublicenses to be issued by Mr. Tulloch, and the terms of the merchandising plan to be attached to such sublicenses were considered in detail. Drafts of such agreements were prepared and revised from time to time pursuant to suggestions by various parties. Several of the meetings referred to were held in New York, and at least one such meeting was held in Chicago.

(d) Illustrative of the final stages of the negotiations carried on concerning the license agreements, Mr. Tulloch, under date of September 5, 1935, wrote George W. Mills, Jr., of Carey:

I enclose agreements for your consideration in connection with the proposed license under the Toohey Patent.

I understand that you will advise me Monday whether these meet your approval for signature by your company (Com. Ex. 5).

On September 7, 1935, Mr. Mills of Carey replied, acknowledging the above letter and "draft of September 4, 1935 Agreement between Johns-Manville Corporation and yourself," suggested a number of changes, and continued:

I have hastily examined this agreement in order to be able to have something in your hands Monday morning. I will examine it further and if I have any other suggestions or comments will wire you Monday. If you have no word from me by wire Monday, you may consider this as my approval of the proposed license between Johns-Manville Corporation and yourself, granting you the right to license others. This, however, does not constitute my approval of the form of sublicense referred to as "Exhibit A" which is to be attached to this agreement as I have not as yet had an opportunity to examine same. As I advised you over the phone Thursday, I would try to approve the form of license between you and Johns-Manville, whereby you acquire the right to license others, so that you would have my approval or disapproval not later than sometime Monday, but I did not agree, as your letter suggests, to advise you by Monday whether the sublicense form Exhibit A met with my approval for the signature of the Philip Carey Company. That is a matter that requires not only my consideration but also conferences with our officials respecting the proposed schedules which you included in yours of August 30. * * * (Com. Ex. 6-A, B).

PARAGRAPH SEVEN: (a) On September 11, 1935, an exclusive license from Johns-Manville to Mr. Tulloch granting him exclusive right to sublicense, and a sublicense thereunder from Mr. Tulloch to Johns-Manville with accompanying "Schedule of Minimum Prices, Terms and Conditions of Sale" for licensed materials, which schedule was known as the merchandising plan, were finally executed. Some changes of little consequence were made at the time these agreements were signed. In writing Mr. Mills of Carey on September 13, 1935, sending him copies of the documents as executed, Mr. Tulloch characterized such changes thus:

You will note that there are a few changes but I think only minor ones (Com. Ex. 8).

(b) In the form executed, the exclusive license to Mr. Tulloch, among other provisions, gave him the exclusive right to sublicense others on terms no more favorable than those contained in the accompanying sublicense to Johns-Manville; required the payment by Mr. Tulloch of \$1,250 per year compensation to Johns-Manville; provided means for either party to terminate the agreement; and provided that at request of Johns-Manville Mr. Tulloch should bring suit against any infringer of the patent. The sublicense referred to in the exclusive license gave Johns-Manville a non-exclusive license under the patent; required payment of royalty fees to Mr. Tulloch amounting to one-fourth of one percent of the list value of licensed materials described in an accompanying schedule; provided right of inspection of books; prohibited the sublicensee from selling at lower prices or upon terms or conditions of sale more favorable than specified by the licensor; provided liquidated damages of 50 percent of the proper net selling price be paid to the licensor on any sales of licensed materials in violation of the licensor's schedule; established procedure for arbitrating disputes concerning the agreement; provided means for terminating the agreement; and contained a number of other provisions.

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(c) The merchandising plan established pursuant to the sublicenses granted by Mr. Tulloch defined the various classes of purchasers and permitted classification or reclassification of any buyer by the licensor; required that contracts with buyers be in conformity with the merchandising plan; established time limits on quotations and shipment of orders; specified the manner of handling price advances or declines with customers and the nature and extent of protection which might be accorded customers or classes of customers; fixed the cash discount and terms of payment; prohibited future dating of invoices or the furnishing of consignment stocks; fixed a differential for warehouse prices; prohibited sales of substandard materials at less than the established prices without special permission; specified the manner of handling returns of material; required that unit prices be figured to the fourth decimal point and provided for the disposition of subsequent decimals and the manner of figuring extension totals; prohibited loans of licensed materials; established a pricing method on other than standard size materials; required that all invoices, estimate blanks, quotation sheets, or other papers used in quoting or selling conform to pertinent provisions of the license; forbade alternate quotations on public bids which resulted in a lower price than authorized; detailed the manner of invoicing materials; prohibited splitting of commissions with purchasers or the use of fictitious invoices;

required that estimates from blue prints be for a specific quantity and that any additional materials needed to complete the job be charged for at the same rate; and prohibited anything not specifically permitted in the schedule.

