Complaint

IN THE MATTER OF

ROBBIN PRODUCTS ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-521. Complaint, June 28, 1963—Decision, June 28, 1963

Consent order requiring Beverly Hills, Calif., distributors of various articles of merchandise to cease representing falsely in advertising materials, matrices, layouts and other printed matter supplied to their retailer-customers, that certain merchandise was "COMPLETELY GUARANTEED", that an electric percolator and 16-piece snack set would be given free with purchase of a cookware set, that lounge chairs were upholstered in a leather product material, that merchandise was offered at special reduced prices, and that certain offers must be accepted at once because the supplies were limited.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Robbin Products, a limited partnership, Sales Development Corporation, a corporation, Merchandise Selectors, Inc., a corporation, Richard Bradley Advertising Company, a corporation, and Meyer Robbin, individually, and as sole general partner of Robbin Products, and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Robbin Products is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 303 South Robertson Boulevard in the city of Beverly Hills, in the State of California.

Respondents Sales Development Corporation, Merchandise Selectors, Inc., and Richard Bradley Advertising Company, are corporations, organized, existing and doing business under and by virtue of the laws of the State of California, with their principal office and place of business located at 303 South Robertson Boulevard in the city of Beverly Hills, State of California.

Respondent Meyer Robbin is the sole general partner of Robbin Products and is president and majority stockholder of each of the

corporate respondents. He formulates, directs and controls the acts and practices of Robbin Products and the corporate respondents, including the acts and practices hereinafter set forth. His address is the same as that of Robbin Products and of the corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of various articles of merchandise such as furniture, watches, radios, tool sets, appliances and other general merchandise to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past, have caused, their said products and merchandise, when sold, to be shipped from their place of business in the State of California, and from other sources of supply located in various States of the United States, to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products and merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, for the purpose of inducing the sale of their merchandise, have engaged in the practice of supplying their customers, who are retail dealers, with advertising materials, matrices, layouts and other printed matter containing various statements and representations.

Typical, but not all inclusive of these statements and representations are the following:

a. COMPLETELY GUARANTEED LIFETIME GUARANTEE

b. FREE ELECTRIC PERCOLATOR PLUS 16 PC. 22 K. GOLD DECORATED SNACK SET with purchase of cookware set

c. LOUNGE CHAIRS, UPHOLSTERED IN "PLYHIDE—" WITH THAT TAILORED LEATER LOOK

d. SPECIAL PRICE DURING THIS SALE ONLY SALE PRICED SALE PRICE

e. WHILE THEY LAST

PAR. 5. Through the use of the aforesaid statements and representations and others similar thereto, not included herein, respondents have represented and have placed in the hands of retailers the means and instrumentalities of representing, directly or by implication that:

a. Certain merchandise is "completely guaranteed", that is, without limitation, condition or qualification for an unlimited period of time. Other merchandise was offered for sale with a "lifetime guarantee," that is, they were guaranteed for a lifetime without any limitation, condition or qualification, other than that indicated in the advertisement.

b. The electric percolator and 16-piece snack set will be given free, that is, as a gift or gratuity without cost to the purchaser of the waterless cookware set.

c. The lounge chairs are covered and upholstered in a leather product material, that is the said material is from the hide of an animal.

d. The prices at which certain merchandise is being offered for sale are special prices, which are reductions from or lower than the prices at which said merchandise was sold at retail by the advertiser in the recent regular course of business.

e. Certain offers of merchandise must be accepted at once or within a limited period of time because the supply or quantity of certain merchandise is limited.

PAR. 6. In truth and in fact:

a. The merchandise advertised as guaranteed with a "completely guaranteed" or "Lifetime guarantee" were not so guaranteed, as the guarantees furnished to purchasers thereof were limited in certain respects, which limitations were not disclosed in the advertisement.

b. Purchasers of the waterless cookware set do not receive the electric percolator and the 16-piece snack set free or without cost because the offer is actually a combination offer consisting of the waterless cookware set, an electric percolator and the 16-piece snack set, and the price charged for said waterless cookware set includes the price of the merchandise referred to as free.

c. The lounge chairs are not covered or upholstered in a leather product material; that is, the said material is not from the hide of an animal, but are upholstered in a vinyl plastic.

d. The prices at which certain merchandise is being offered for sale are not special prices, i.e., they are not reductions from or lower than the prices at which said merchandise was sold at retail by the advertiser in the recent regular course of his business.

e. Said offers of merchandise need not be accepted at once or within a limited period of time as adequate quantities are available.

Therefore, the statements and representations referred to in Paragraphs 4 and 5 hereof, were and are false, misleading and deceptive.

PAR. 7. The respondents by and through the use of the aforesaid acts and practices place in the hands of retailers the means and instrumentalities whereby said retailers may mislead and deceive the public in the manner herein alleged.

PAR. 8. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals likewise engaged in the sale of like and similar merchandise.

PAR. 9. The use by respondents of the aforesaid false, misleading

and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Robbin Products is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 303 South Robertson Boulevard, in the city of Beverly Hills, State of California.

Respondents Sales Development Corporation, Merchandise Selectors, Inc., and Richard Bradley Advertising Company, are corporations organized, existing and doing business under and by virtue of the laws of the State of California, with their office and principal place of business located at 303 South Robertson Boulevard, in the city of Beverly Hills, State of California.

Respondent Meyer Robbin is the sole general partner of Robbin Products and is an officer of each of the said corporations. His address is the same as that of Robbin Products and of the said corporations.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Robbin Products, a limited partnership, Sales Development Corporation, a corporation, and its officers, Merchandise Selectors, Inc., a corporation, and its officers, Richard Bradley Advertising Company, a corporation, and its officers, and Meyer Robbin, individually, and as sole general partner of Robbin Products, and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of furniture, watches, radios, tool sets, appliances or any other merchandise, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any of respondents' products or merchandise are guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

2. Representing directly or by implication that merchandise is given free or without charge in connection with the purchase of other merchandise when the so-called free merchandise is received only after payment therefor is included in the price charged for the other merchandise.

3. Using the term "Plyhide" or any other term, word or description of similar import or meaning to describe or designate any product or material which is not made of leather without clearly and conspicuously disclosing in immediate conjunction with said term, word or description the true nature or origin of said product or material; or representing in any other manner that any non-leather product or material is made of or composed of or contains leather.

4. Using the words "SPECIAL PRICE DURING THIS SALE ONLY", "SALE PRICED", "SALE PRICE", or any other words or terms of similar meaning or import, in conjunction with any article of merchandise or merchandise, unless the price at which said merchandise or articles of merchandise are offered for sale constitutes a reduction from the price at which said merchandise or articles of merchandise were sold at retail by the ad-

vertiser in the recent regular course of his business or a reduction from the generally prevailing price of said merchandise or articles of merchandise in the trade area where the representation is made.

5. Representing, directly or by implication, that certain offers of merchandise must be accepted at once, or within a limited time, when there are, in fact, no specific time limitations, or representing that the supply or quantity of any merchandise or articles of merchandise is limited, when adequate supplies are available.