Following these general provisions, the special conditions attached to the sale and distribution of the various licensed products were set out separately. One of these schedules covered pipe coverings, sheets and blocks, of the several types and defined standard construction thereof; specified units of sale; supplied tables for calculating areas of sheets and blocks; fixed standard list prices for pipe coverings, sheets and blocks, and required prices be quoted in terms of discounts therefrom; outlined factory zones; divided the country into geographical zones for pricing purposes; specified the extent to which freight allowances might be made; established price differentials for different weights of canvas, for different types and number of bands, and for waterproof jackets with or without accessories; specified the method of figuring prices on sheets and blocks, flat, curved, or with cutouts; defined carload quantity, the method of applying carload prices, and the handling of stop-over cars.

The schedule on corrugated or indented asbestos paper excluded from its application a few of the extreme western States, the exact limits excluded being defined; fixed the unit of sale and specified standard sizes; specified the prices to the various classes of purchasers in carlot and LCL quantities; defined carload and LCL shipments; fixed differentials for warehouse prices; made provision for special grades of these products and prices thereof; and outlined the manner in which freight might be equalized, naming the points to be used for equalization purposes.

The schedule for high-pressure laminated asbestos pipe covering, sheets and blocks, defined the unit of sale; specified constructions considered standard; required that prices be made f.o.b. factory in terms of discount from a standard list; specified points to be used for freight equalization purposes; forbade quoting prices on a freight-allowed basis unless demanded, and then only when calculated according to a specified formula; established differentials for different weights of canvas, types and number of bands, and waterproof jackets; stated a formula for figuring prices on sheets and blocks and price additions for special sizes, curved, or cylindrical shapes or cutouts; made the plan applicable to all but the Pacific Coast territory as defined; and fixed the prices for the different classifications of purchasers.

The schedule on asbestos paper and rollboard was made applicable to all of the United States except a Pacific Coast zone which was defined; specified units of sale; established standard weights and dimensions and fixed the prices therefor in carlot or LCL quantities and as between different classifications of customers; defined carload shipments, mixed cars, pool cars, and LCL shipments; fixed differentials for warehouse prices and prices on special grades; provided the formula for equalization of freight and specified points to be used for freight equalization purposes; established the relation between weights and thicknesses of paper and rollboard and required that other thicknesses be quoted on the basis of the next higher standard weight.

(d) The merchandising plan described above is in general outline and in many details merely a re-establishment, with additions, of the merchandising plan created by these respondents and others under NRA. The principal differences are that the present plan substitutes direct price fixing for price reporting, stops some loopholes for competition which existed in the NRA plan, and provides more direct and effective means of enforcement. The differences which exist between the two plans are largely a matter of degree rather than principle.

PARAGRAPH EIGHT: (a) At various dates between September 11, 1935, when the license agreements were executed by Johns-Manville, and October 25, 1935, sublicenses were executed with twelve other members of the industry, including more important members such as Carey, Ruberoid, Norristown, and Keasbey & Mattison. The merchandising plan attached to the sublicense to Johns-Manville bears the statement: "Effective--upon a date to be fixed hereafter by licensor." These sublicensees did not proceed individually to operate under the sublicenses when granted, or as soon thereafter as possible. Mr. Tulloch fixed November 1, 1935, as a common effective date for the commencement of operations under the patent in accordance with the merchandising plan described.

(b) The licensing system was viewed by members of the industry as being a program by and for the industry. This attitude on the part of both licensed and unlicensed concerns is illustrated below. The Chicago office of Johns-Manville announced the effective date of the merchandising plan to their salesmen by a circular dated November 1, 1935, reading in part:

We have been advised that effective November 1, 1935, the Low Pressure Insulation Manufacturing Industry begins operations under a patent and license agreement.

The patent covers the manufacture of "Pre-shrunk" insulation materials.

Under the terms of the license, we and other manufacturers must manufacture and sell our products involving the patent in strict accordance with rules and price schedules established by the Licensor.

We have just been advised by the Licensor of the establishment of a schedule of selling prices, effective November 1, as per attached copy.

Note particularly that this schedule provides for an increase in the price of Low Pressure Pipe Coverings * * * (Com. Ex. 302).

On December 17, 1935, Clark Asbestos, which was not then a licensee, wrote Mr. Tulloch, stating:

Not having received any further correspondence since November 14th, 1935, we are anxious to know if the present set-up on low-pressure covering is in effect now.

The reason we ask, is that we have been following the prices as you laid down and find that our competitors are not doing this. In fact, the Poewils Asbestos Company had stated that they did not receive any new prices and are still quoting the old.

Please let us hear from you at once (Com. Ex. 183).

On December 21, 1935, Ehret Magnesia Manufacturing Company wrote Mr. Tulloch in part:

If you expect the Ehret Company to live up to the letter of your Merchandising Plan it is going to be necessary for you to send direct to us any memos or rulings, particularly regarding change in price or price clarification.

* * * * *

We realize we are not a Licensee under your patent but we are desirous of living up to all the rules and regulations just as if we were, but we can not do it unless we get the information just as soon as all Licensees get it (Com. Ex. 137).

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Under date of December 27, 1935, Norristown acknowledged a memorandum from Mr. Tulloch concerning the above request by Ehret, and concluded by stating:

We would suggest at the time you send the Ehret Magnesia Mfg. Company their copy that you forward copy of such information direct to Grant Wilson, Inc., 4101 W. Taylor Street, Chicago, Ill. (Com. Ex. 138).

On January 2, 1936, Mr. Tulloch wrote Norristown concerning the Ehret request, stating in part:

In view of the fact that their financial arrangement is such that they practically control two accounts, which I hope will be Licensees, it does not seem to me that there can be any great amount of harm done (Com. Ex. 139).

Clark Asbestos, upon the insistence of Ehret, one of whose officials stressed to Mr. Clark the price-control and stabilization benefits rather than any advantages of preventing shrinkage through the use of the patent, became a licensee soon after the correspondence quoted above. Atlantic Asbestos, one of the respondent licensees, received the understanding that the licensing agreements and merchandising plan merely constituted a method adopted by the industry to stabilize asbestos products.

PARAGRAPH NINE: The merchandising plan put into effect November 1, 1935, represented the result of common consideration by and understandings and agreements among some of the more important members of the industry, including Johns-Manville, Carey, Ruberoid, Norristown, and Keesbey & Mattison. Beginning soon after November 1, 1935, and continuing thereafter changes were made from time to time in its provisions. In general, these changes were made as a result of common consideration by the sublicensees and, insofar as possible in such a group, understanding and agreement among them. From a technical standpoint, all changes made were necessarily ordered by Mr. Tulloch in his own name, but such changes rarely, if ever, represented truly independent action by him. In fact, Mr. Tulloch consistently followed a policy of holding meetings with groups of licensees at frequent intervals to discuss proposed changes in prices, terms of sale, and other features of the merchandising plan which were suggested by him or by others. In addition, he regularly conducted negotiations concerning such matters with licensees individually and as a

go-between for various licensees. The examples set out below illustrate these activities as well as the industry attitude referred to in the preceding paragraph. In a memorandum of February 3, 1936, addressed "TO ALL LICENSEES" Mr. Tulloch stated:

I would like to call a meeting of all Licensees at the Commodore Hotel, New York City, on Wednesday, February 19th at 10:30 A.M.

There are a number of matters of importance to discuss. Please advise promptly whether or not you will be present (Com. Ex. 142).