6. Misrepresenting in any manner the composition, price or availability of any item of merchandise or product.

7. Furnishing or otherwise placing in the hands of others the means and instrumentalities by and through which they may mislead or deceive the public in the manner or as to the things hereinabove prohibited.

It is further ordered, That each of the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

THE MEAD CORPORATION

File Number 571 0656. Order and Opinion, Jan. 3, 1963

Order, in a non-public investigational hearing, granting subpoenaed officers and employees the right of full representation by counsel and issuing rules relating to the rights of witnesses in such proceedings.

ORDER GRANTING IN PART MOTION FOR REPRESENTATION BY COUNCIL

Upon consideration of the respondent's motion filed November 13, 1962, for an order directing that its president, D. F. Morris, and any other employees and officers of The Mead Corporation who may be subpoenaed in connection with a pending investigation (FTC File No. 571 0656), be given the right of "full representation" by counsel of their choice,

It is ordered, That respondent's motion be, and it hereby is, granted to the extent set forth in the accompanying opinion.

By the Commission, Commissioners Anderson and MacIntyre dissenting.

UPON MOTION OF RESPONDENT FOR "FULL REPRESENTATION" BY COUNSEL IN INVESTIGATIONAL HEARING

OPINION OF THE COMMISSION

BY THE COMMISSION:

This matter is before the Commission upon the motion of The Mead Corporation for an order directing that its president, D. F. Morris, and any other employees and officers of The Mead Corporation who may be subpoenaed in connection with a pending investigation (FTC File No. 571 0656), be given the right of "full representation" by counsel of their choice.

A subpoena *duces tecum*, dated March 29, 1962, was served on Mr. Morris, commanding his presence before an attorney of the Federal Trade Commission in Dayton, Ohio, in connection with a non-public "investigation being conducted to determine whether there is reason to believe that Section 7 of the Clayton Act, as amended, has been violated by The Mead Corporation * * *." According to the papers submitted in support of the motion, counsel for D. F. Morris and The

Mead Corporation were informed by the Commission attorney conducting the investigation that they would be permitted only to accompany the witness and to advise him privately, and would not be allowed to speak on the record.

Consideration of this motion requires us to enter an area of administrative law that is relatively uncharted. Section 6(a) of the Administrative Procedure Act provides that "Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel * * *." While the case law on the point is meager and inconclusive,[1] the legislative history and unqualified language of Section 6(a) indicate that Congress intended it to apply to all administrative proceedings, including investigational hearings, where the appearance and testimony of witnesses is compelled.[2]

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[1] *Backer* v. *Commissioner of Internal Revenue,* 275 F. 2d 141 (5th Cir., 1960); *U.S.* v. *Smith,* 87 F. Supp. 293 (D. Conn., 1949); *Wanderer* v. *Kaplan,* decided by the District Court for the District of Columbia, October 30, 1962; *Federal Communications Commission* v. *Schreiber,* decided by the District Court for the Southern District of California, March 1, 1962. The *Schreiber* case, it may be noted, involved a public investigation initiated by an order of the Federal Communications Commission of February 27, 1959 (24 F.R. 1605), which directed that inquiry be made to determine the policies and practices pursued by networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition and the reasons and necessity in the public interest for those policies and practices. Unlike the FCC's general investigation of the television broadcasting industry involved in *Schreiber,* the investigation being conducted here is for the purpose of ascertaining whether there is reason to believe that the named parties have violated specified provisions of law, warranting the issuance of formal complaint and the institution of administrative proceedings which may culminate in cease and desist orders.

[2] The House Committee Report, submitted by Congressman Walter for the Committee on the Judiciary, expressly stated that Section 6(a) "is a statement of statutory and mandatory right of interested persons to appear themselves or through or with counsel before any agency in connection with any function, matter, or process whether formal, informal, public, or private." H. Rept. No. 1980, 79th Cong., 2d Sess., pp. 31–32, reprinted in "Administrative Procedure Act, Legislative History," Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 263–64.

The Attorney General's Manual on the Administrative Procedure Act (1947) states (pp. 61–62) that Section 6(a):

"restates existing law and practice that persons compelled to appear in person before an agency or its representative must be accorded the right to be accompanied by counsel and to consult with or be advised by such counsel. Such persons are also entitled to have counsel act *as their spokesmen in argument and where otherwise appropriate.* Senate Comparative Print of June 1945, p. 10 (Sen. Doc. p. 26). It is clear, of course, that this provision relates only to persons whose appearance is compelled or commanded, and does not extend to persons who appear voluntarily or in response to mere request by an agency. Where appearance is compelled, whether as a party or as a witness, the right to counsel exists." (Emphasis added.)

The Report issued by the (Hoover) Commission on Organization of the Executive Branch of Government, Task Force on Legal Services and Procedure, states (pp. 287–88):

"This [Section 6(a)] right was to be accorded in connection with any function, matter, or process, whether formal, informal, public, or private.

* * * * * * *

"Agency restrictions upon the freedom of a witness or a party to be represented by an attorney in good standing or other duly qualified person in administrative proceedings, whether investigatory or adjudicatory, not only contravene an important purpose of the Administrative Procedure Act, but also derogate from due process of law in the administrative process."

Rule 1.40 of the Commission's Rules of Practice provides, in pertinent part:

> Any person compelled to testify or to produce documentary evidence in a non-public hearing may be accompanied and advised by counsel, but counsel may not, as a matter of right, otherwise participate in the investigational hearing.

Strictly construed, the Rule in its present form permits no participation whatsoever, as a matter of right, by counsel for a subpoenaed witness in a non-public investigation, beyond accompanying the witness and advising him privately off-the-record. The instant motion urges us to reject such a strict construction of the Rule. The Commission believes that because of the obvious great importance of the questions involved, and of the need for providing clear guidance to all concerned, it should now reexamine the considerations of law and policy underlying the Rule and set forth with particularity its views as to the proper scope of participation by counsel for subpoenaed witnesses in non-public investigations of possible violations of law.

At the outset, we may note that the few cases dealing with the minimum constitutional requirements of due process, in relation to the right to counsel in investigatory proceedings, are not very helpful here. Our duty here is, essentially, to determine the standards which, apart from constitutional and statutory compulsions, should be prescribed in the interests of administrative efficiency and fairness to witnesses.[3] Counsel for the movant contends, in substance, that Rule 1.40, in its present form, is weighted too heavily in the direction of administrative convenience, and that it fails to give due regard to the rights of witnesses. It is urged, therefore, that the right to counsel in investigational proceedings be as broad in scope as that in judicial proceedings in the federal courts or in adversary adjudicative proceedings conducted by administrative agencies. We must reject this contention, because it plainly goes much too far in the opposite direction. A reasonable balance must be struck between two legitimate interests, that of administrative efficiency in conducting non-public pre-adjudicative investigations and that of proper representation by counsel of witnesses compelled to testify in such investigations.

The motion here, if granted in terms, would undermine the clear and strong public interest in the orderly and expeditious conduct of

[3] The Supreme Court's decision in *Hannah* v. *Larche*, 363 U.S. 420, dealt only with the compulsions of the Fifth Amendment. Moreover, the investigation there conducted by the Civil Rights Commission—an agency with power only to advise, not to adjudicate—was wholly different from the pre-adjudicative investigation of possible violations of law being conducted here. That case, it may also be noted, involved no contention as to the right to counsel of subpoenaed witnesses. The only issue was whether such witnesses had the right to refuse to appear on the ground that the identity of informants had not been disclosed to them in advance, and that the rules of the Civil Rights Commission did not specifically afford them the right to cross-examine other witnesses.

Commission investigations. The Commission need not, and should not, permit a witness' right to counsel to be abused by unduly delaying the proceeding or turning it into a trial or adversary contest. In his opinion for the Supreme Court in *Hannah* v. *Larche*, Mr. Chief Justice Warren emphasized the differences between an investigation and a trial. Referring specifically to investigations conducted by the Federal Trade Commission, the Court's opinion stated (p. 446): "The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial." In its very nature, an investigative hearing is an *ex parte*, not an adversary, proceeding. The purpose of an investigation is to obtain information, and it is the Commission which has the primary responsibility for deciding what information it needs and from what sources it should be elicited. And both the Administrative Procedure Act and the Commission's Rules make a clear distinction between the procedural safeguards required in adjudicative and in other types of proceedings.[4]

Experience indicates that the danger of dilatory or obstructionist tactics by counsel for witnesses in agency investigations is very real. Such investigations are ordinarily conducted, not by seasoned judges or hearing examiners, but by an investigator or attorney who may lack the weight of authority derived from age, experience, or the stature and respect implicit in judicial or quasi-judicial office. In addition, it is not a reflection on lawyers—indeed, it is perhaps a tribute to their zeal in protecting the rights of clients—to note that, if given an inch, they are prone to claim a yard. Opening the door for counsel to participate on the record of an investigatory proceeding by raising objections, making statements, etc., is inherently hazardous. For, no matter how carefully such right of participation be defined and delimited, opportunities to obstruct or delay the investigation may thus be created which some lawyers may be unable to resist. Accordingly, provision must be made to guard against any such abuse of the right to counsel. If dilatory or obstructionist tactics should be encountered, they must be dealt with sternly. But, to deal with such tactics, it is neither necessary nor desirable that the right to counsel be denied.

Though the hearing be incident to an investigation and not a trial, a witness compelled to appear and testify therein should have the

[4] Section 7(c) of the Administrative Procedure Act provides, *inter alia*, that in adjudicative hearings: "Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." Similarly, Section 4.14(b) of the Commission's Rules of Practice provides that in such hearings, "Every party, except intervenors, shall have the right to due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing."

right to counsel. He may need or desire advice as to whether the hearing is being conducted pursuant to the requirements of the Constitution, the relevant statutes, and the Commission's own Rules. The witness may also need advice, for example, as to whether the investigation is authorized by law, and whether the information sought from him is within the scope of the investigation. Since, under Sections 9 and 10 of the Federal Trade Commission Act, the conduct of the witness may be the basis of subsequent judicial proceedings, he has a legitimate interest in having his counsel take appropriate steps to protect his legal rights. Finally, and especially where the practices of the witness or of his company are the subject of the investigation, he has a right to understand the legal significance of questions addressed to him and to have the assistance of counsel in making certain that his answers to such questions are not left equivocal or incomplete on the record.

In the exercise of its responsibility to establish fair and effective procedures governing non-public investigations of acts or practices that may violate laws administered by it, the Commission hereby prescribes rules which it believes will amply protect the legitimate interests of subpoenaed witnesses without impeding or impairing the efficiency of such investigations. We are convinced that these rules effectuate the policy of Congress, and will not contribute to any "regulatory lag" or delay investigational hearings. As Mr. Justice Jackson noted in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 640: "The Trade Commission Act is one of several in which Congress, to make its policy effective, has relied upon the initiative of administrative officials and the flexibility of the administrative process." On issues challenging the fairness of administrative procedures, we need not wait for judicial mandates. We should not attach to past procedural practices a sacredness that prohibits reexamination.

1. A witness may have present with him counsel of his own choice.

2. Counsel for a witness may advise his client, in confidence, and upon the initiative of either himself or the witness, with respect to any question asked of his client, and if the witness refuses to answer a question, then counsel may briefly state on the record if he has advised his client not to answer the question and the legal grounds for such refusal.

3. Where it is claimed that the testimony or other evidence sought from a witness is outside the scope of the investigation, or that the witness is privileged (for reasons other than self-incrimination, as to which immunity from prosecution or penalty is provided by Section 9 of the Federal Trade Commission Act) to refuse to answer a question or to produce other evidence, counsel for the witness may

object on the record to the question or requirement and may state briefly and precisely the grounds therefor.

4. Any objections made under these rules will be treated as continuing objections and preserved throughout the further course of the hearing, without repeating them as to any similar line of inquiry. Cumulative objections are unnecessary and repetition of the grounds for any such objection will not be allowed.

5. Counsel for a witness may not, for any purpose or to any extent not allowed by paragraphs 2 and 3, interrupt the examination of the witness by making any objections or statements on the record. Motions challenging the Commission's authority to conduct the investigation or the sufficiency or legality of the subpoena must have been addressed to the Commission in advance of the hearing. Copies of such motions may be filed with the hearing officer as part of the record of the investigation; but no arguments in support thereof will be allowed at the hearing.

6. Following completion of the examination of a witness, counsel for the witness may on the record request the officer conducting the hearing to permit the witness to clarify any of his answers which may need clarification in order that they may not be left equivocal or incomplete on the record. The granting or denial of such request shall be within the sole discretion of the officer conducting the hearing.

7. The officer conducting the investigation shall take all necessary action to regulate the course of the hearing to avoid delay and to prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct. Such officer shall, for reasons stated on the record, immediately report to the Commission any instances where an attorney has refused to comply with his directions, or has been guilty of disorderly, dilatory, obstructionist, or contumacious conduct in the course of the hearing. The Commission will thereupon take such further action, if any, as the circumstances warrant, including suspension or disbarment of the attorney from further practice before the Commission, or exclusion from further participation in the particular investigation.

The motion of The Mead Corporation for representation by counsel of its employees and officers in any further hearings in the present investigation will be granted to the extent stated in this opinion.[5]

Commissioners Anderson and MacIntyre dissented from the decision herein.

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[5] Rule 1.40 of the Commission's Rules of Practice will in due course be amended to bring it into conformity with this opinion. The rules announced in this opinion, however, will become effective immediately, in this matter and in other pending non-public investigations of possible violations of law, without awaiting the effective date of such amendment of Rule 1.40.

DISSENTING OPINION

By ANDERSON, *Commissioner:*

I dissent from the action of the majority.

In view of the fact that notices of cross appeal have been filed in *Federal Communications Commission* v. *Schrieber, et al.*, District Court, Southern District of California, March 1, 1962, where some of the same issues are involved, I am of the opinion that for the Federal Trade Commission to take the action advocated by the majority in this matter would be inadvisable. Since *Schrieber* is now on the way to review in the appellate court, I believe it would be good judgment to await the decision therefrom. For this reason, and for this reason alone, do I note this dissent.