In a memorandum of February 20, 1936, addressed to licensees Mr. Tulloch stated:

Subject: Committee Meeting -
Asbestos Paper Group

I would like to call a meeting of the above group to shape policies on several matters for submission to a meeting of licensees around the middle of March.

The meeting is called for my office at 10:00 A.M., Thursday, February 27.

Please advise promptly whether you can attend (Com. Ex. 146).

In writing Mr. Tulloch on February 24, 1936, the president of Norristown, in discussing pricing of foil and asbestos, stated in part:

We do think, however, that the Industry should reprice the 1/2" thick Aircell Boards when sold as a board without foil and this price should not exceed 3- $\frac{1}{2}$ ¢ per square foot to keep it in line with other thicknesses. My reason for asking this is that there will be some demands for this class of material and contrary to what we might say or think there is now being discussed this price by the user of such thickness of board. In the event the Industry agrees to this we would not price our 1/2" thickness of board lower than the price originally agreed upon or \$0.0608 per square foot and we will base our quotations on this price.

I wish you would take this up with the Industry and see whether they will not agree on the price as outlined above (Com. Ex. 147).

Under date of July 28, 1936, Mr. Tulloch addressed a memorandum to licensees concerning change in Price Schedule II, stating in part:

Under separate cover you are being forwarded copies of revision of Schedule II.

You will note that many points indicate that I have used my best judgment in adopting compromises which seem to be in the best interests of the industry where differences of opinion on the part of licensees existed (Com. Ex. 321).

On September 22, 1936, Mr. Tulloch's office addressed a memorandum "TO ALL LICENSEES" concerning cut-size boards to equipment accounts, stating in part:

At our recent meeting it was agreed you would give further consideration to the above subject and make a study of the following suggestion designed to eliminate loss on waste. I shall appreciate your comment at your earliest convenience. The following is the suggestion * * * (Com. Ex. 324).

On October 29, 1936, Mr. Tulloch wrote Acme Asbestos concerning removing a provision in the schedules for protection of mechanical contractors and stated in part:

So far as the east is concerned, I'm sure we can remove it.

Can you let me hear on this by return mail so that we can make a decision before printing our new schedules.

Will appreciate it if you can agree with this viewpoint, and would like to know whether others in your territory, according to your recollection, feel as you do about it (Com. Ex. 214).

On November 9, 1936, Acme Asbestos replied to Mr. Tulloch's inquiry, expressing disagreement with a suggestion that the particular provision be removed and the matter be handled by special authorizations, stating in part:

For our own part we are very skeptical about the ultimate workability of any agreement in such a group as ours if it contains any number of "special authorizations." If we were entitled to such an arrangement, others would feel they were entitled to the same or different "special authorizations" which they thought desirable for their business.

If, on the other hand, by "special authorization" you mean it would be authorized in a bulletin to all licensees and in the same terms and conditions that now exist in the present schedule, this would not seem to us to be seriously out of order.

I do think Don you should strongly resist the effort of any one group or trade classification in the industry to appropriate too much of the protection and benefit of the License Agreement to itself. I feel that you as a guiding spirit of the low pressure industry should foster the interests of the plumbing and heating contractor and the jobber just as much as the approved insulation contractors who are even now getting the long end of the deal
* * * (Com. Ex. 215-A, B).

Under date of March 10, 1937, Mr. Tulloch's office addressed a memorandum to licensees concerning flexible range boiler jackets, stating:

Comments made on proof of the above Schedule were sent you February 4 and February 24. While there has been some difference of opinion relative to suggested changes, the general view seems to favor the following changes in the original proof.

* * * * *

If licensees approve the above, we can proceed at once to make effective Schedule VI - so your prompt comments are urged (Com. Ex. 221).

Under date of August 25, 1937, Acme Asbestos wrote Mr. Tulloch in response to his memorandum of August 13th concerning price protection in the event of price advances, stating in part:

We have reviewed your remarks very carefully and I hope you will defer ruling protection out until

the matter has been openly discussed in a meeting. We think it quite too serious to pass on otherwise.