DISSENTING OPINION

By MACINTYRE, *Commissioner:*

From the action of the Majority, I dissent.

We should remain mindful of what is involved here. In this matter The Mead Corporation is under investigation by the Federal Trade Commission. It is a large, complex, corporate entity. No natural person is under investigation. Of course, an official of The Mead Corporation has been subpoenaed to appear, testify and produce corporate records regarding The Mead Corporation's activities. If the official should respond to the subpoena and testify, he will do so with complete immunity. Section 9 of the Federal Trade Commission Act provides as follows:

*** * * no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it.**

From the foregoing it is clear that here we are not concerned with the usual type of situation where the civil rights of a natural person are brought into focus. Instead, the real question is whether we shall become so enmeshed in arguments regarding inapplicable legal theories that our time and efforts will be so taken up and spent that we shall become unable to gather and study factual data relating to the structure and interrelationships of large interstate corporations. If we are to answer such question in the affirmative, then we shall find ourselves unable to discharge the responsibilities imposed upon us by the Congress. We should assure and afford witnesses all of their legal and constitutional rights when they are compelled to testify in the course of our proceedings. Even in investigative hearings conducted by us or under our direction we should make sure that the rights of the witnesses are fully protected. Witnesses are

entitled to the benefit of the advice of counsel even when they appear in the course of our non-public investigative hearings. They are entitled to full representation by counsel and a full opportunity to present their cases when they are made subject to charges by the Commission in the course of other proceedings. They are not entitled to nor are their attorneys entitled to convert investigative proceedings into full-grown trials as if they were adversary proceedings.

In this instance the Majority has chosen to accommodate some parties but to ignore and disregard the public interest. It has chosen to disregard the admonition of the Supreme Court in *Hannah* v. *Larche* (363 U.S. 420) that to convert investigations into trials will result in inefficiency and subversion of the purposes of such investigations.

I feel that inimical to the proper resolution of the issues in the present matter was a failure by my colleagues to objectively analyze and appreciate the Commission's overriding obligation to retain and use at maximum efficiency, but within the law, the investigative powers and responsibilities delegated to it by Congress. These powers and responsibilities must not only be assiduously respected and utilized but, above all, not be, as has now been done, surrendered by us in a climate of unsettled law, and without any demonstration on this or other records that the section of Rule 1.40 here in issue has resulted in hardship or injustice to any party. Additionally, there should not be, as has now occurred, a failure in the desire to breathe vitality into a misconceived concept of equity, here cast in the guise of a claim of a right of representation erroneously premised, to balance this action against the distinct probability that in doing so we have dispensed a largess which Congress may not have intended us to bestow upon witnesses and their counsel in non-public investigational hearings.

I feel that the section of Rule 1.40 of the Commission's Rules of Practice as presently drawn and here in issue in all probability, and certainly to the extent we know, satisfies the requirements of constitutional due process, countenances the distinction between investigation and adjudication inherent in the provisions of the Administrative Procedure Act, 60 Stat. 237, 5 USC 9 § 1001–1011, and affords any person compelled to testify or to produce documentary evidence in a non-public investigational hearing all rights of counsel commensurate with the nature of the proceeding being conducted, i.e., a non-public, *ex parte*, investigational hearing.

It should be kept in mind that this is not a lawsuit. Here the Commission has been endeavoring to get some information for the purpose of determining whether a lawsuit or any other proceeding should be undertaken by the Commission. Such information as it

seeks and should secure in the course of this investigation would not constitute a record in any proceeding in a lawsuit. If a lawsuit should ensue as a result of any information the Commission should secure in the course of this investigation, the rules governing lawsuits will apply as they have in Commission proceedings heretofore. In the conduct of lawsuits, Commission rules always have provided for witnesses and parties charged with violations of law to be accompanied, advised, and fully represented by counsel. This means that such parties have been entitled to counsel, to the advice of counsel, and to have counsel make objections, cross-examine witnesses, and offer evidence.

Emphasized by way of repetition at this point is the reminder that here we are not deciding an issue in a lawsuit. Here the Commission is endeavoring to interview some persons who have information relevant to the question of whether the Commission should consider the institution of a lawsuit. The testimony those persons would give us in the course of those interviews in this investigation would not be evidence *ipso facto* in a lawsuit if one should arise. All information adduced at the trial of any such lawsuit would be subjected to the applicable rules and to the procedures applicable to lawsuits.

It is understandable that some parties would prefer to transform all investigative efforts and proceedings into adversary proceedings. Some parties would like to see Grand Jury proceedings made subject to the same rules as are applicable to trial of issues in adversary proceedings. Some parties would prefer that field investigations and interviews conducted by the Federal Bureau of Investigation be formalized and made subject to rules of trials in court. Obviously, such extreme views could not and should not prevail. The Majority in this case has not gone that far. But it has gone quite a distance in that direction. It has gone much farther than either the rights of the parties require or the public policy dictates.

I can in no way agree that the cases cited by the Majority in arriving at their supposition to the contrary are in any way persuasive, controlling, or in fact properly available for citation on the critical question of law here involved, namely, whether Section 6(a) of the Administrative Procedure Act applies at all to non-public investigations of the Federal Trade Commission so as to require that private counsel be permitted to participate in investigational proceedings such as is before us now. This lack of persuasiveness is self-evident in view of the elementary judicial posture of both *Federal Communications Commission* v. *Schrieber, et al.* (Dist. Ct., Sthn. D. Calif. March 1, 1962) and *Wanderer* v. *Kaplan* (Dist. Ct., D.C. December 3, 1962). Cross notices of appeal have been filed in

Schrieber and the order was entered in *Wanderer* on December 3, 1962. Appellate courts have not had the opportunity to review and consider the decisions of United States District Courts in these cases. When and if these cases are reviewed the results could well be the opposite of what the Majority decided and held in this matter.

Other cases relied upon by the Majority to support its position in this matter include *Backer* v. *Commissioner of Internal Revenue*, 275 F. 2d 141 (5th Cir., 1960), and *U.S.* v. *Smith*, 87 F. Supp. 293 (D. Conn., 1949). These cases are without application here. The *Backer* case involved only the issue as to whether a witness had a right to counsel of his own choice to accompany and advise him in the course of an investigational hearing. A like issue was similarly resolved in the case of *U.S.* v. *Smith*, where the Court said:

We hold, therefore, that witnesses summoned to appear before Special Agents have the right to the presence and advice of counsel.