* * * * *

The advances our lines have made have been in some cases considerable over the last 12 or 18 months, but we think they have been accepted a lot more cheerfully in the trade by reason of the protection we have held out to them from time to time as advances have been published than might otherwise have been the case (Com. Ex. 225).

On December 9, 1937, Mr. Tulloch advised licensees in part:

A large majority of Licensees selling Flexible Range Boiler Jackets favor eliminating freight allowance on less than ten jackets.

* * * * *

Therefore on December 25th the following ruling becomes effective:

"Prices on less than 10 jackets F.O.B. factory. On 10 or more jackets prices are F.O.B. factory with full freight allowed" (Com. Ex. 227).

A few days later, on December 14, 1937, Mr. Tulloch advised licensees with regard to the same subject:

This is to advise that developments since publication of elimination of freight allowance on less than 10 jackets indicate the necessity for rescinding this ruling.

Will you therefore disregard the memo of December 9th on this subject.

It has been extremely difficult to find a common ground on which to solve this problem. It is obvious that allowance of freight on these small lots is expensive.

I would like your consideration of a general revision of Range Boiler Jacket prices, sufficient to take care of advancing costs, to be made effective sometime after the first of the year (Com. Ex. 228).

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The respondent sublicensees who did not participate in the organization of the licensing system could not have remained ignorant of the fact that the merchandising plan was being administered upon the basis of cooperation, agreement, and understanding between and among the sublicensees and the licensor. The numerous communications from Mr. Tulloch to all his licensees alone make this plain, without reference to other negotiations and meetings.

PARAGRAPE TEN: (a) Respondent Norristown owns a patent relating to range boiler jackets used principally for insulating household hot water tanks. Under this patent such jackets are made in flexible form, thus conserving shipping space and substantially reducing shipping costs as compared with rigid jackets. In 1933 Norristown licensed Carey under this patent but did not include any price-control provision in the license. In 1934 it licensed Johns-Manville and Sall Mountain under this patent, with provisions for price control. During the time Mr. Tulloch was actively negotiating arrangements for licensing under the Toohey patent, Norristown suggested to him that he also handle licenses under the Norristown patent. On June 26, 1934, Norristown wrote Mr. Tulloch in part:

We had a conversation some time ago with reference to your handling the License Agreements in connection with our flexible boiler jacket. We now hold such Agreement with Carey and J-M, and, while none of them are very profitable and we are not expecting them to be, we believe that by such cooperation far better results can be obtained (Com. Ex. 95).

On December 4, 1935, Norristown wrote Mr. Tulloch:

What progress have you made since we have turned over to you the License Agreement on Flexible Jackets?

There are a number of manufacturers such as National Asbestos, Standard Asbestos at Chicago, etc., who we think should be brought into line.

An expression from you will be appreciated by (Com. Ex. 104).

The lack of a price-control feature in the license to Carey was a hindrance to Norristown and Tulloch in securing licensees under the flexible jacket patent, and unsuccessful efforts were

made to persuade Carey to accept a price-control provision in its license. For example, Norristown wrote Carey on November 9, 1934, in part:

Several days ago I was talking to Roy Hoff of the J-M Company and he told me that while in your company some time ago he mentioned the flexible jacket and the arrangement they have with us and the fact that he believed that a lack of cooperation on the part of some of the manufacturers was penalizing the profits that might be derived from the sale of these jackets. I have had this matter up with both Mr. Steffens and Mr. Moore from time to time and I want to give you an exact picture of our working arrangements at the present time.

You were the first manufacturer to cooperate with us and sign a License Agreement for the making of the flexible jacket. At that time we did not incorporate (sic) a price control, believing that we could work the matter out without such provision. Later the J-M Company signed an Agreement and in this we incorporated the price control and have found that it works very satisfactorily. They naturally want the same cooperation from other manufacturers who are under a License Agreement.

I realize that you are making several types of jackets and that for this reason you are not as much interested in the handling of this matter on a price basis as others might be but the fact that we have not been able to reach a satisfactory working arrangement with you on this part of the Agreement is the cause for our not being able to have several other manufacturers consent to handle the License Agreement for the present at least. This morning Keasbey & Mattison expressed their willingness to work with us on such an Agreement, again with the proviso that everybody of importance would do the same thing. I am, therefore, writing you and asking whether it would be possible to have you agree to such an arrangement (Com. Ex. 84).

The negotiations continued in a desultory manner during the remainder of 1934 and all of 1935. Mr. Tulloch made some efforts to secure licensees under the Norristown patent, and

from time to time during this period various matters were taken up with him concerning operations under the Norristown patent. For example, on May 28, 1935, Norristown wrote Mr. Tulloch:

Some time ago I asked you to confirm the fact that K & M are not quoting our published prices on flexible jackets. Contrary to what you assume, they still have prices with some of the utilities that show a great reduction.

I wish you would check this very closely and if they do not intend playing ball we shall serve a legal notice on them to discontinue the making of this type material. We feel this is necessary to protect our interests as well as the other Licensees (Com. Ex. 100).

On January 8, 1935, Johns-Manville wrote Norristown in part:

We assume you will keep us advised periodically regarding your negotiations with Keasby & Mattison and other range boiler cover manufacturers in regard to their accepting a license under your patent, as it would seem that this will have to be accomplished if we are ever to realize stabilization of prices in this field (Com. Ex. 91).

In writing Mr. Tulloch on January 16, 1936, concerning price cutting on boiler jackets in Detroit, Norristown stated in part:

* * * As you probably know, Empire and National are both selling boiler jackets today at ten per cent less than we are quoting. This is the reason I have thought it important that you proceed without further delay on the jacket proposition because it is coming (sic) serious in that area (Com. Ex. 141).

Sometime during 1936 the idea of bringing flexible boiler jackets under the Toohy patent was advanced and interest in securing licensees under the Norristown patent ceased. On July 23, 1936, Mr. Tulloch addressed a memorandum to his licensees reading:

I have a recommendation from one member of the Industry to the effect that Range Boiler Jackets which should be, and probably are being made out

of patented materials, should be included in the schedules which I publish.

In order to get quick comments on the above, I am attaching, hereto, recommendations for both the rigid type and flexible type jackets.

I would appreciate your consideration of both of these, and your comments thereon (Com. Ex. 209-A).

(b) After extended consultations with and among licensees and after various revisions, Mr. Tulloch in the spring of 1937 published and put into effect under the Toohey patent Schedule VI, which controlled the pricing and merchandising of flexible range boiler jackets made from materials produced under the Toohey patent. This product had not theretofore been included in the merchandising plan. The schedule published was similar in scope, character, and degree of particularity to other schedules previously described. After the incorporation of flexible boiler jackets in the Tulloch merchandising plan, Norristown ceased publishing its own individual price schedules for this product and adopted the schedule published by Mr. Tulloch under the Toohey patent, as did its licensees and those of Mr. Tulloch who produced such jackets.

PARAGRAPH ELEVEN: (a) It was the policy and practice of respondent Tulloch to include in each sublicense only those of the products claimed to be subject to the patent as were produced by the particular concern to which the sublicense was granted. The licenses to respondents Bennett, Clark, Gillen-Cole, and Nott covered only low-pressure pipe covering, sheets and blocks. Those issued to respondents Acme Asbestos, Asbestos Asphalt, Empire Asbestos, L. A. Rubber, and MacArthur included only low-pressure pipe covering, sheets and blocks, and corrugated asbestos paper. Those to Pacific Asbestos and Plant Rubber included low-pressure pipe covering, sheets and blocks, corrugated asbestos paper, and high-pressure laminated pipe covering, sheets and blocks. That to Atlantic Asbestos included low-pressure pipe covering, sheets and blocks, corrugated asbestos paper, and asbestos paper and rollboard. Those to respondents Carey, Johns-Manville, Keasbey & Mattison, Norristown, Ruberoid, Sall Mountain, and Standard Asbestos included low-pressure pipe covering, sheets and blocks, corrugated asbestos paper, high-pressure laminated pipe covering, sheets and blocks, sponge felt paper, wool felt paper, and asbestos paper and rollboard.