The courts in the *Backer* case and in the *Smith* case decided *only* the issue of whether a witness has a right to counsel of his own choice to accompany and advise him in the course of an investigational hearing. As noted, the courts held that the witnesses do have a right to be accompanied and advised by *counsel of their choice.*

The issue as to whether or not Section 6(a) of the Administrative Procedure Act applies at all or to what degree to non-public investigations being conducted by the Commission is a critical question of law which should be resolved with finality before we blithely undertake to assume that it does apply, and having made that assumption set forth to disestablish Rule 1.40 as presently drawn. It is clear to me that there is no persuasive precedent existent today to the extent that Section 6(a) of the Administrative Procedure Act applies literally to investigations. Rather, I feel the converse is clear. *Hannah* v. *Larche*, *supra.* Moreover, it is unclear from the face of 6(a) as to whether or not, if applicable at all to "investigations" it invests any right other than to be "represented and advised by counsel * * *" in a manner other than one that is consonant or commensurate with the nature of the proceeding, namely, investigation vis-a-vis adjudication. It is not inconceivable, therefore, that if 6(a) applies at all to investigations, the right of representation by counsel there provided would be a right of representation no broader than that presently contained in Rule 1.40. In addition, the only section of the Administrative Procedure Act literally dealing as such with "investigations" is Section 6(b) and the present Rule conforms thereto.

Though the thrust of *Hannah* was avoided by the District Court in *Wanderer* v. *Kaplan*, *supra*, which in turn followed *F.C.C.* v. *Schrieber*, *supra*, where the court failed to follow its own analysis

of the applicable law because of factors intervening between issuance of its opinion and settlement of the order, it is most compelling.

The Court stated the following with respect to administrative agencies and the Administrative Procedure Act:

> * * * The best example is provided by the administrative regulatory agencies. *Although these agencies normally make determinations of a quasi-judicial nature, they also frequently conduct purely fact-finding investigations. When doing the former, they are governed by the Administrative Procedure Act, 60 Stat. 237. 5 U.S.C. § 1001–1011, and the parties to the adjudication are accorded the traditional safeguards of a trial.* However, when these agencies are conducting nonadjudicative, fact-finding investigations, rights *such as* apprisal, confrontation, and cross-examination generally do not obtain.
>
> A typical agency is the Federal Trade Commission. Its rules draw a clear distinction between adjudicative proceedings and investigative proceedings. 16 CFR, 1958 Supp. § 1.34. Although the latter are frequently initiated by complaints from undisclosed informants, id., §§ 1.11, 1.15, and although the Commission may use the information obtained during investigations to initiate adjudicative proceedings, id., § 1.42, nevertheless, persons summoned to appear before investigative proceedings are entitled only to a general notice of "the purpose and scope of the investigation," id., § 1.33, and while they may have the advice of counsel, "counsel may not, as a matter of right, otherwise participate in the investigation." Id., § 1.40. The reason for these rules is obvious. The Federal Trade Commission could not conduct an efficient investigation if persons being investigated were permitted to convert the investigation into a trial. We have found no authorities suggesting that the rules governing Federal Trade Commission investigations violate the Constitution, and this is understandable since any person investigated by the Federal Trade Commission will be accorded all the traditional judicial safeguards at a subsequent adjudicative proceeding, just as any person investigated by the Civil Rights Commission will have all of these safeguards, should some type of adjudicative proceeding subsequently be instituted. (363 U.S. 420, 445–446) (Emphasis supplied.)

Aside from the patent approbation bestowed upon the very Rule here in contest, viz., Section 1.40, it is also clear that the Administrative Procedure Act was directly in contemplation by the Court in deciding *Hannah* and I interpret it as being at least a caveat to us to the effect that the provisions of that Act do not invest substantive adjudicative rights of the nature of those sought in the present motion to a witness or to the witness's counsel in non-public investigations conducted by the Federal Trade Commission. Quite to the contrary, the Court in *Hannah* stated with definiteness that "When doing the former * * * (adjudicating) administrative agencies are governed by the Administrative Procedure Act." Additionally, it should be noted that the Court cited Sections 1 through 11 of the Administrative Procedure Act in so concluding. This includes Section 6(a) and points the way to its inapplicability to non-public investigational hearings.

At the top of page 1468 of the Majority's Opinion a portion of one sentence is quoted from the text of Section 6(a) of the Admin-

istrative Procedure Act. Important portions of that sentence and succeeding sentences were omitted from the Opinion of the Majority. The two succeeding sentences from Section 6(a) of the Administrative Procedure Act the Majority did not see fit to quote are as follows:

> Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function.

It is clear from a reading of the complete text of the Administrative Procedure Act that Section 6(a) deals with "appearances" of "parties" to any agency proceeding. In that connection such "parties" are provided with the right not only for representation by counsel but "for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding." The matter before us involves none of those things. There is no issue drawn in this matter. None is ripe for resolution. Here, it is reiterated, we merely are seeking information about corporate structure and corporate interrelationships. Section 6(b) of the Administrative Procedure Act expressly deals with the type of proceeding before us here. The Majority undertakes a hybridization of investigation and adjudication.

In the Majority's effort to do that, it is admitted that "the case law on the point is meager and inconclusive." Therefore, the Majority, without legal precedent and without support in logic, undertakes to quote bits from here and there from the great volume of writings about the Administrative Procedure Act. In doing that at page 1468 in Footnote 2 of the Majority Opinion, reference is made to the Attorney General's Manual on the Administrative Procedure Act. Even bits and pieces extracted from that Manual do not seem to support the Majority. The substance of what the Majority has quoted from the Manual seems to say that persons in proceedings before agencies should have the right for counsel to "act as their spokesmen in *argument* and where otherwise appropriate." What does the term "*argument*" on the behalf of "party" as there used, mean? It means that where an issue is to be resolved, a "party" is entitled to have counsel of his choice to *argue* his case or points as he wishes in order to get his point of view before the agency prior to the resolution of the issue. The quotation by the Majority from the Hoover Commission report is open to a similar interpretation.

At page 1468 of the Majority's Opinion, a quotation appears which purports to be directed to the language of Section 6(a) as it appears in the Administrative Procedure Act. This purports to be something it is not. Instead of being directed to the language appearing in Section 6(a) of the Administrative Procedure Act, it is language which was directed to the content of what was proposed to be included in Section 6(a) of the Administrative Procedure Act. This will be found to be true by anyone who would care to take the trouble to examine pages 31 and 32 of House Report No. 1980 of the 79th Congress. Of what significance is this mistake of the Majority? The Majority Opinion at page 1468, where it quotes from House Report No. 1980 of the 79th Congress, is arguing that the language it quotes provides an expression by the Congress of what is meant by the word "represent" as it appears in Section 6(a) of the Administrative Procedure Act. As a matter of fact, the language quoted at page 1468 of the Majority Opinion from House Report No. 1980 of the 79th Congress, is directed to the first sentence of what was proposed for Section 6(a) of the Administrative Procedure Act. That first sentence would have appeared in the following language:

> Any person compelled to appear in person before any agency or its representative is entitled to counsel.

Thus it is seen that the language appearing at page 1468 of the Majority Opinion as a quotation from House Report No. 1980 of the 79th Congress has no application to the word "represent" in issue here and which appears in the first sentence of Section 6(a) of the Administrative Procedure Act as finally enacted into law.

The Majority opinion has bent much effort towards the curbing of possible abuses by overly protective counsel after giving the witness the right to now have counsel speak for or with him. This bespeaks eloquently of the practical reason why in the pursuit of *ex parte* investigation the Commission's power to get unfettered and expeditious access to facts through the heretofore effective medium of non-public investigational hearings should not be precipitously weakened. The Majority opinion has, I fear, done this through the failure to perceive that in the guise of legislating privileges of representation heretofore foreign to administrative non-public investigations, it has weakened the public's ability to be assured of efficacious investigation within the law.

Holding these considerations in logical juxtaposition with the novelty of permitting access to the investigative record to counsel for a witness to express his views, to object, and to audibly advise, it is apparent, to me at least, that no practical substantive purpose, from either the Commission's or the witness's standpoint can be

served. The witness has, because of our need to seek the Court's assistance, a built-in objection to all we do if his cause is valid. This failure to recognize that a denial of substantive or bona fide procedural rights are not here involved because of the nature of the proceeding and the relationship of Section 1.40 thereto has resulted, I fear, in our placing the efficaciousness of administrative investigation, and therefore public protection, back to antediluvian ages. We are opening the door to now making investigation "an invitation to a game of hare and hounds" where the facts are to be cornered only after a long chase. This the Supreme Court has condemned. *U.S.* v. *Bryan*, 339 U.S. 323, 331 (1950).

I feel also that the reasons additionally expressed in support of the conclusions reached by the Majority lack persuasiveness.

My colleagues properly note that the Administrative Procedure Act and the Commission's Rules make a clear distinction between the procedural safeguards required in adjudicative or in other types of proceedings.[1] They additionally state, however, that they believe a reexamination of the Rule (1.40) and an expression of their views as to the proper scope of participation by counsel for subpoenaed witnesses, in what is now termed in the most novel of phrases as "* * * non-public investigations of possible violations of law," is now in order.

Herein lies, I believe, one of the basic misconceptions of the nature and purpose of the non-public investigative proceeding and inherent in such misconception is the keystone to the Majority's removal of the clear distinction formerly existent between adjudicative and investigatory proceedings as expressed in our Rules.

Investigation of its very nature is a prelude to being informed but not necessarily to adjudication or even necessarily to an allegation that the law has been violated. In an investigation in its purest form (which is generically proper if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant) no allegations have been made that the law is being violated. Our inquiry may, for example, be like that of the Grand Jury, one for no other purpose than to satisfy ourselves that the law is not being violated. *U.S.* v. *Morton Salt Co., et al.*, 338 U.S. 364 (1948).

Literally, the investigative stage has past when the violation of law is charged and it is at that juncture that the very change from investigation to adjudication dictates, under our Constitutional system, the need for representation by counsel in a form other than through presence and advice. This failure to recognize a basic

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[1] In accord. *Hannah* v. *Larche*, 363 U.S. 420, 445–446 (1960); *FTC* v. *Scientific Living, Inc.*, 150 F. Supp. 495, 502, DC MD Pa. (1957) [6 S.&D. 263].

distinction between the investigative and adjudicative processes I feel has contributed, in part at least, to the viewing, as if existent, of the claimed rights of representation by counsel, certainly proper in the adjudicative forum, through the distorting lens of inapplicable legal doctrine. Either investigation or adjudication is involved here and it is the former, not the latter. If this were not the case our adjudicatory rules would apply and we could so state and this Opinion would be unnecessary. Since it is not adjudication, however, no need exists to expand the investigative Rule (1.40) unless the law is clearly compelling that we should do so.

The present motion must be viewed in light of literal investigation and the rights of representation there legally available. If we fail to do this and dispose of this matter on the false premise of a self-created hybridization, namely, that this is almost adjudication, we fail in our mission as a matter of logic and of law and become miscast in our role of insuring that the public's right to protection through effective investigation does not become a mirage created through the ill-founded assertion of the individual's wants as distinguished from his rights.

Additionally, we must consider that the Commission, when faced with recalcitrancy after the issuance of compulsory process, has no statutory authority to breathe vitality or efficacy into such process, including investigative, though it is authorized to issue such process under Section 9 of the Commission Act. It must seek the assistance of the courts to the accomplishment of this end. It was thus that Congress intended it to be. Accordingly, the courts have recognized these statutory strictures imposed on administrative process as constituting judicial safeguards to the citizen who feels aggrieved. Should the Commission seek to enforce through application to the courts an improper subpoena, it is at this juncture that our process and actions taken thereunder must stand on their merits. The citizen can therefore lose nothing of his rights under our present Rule. e.g., *FTC* v. *Hallmark, Inc.*, et al., 265 F. 2d 433 (7th Cir. 1959) [6 S.&D. 539].

We have heard much about the "regulatory lag." The decision of the Majority in this case is not calculated to solve that problem. Instead, it is obvious that the decision made by the Majority in this case will aggravate the problem of the "regulatory lag."

In a report on the Federal regulatory agencies to the President-elect December 15, 1960, the "regulatory lag" was severely criticized. Examples of long drawn out proceedings and delays in arriving at results demanded in the interest of the public were provided in that report. There, also, it was pointed out that "the result is that in many situations the small businessman is practically excluded from an opportunity to compete."

The mistake of the Majority in this case will become clearer as future circumstances unfold. The unfolding of the future circumstances will demonstrate how the decision of the Majority in this case provides for complicating and substantially adding to the burden of conducting the public business. Then, and only then, will one be able to determine the extent to which the Majority decision in this case adversely affects the public interest.

At page 1470 of the Majority Opinion, it is stated:

Experience indicates that the danger of dilatory or obstructionist tactics by counsel for witnesses in agency investigations is very real.

However, despite these real dangers, the Majority, at page 1471 of its Opinion, rushes toward such dangers by stating "we need not wait for judicial mandates." In other words, the Majority, although admitting that here we are dealing with a matter inconclusively resolved by the judiciary, we shall not wait for judicial guidance on how far we may go in protecting the public interest.

Here the Majority is following *Wanderer* v. *Kaplan*, *supra*. It is clear that it intends to continue to follow *Wanderer* in all of the wandering hither and yon. We are to wander across the glen and over the hills. I shall not join in this game of hare and hounds, where the facts are to be cornered only after the long and perhaps never-ending chase. Consequently, I would deny the motions, and above all, not change Rule 1.40 in any respect.

UNION BAG-CAMP PAPER CORPORATION

Docket 7946. Order, Jan. 7, 1963

Order denying application for special reports and for leave to file interlocutory appeal.

Upon consideration of respondent's application filed December 14, 1962, for Special Reports pursuant to Section 6 of the Federal Trade Commission Act, and for leave to appeal from the refusal of the hearing examiner to certify said application to the Commission, and

It appearing, for the reasons set forth in the hearing examiner's order dated December 6, 1962, that the examiner's refusal to certify to the Commission respondent's application for Special Reports was made in the exercise of his sound discretion, and that the granting of said application is not necessary to respondent's defense in this proceeding and would not be in the public interest.

It is ordered, That respondent's application for Special Reports and for leave to file an interlocutory appeal be, and it hereby is, denied.

Commissioner MacIntyre not concurring and Commissioner Higginbotham not participating.

ALHAMBRA MOTOR PARTS ET AL.