(b) The prices and merchandising plans established by respondent Tulloch applied only to the first sale of a licensed

product by a licensee, except when the purchaser was also a licensee. Those respondents designated as winders or converters did not produce paper and necessarily bought their supplies thereof from others. The question of purchases by one licensee from another came up early in the history of the licensing plan. On January 21, 1936, Mr. Tulloch advised all licensees that:

It is quite definite that purchasing licensees must respect my selling schedules and pay royalties on materials they buy and sell, as well as materials they make and sell * * * (Com. Ex. 308).

Although the sublicenses established minimum prices and completely controlled the merchandising of all of the products mentioned in (a) above, and also flexible boiler jackets, Mr. Tulloch did not require or collect royalties from licensees on any of the licensed products except pipe coverings, sheets and blocks.

(c) As heretofore stated, the sublicenses provided for liquidated damages when a licensee violated the merchandising plan. Under this provision Mr. Tulloch from time to time assessed and collected damages from licensees for infractions of the merchandising schedules.

(d) The amount paid to Johns-Manville by Mr. Tulloch for the exclusive license, \$1,250 per year, at most could no more than reimburse Johns-Manville for the development cost of the patent. When considered in connection with the fact that Johns-Manville was obligated to pay a royalty of one-fourth of one percent on all the licensed pipe covering, sheets, and blocks sold or used by it (and it produced no other kind), the financial return to Johns-Manville from the ownership of the patent was insignificant. Johns-Manville contends that it hoped to benefit from the licensing of others under the Toohy patent through the creation of a broader market for the licensed materials in which it would be able to hold its relative position. As a matter of fact, however, the other corporate respondents did little or nothing to promote and create demand for licensed products as against unlicensed. It is also evident from the record that insufficient consumer demand for licensed products developed to make it necessary, as a business policy, for respondents to remain in a position to supply licensed products to purchasers.

PARAGRAPH TWELVE: The Commission has given consideration to the contention by some of the respondents that the various negotiations which preceded the granting of the exclusive

license to Mr. Tulloch represented no more than his efforts to ascertain whether it would be a profitable business venture for him to assume the obligations imposed by the exclusive license, and to the further contention that the negotiations concerning changes in or additions to the merchandising plans represented no more than the efforts of an intelligent business man, not himself engaged in the manufacture and sale of any of the licensed products, to inform himself of the conditions which existed in the manufacture and sale of such products to the end that he might properly administer the licenses. In view of the facts and circumstances shown in the record, however, the Commission concludes that these contentions are without merit.

PARAGRAPH THIRTEEN: (a) The sublicenses granted by respondent Tulloch did not prohibit the sale by licensees of insulating materials made without utilizing the Toohey patent. Although sublicenses were accepted by some 25 concerns, including all the more important ones, there were some producers of pipe coverings and other insulating materials who did not accept sublicenses from Mr. Tulloch. Competition from these unlicensed concerns resulted in many sublicensees selling pipe coverings and other insulating materials not produced under license at prices less than those specified in the Tulloch schedules for licensed materials. Apparently Johns-Manville was the only sublicensee who did not meet such competition in this manner. Carey followed a policy of regularly selling in conformity with the Tulloch schedules except when a competitor offered lower prices on unlicensed materials. If Carey met such lower prices, it furnished unlicensed materials in filling such orders. The record shows a limited number of cases where unlicensed insulating materials were sold in accordance with the prices, terms, and conditions of the Tulloch merchandising plan. The price lists, conditions, and terms of sale issued by respondents to their customers were in accord with the Tulloch plan: they did not have two price lists or two merchandising plans, one for patented and the other for unpatented products. It is plain from the record that a number of the features of the Tulloch plan were frequently, if not regularly, used by respondents in the sale of unlicensed materials. These include matters such as terms of sale other than price, sales of certain types of products on a delivered-price basis and of other types on a freight-equalization basis, differences resulting from the use of the geographical zones, and other features of the merchandising plan. Respondents did not maintain and concurrently use two different merchandising plans for products which were alike except for the wax treatment, and as a practical matter it would have been difficult to do so.

(b) Certain unpatented materials are sold with pipe covering. These include canvas covers made a part of the pipe covering and accompanying accessories such as staples, metal bands, and waterproof jackets. The price for boiler jackets also included unpatented articles such as bands, staples, and asbestos cement, and differentials for extra bands were specified. By establishing price differentials on the same pipe covering when different weights of canvas were used, when different kinds or varying numbers of bands were supplied, and when waterproof jackets were furnished, as well as for unpatented articles used with boiler jackets, the sublicenses issued by Mr. Tulloch effectively fixed the prices for these unpatented articles when sold with pipe coverings or boiler jackets, as they usually are.

PARAGRAPE FOURTEEN: (a) During the period the patent-licensing plan was being negotiated, prices of products covered by its claims were at a low level. When the licensing plan became operative, the prices of such products licensed under the Toohey patent were increased while similar products not made under that patent continued at the previous price levels until about the end of 1936. At that time a general upward trend began and continued until some indefinite time about 1940, when the condition known as a "seller's market" in such products was reached. It is common knowledge that in a seller's market sellers have little occasion for the use of or for interest in a price-stabilization program such as that provided by the Tulloch licensing plan heretofore described.

(b) The record shows that those respondents who discontinued the use of the Toohey patent ceased paying royalties to Mr. Tulloch on or about the following dates:

Pacific Asbestos	September 1937
W. S. Nott	March 1938
Plant Rubber	August 1938
L. A. Rubber	September 1938
Atlantic Asbestos	October 1938
Gillen-Cole	December 1938
Clark Asbestos	December 1938
Standard Asbestos	March 1939
Keasbey & Mattison	May 1939
Norristown	June 1939
Empire Asbestos	June 1939
Acme Asbestos	October 1939
Sall Mountain	January 1940
Ruberoid	May 1940
Bennett	July 1940
MacArthur	March 1941
Asbestos Asphalt	April 1941

Johns-Manville and Carey have continued to utilize the sub-licenses which they hold and to produce and sell products covered by the Toohey patent.

(c) The sublicenses provided that they might be canceled on December 31 of any year by either party giving the other written notice 90 days in advance of that date. Some of the respondents have canceled their licenses in the manner provided; some have not done this, but have simply ceased utilizing the rights granted them by the sublicenses and therefore stopped paying royalties to Mr. Tulloch; and as to some, the record does not show whether or not cancellations in accordance with the terms set out in the sublicenses have been made.

PARAGRAPH FIFTEEN: The Commission concludes from the evidence of record, and therefore finds, that the license from Johns-Manville to Mr. Tulloch was granted and the patent-licensing and merchandising plan heretofore described was established as a part of and as a means of effectuating the combination and conspiracy entered into and maintained by the respondents herein in the manner aforesaid. It further finds that the capacity, tendency, and effect of said combination and conspiracy and the acts and practices performed thereunder and in connection therewith by said respondents as set out herein has been, and is, to lessen, restrain, and suppress competition in the sale and distribution of pipe covering and other insulating materials as described herein in, among, and between the several States of the United States; to fix and maintain prices, terms, and conditions of sale for such materials and to deprive purchasers of such materials of benefits of competition in price; to collectively determine and establish classifications of customers for pricing purposes, and fix and determine price differentials as among such classes; to create substantial uniformity in contracts of sale and in terms and conditions specified therein; to determine and maintain uniform delivered prices on certain insulating materials; to determine and maintain uniform delivered costs to particular purchasers through a freight-equalization plan based upon specified equalization points; to determine and maintain geographical zones within which prices of certain insulating materials were made uniform, and using such zones so established for pricing purposes; to establish standard construction, size, and thickness specifications of products to facilitate price fixing thereon; and otherwise to promote and maintain their price-fixing combination and conspiracy and obstruct, lessen, and defeat any form of competition which threatened the maintenance and purpose of said combination and conspiracy.

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CONCLUSION

The aforesaid combination and conspiracy, and the acts and practices of respondents pursuant thereto and in connection therewith as hereinabove found, under the conditions and circumstances set forth, constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

By the Commission.


R. E. Freer,
Chairman.

Dated this 27th day of
April, A. D. 1944.

ATTEST:


Otis B. Johnson,
Secretary.