Docket 6889. Order, Jan. 17, 1963

Order reopening proceedings, 57 F.T.C. 1007, and remanding case to Hearing Examiner to comply with the Opinion of the Court of Appeals, Ninth Circuit, 309 F. 2d 213, 7 S.&D. 550.

The United States Court of Appeals for the Ninth Circuit having on October 9, 1962, issued its opinion and on November 15, 1962, entered its final decree affirming and enforcing in part and setting aside in part the Commission's order to cease and desist in this matter; and

The Court having remanded the cause to the Commission for further proceedings not inconsistent with the Court's opinion insofar as the Commission's order relates to the warehouse redistribution discount:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the matter be, and it hereby is, remanded to Chief Hearing Examiner Earl J. Kolb for such further proceedings as are necessary to comply fully with the opinion and decree of the Court, and that the Chief Hearing Examiner, upon completion of the hearings, issue a revised initial decision based upon the present record and such additional evidence as may be received.

OXWALL TOOL COMPANY, LTD., ET AL.

Docket 7491. Order, Jan. 18, 1963

Order reopening proceedings to consider modifying cease and desist order dated December 26, 1961, 59 F.T.C. 1408.

Respondents having moved the Commission to reopen this proceeding and modify the final order to cease and desist entered herein on December 26, 1961 [59 F.T.C. 1408]; and

The Commission having considered said motion and the opposition thereto filed by complaint counsel, and having determined that the public interest would best be served by reopening this matter for the purpose of considering the merits of respondents' motion:

It is ordered, That this proceeding be, and it hereby is, reopened for reconsideration by the Commission of the terms of the order to cease and desist and if additional briefing or argument is deemed necessary, the parties will be notified by appropriate order.

BRISTOL-MYERS COMPANY

Docket 8319. Order, Jan. 23, 1963

Interlocutory order denying motion to take oral depositions and for subpoenae duces tecum.

This matter having come on to be heard upon respondent's motion filed January 7, 1963, requesting the hearing examiner to order the taking of the oral depositions of certain physicians and others who aided in, or who have custody of papers and other data relating to, a study reported in an article entitled "A Comparative Study of Five Proprietary Analgesic Compounds," published in The Journal of the American Medical Association, December 29, 1962, at pages 1315–1318, and for subpoenae duces tecum commanding each of those persons to produce all documents, records, and other written, printed, or graphic materials relating thereto; and

It appearing that respondent has stated as grounds for said motion that the reported study, which was sponsored by the Commission, is relevant to the subject matter of the proceeding commenced by the issuance of the Commission's complaint in the instant case, and that complete details as to the procedures followed, and data gathered, in that study are now needed to permit respondent to prepare for trial, to conduct its cross-examinations at trial, and to preserve the evidence; and

The Commission having placed this matter on its suspense calendar by order of June 25, 1962, thereby staying all proceedings therein until further notice, and thus relieving the hearing examiner to whom the matter had been previously referred of responsibility therein, the reason for such suspension being the Commission's belief that an investigation should be conducted to determine whether other firms in the industry might be falsely advertising their analgesic preparations, and whether simultaneous action against all such firms might be warranted; and

The Commission being of the opinion that its order placing the instant matter on its suspense calendar is the administrative equivalent of a court's order staying a proceeding before it, and that, while such an order is in effect, the taking of depositions is unwarranted where, as here, there has been no showing that the perpetuation of the testimony in question is necessary in order to assure its availability if and when the case is restored to the adjudicative docket:

It is ordered, That respondent's motion be, and it hereby is, denied.

STANDARD MOTOR PRODUCTS, INC.

Docket 5721. Order, Feb. 1, 1963

Order directing appointment of hearing examiner to conduct public hearings on alleged violations of a cease and desist order of the Commission issued Dec. 27, 1957, 54 F.T.C. 814.

WHEREAS, the Federal Trade Commission adopted as its own on December 27, 1957 the findings and conclusions of the hearing examiner filed May 29, 1957 that certain acts and practices of Standard Motor Products, Inc., violated Section 2(a) of the Clayton Act, as amended (15 U.S.C. 13), and on December 27, 1957 ordered that

> "respondent Standard Motor Products, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in or in connection with the sale, for replacement purposes, of automotive products and supplies in commerce, as 'commerce' is defined in the Clayton Act, do forthwith cease and desist from:
>
> Discriminating, directly or indirectly, in the price of such products and supplies of like grade and quality:
>
> 1. By selling to any one purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products"; and

WHEREAS, such order was affirmed on April 15, 1959 by the United States Court of Appeals for the Second Circuit; and

WHEREAS, certiorari applied for by respondent Standard Motor Products, Inc., was denied on October 12, 1959 by the Supreme Court of the United States; and

WHEREAS, such order has continued in effect, not having been modified or set aside, and is in effect now; and

WHEREAS, the Commission has reason to believe that Standard Motor Products, Inc., may have violated the provisions of said order; and

WHEREAS, it is deemed by the Commission to be in the public interest to ascertain the extent to which such violation may have occurred:

Now, therefore, it is ordered, That public hearings be conducted in respect to compliance with the aforesaid order pursuant to § 1.34 and related provisions of the Commission's published Rules (16 CFR Chapter I, Subchapter A).

It is further ordered, That the Director of Hearing Examiners shall designate the hearing examiner to preside at and conduct such public hearings with all the powers and duties provided in the Com-

mission's Rules of Practice For Adjudicative Proceedings as though a formal complaint had been issued and an answer had been filed except that he shall certify the entire record to the Commission and shall not be required to make and file an initial decision; and that he shall grant respondent Standard Motor Products, Inc., all appropriate rights under the Commission's Rules such as, but not limited to, the following: due notice, pre-hearing conference, cross-examination and production of evidence in rebuttal.

It is further ordered, That the hearings shall be held at such times and places as may be necessary to be set by the hearing examiner, provided, however, that the initial hearing shall not be held sooner than the thirtieth (30th) day after service of this order upon respondent Standard Motor Products, Inc.

It is further ordered, That the Secretary shall cause service of this order to be made upon respondent Standard Motor Products, Inc.

C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY

Docket No. 4589. Order, Feb. 1, 1963

Order directing appointment of a hearing examiner to preside over public investigational hearings on alleged violations of a cease and desist order of the Commission issued Jan. 6, 1947, 43 F.T.C. 297.

WHEREAS, pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. Sec. 13, the Federal Trade Commission on January 6, 1947 [43 F.T.C. 297], after due process and proceedings of record herein and in accordance therewith, issued and served upon the respondents named in the caption hereof, an order to cease and desist under subsection (c) of Section 2, thereof; and

WHEREAS by the said order to cease and desist the respondent C. H. Robinson Company and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of fruits, vegetables, and other commodities in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made by respondent Nash-Finch Company while acting under the control of and in fact for and on behalf of said respondent Nash-Finch Company.

2. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account or while acting for or in behalf of a purchaser as an intermediary or agent or subject to the direct or indirect control of such purchaser.

3. Paying, transmitting, or delivering to or for the benefit of any purchaser, either directly or in the form of money or credits or indirectly in the form of dividends, or otherwise, any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, received from any seller while acting as an intermediary or agent for such purchaser or while subject to the direct or indirect control of such purchaser; and

WHEREAS the respondent Nash-Finch Company and its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the purchase of fruits, vegetables, and other commodities in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof on or in connection with purchases made for respondent's own account, either directly or by or through respondent C. H. Robinson Company.

2. Receiving or accepting from respondent C. H. Robinson Company, either directly in the form of money or credits or indirectly in the form of dividends, or otherwise, any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, received by said C. H. Robinson Company from any seller while acting for or in behalf of said respondent Nash-Finch Company as an intermediary or agent for said respondent or while subject to the direct or indirect control of said respondent; and

WHEREAS the said order to cease and desist has not at any time been modified or set aside and is now, and has at all times since January 23, 1947, been in full force and effect; and

WHEREAS the Commission has reason to believe that respondent C. H. Robinson Company and Nash-Finch Company and their officers, agents, representatives and employees, while engaged in commerce in the purchase of certain fruit and other products, may have violated the provisions of the said order to cease and desist as heretofore set forth; and

WHEREAS it is deemed by the Commission to be in the public interest to ascertain the extent to which such violations may have occurred;

Now, therefore, it is ordered, That a public investigational hearing be conducted for that purpose pursuant to Rule No. 1.34 and related rules of the Commission's Rules of Practice.

It is further ordered, That the Chief Hearing Examiner hereby appoint and designate a hearing examiner to preside at such hearing with all the powers and duties as provided by Section 4.13 of the Commission's Rules of Practice, except that of making and filing an initial decision; and upon completion of the hearing, that the hearing examiner shall certify the record to the Commission with his report on the investigation; and that respondents C. H. Robinson Company and Nash-Finch Company shall have the right of due notice, of cross-examination, of production of evidence in rebuttal, and that the hearing shall be conducted in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules are applicable.

It is further ordered, That the hearings shall be held at such time and at such places as may be necessary, the initial hearing to be held at a place to be fixed by the said hearing examiner on a day occurring at least thirty (30) days after the service of notice thereof upon respondents C. H. Robinson Company and Nash-Finch Company.

It is further ordered, That the Secretary shall cause service of this order to be made on said respondents C. H. Robinson Company and Nash-Finch Company.

SHELL OIL COMPANY

Docket 8537. Order and Opinion, Feb. 1, 1963

Interlocutory order denying, for lack of good cause shown, request for release from the Commission's files of confidential documents claimed to "show that the Commission has arbitrarily reversed its position [not to proceed against Shell] * * * to protect its position in the *American Oil* Case".

Order Denying Motion for Disclosure of Confidential Commission Records

The hearing examiner having certified to the Commission respondent's "Motion For Order Directing Counsel Supporting The Complaint To Produce Certain Documents Necessary To Respondent's Defense" because it appeared that the motion constituted a request for the release of confidential files of the Commission and he was without authority to rule thereon; and

It appearing to the Commission, for the reasons stated in the accompanying opinion, that respondent has not shown good cause

for the release of confidential information made requisite by § 1.164 of the Commission's Rules of Practice:

It is ordered, That said motion be, and it hereby is, denied.

Commissioner Elman not participating.

OPINION OF THE COMMISSION

BY THE COMMISSION:

This matter is before the Commission on certification from the hearing examiner of respondent's motion for an order directing complaint counsel to produce certain documents from the Commission's confidential files. Under § 1.164(b) of the Commission's Rules of Practice, confidential information may be released to properly interested persons upon good cause shown if such release is not contrary to any statutory restriction, Commission rule or the public interest.

The preliminary point to be decided is whether respondent has shown good cause for the release of the documents sought. Respondent claims that the materials requested are necessary to the preparation of its defense and if this is so, then, of course, good cause has been shown. If, on the other hand, the documents requested would contribute nothing to respondent's defense, then good cause has not been shown and disclosure must be denied.

The material requested consists of internal Commission memoranda and other papers of the most confidential nature. Respondent's pleading describes the documents as follows:

(1) Memoranda to the Commission from its staff in the Phoenix, Arizona, investigation recommending the closing of the investigation;

(2) The minute of the Commission closing the Phoenix, Arizona, investigation;

(3) Any memoranda of recommendation of the Commission staff in the Smyrna, Georgia, investigation which recommend closing the investigation;

(4) Any minute of the Commission closing the Smyrna, Georgia, investigation;

(5) Any memoranda of the Commission staff relating to reopening, or to issuance of a complaint, in the Smyrna, Georgia, investigation;

(6) Any minute of the Commission on reopening, or on issuing a complaint in the Smyrna, Georgia, investigation;

(7) Any memoranda to the Commission of recommendation on the part of the Commission staff in the Seattle, Washington, investigation;

(8) Any minute of the Commission closing the Seattle, Washington, investigation, or recommending a complaint in that matter.

It is manifest from the description of the papers themselves that they have no relevance or materiality to the issues in any normal Commission proceeding, but respondent charges that this is not a normal proceeding but "* * * that in bringing the present complaint the Commission has used its discretion in an arbitrary manner to justify its prior decision in the *American Oil Company* case." Respondent speculates that the Commission had previously decided not to proceed against it and that the "* * * documents will show that the Commission has arbitrarily and without just cause reversed its position on the aforesaid issues solely to protect its position in the *American Oil* case." [1]

Respondent cites no facts in support of its charges for the simple reason that none exist. While respondent is not entitled to this information, we deem it necessary to disclose that no employee of the Commission ever recommended against the issuance of this complaint and the Commission did not at any time consider or decide that a complaint should not issue.

Moreover, respondent well knew that the Commission's investigations of its pricing practices in Smyrna-Marietta, Georgia, Seattle, Washington, and Long Island, New York, were not completed until the latter part of 1961, and that the results of these separate area investigations could not be normally processed, coalesced and submitted to the Commission until 1962, the year in which complaint issued. Respondent is aware that this proceeding differs materially from the *American Oil* matter in that it is based upon Shell's activities in a number of markets and is not confined to only the Smyrna-Marietta, Georgia, area.

Even if respondent's completely baseless charges were true to the extent that the Commission had originally decided not to issue a complaint and had changed its mind for any reason, there would still not be good cause shown for the release of the documents. The complaint announced that it was issued because the Commission "had reason to believe" that the law had been violated in the respects described. This is a pronouncement of the reason for the complaint's issuance and is not an allegation to be contested. The respondent's effort to obtain the documents constitutes an obvious attempt to probe the mental processes of the Commission, a practice universally condemned by administrative agencies and the courts.[2]

An appropriate order denying respondent's motion will issue.

Commissioner Elman did not participate in the decision of this matter.

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[1] Docket No. 8183, order to cease and desist June 27, 1962 [60 F.T.C. 1786].

[2] E.g., *United Airlines, Inc.* v. *Civil Aeronautics Board*, 281 F. 2d 53, 56 (D.C. Cir. 1960).

SHELL OIL COMPANY

Docket 8537. Order, March 7, 1963

Order denying motion to place documents in the public record, failing for the second time to show good cause.

Respondent's Motion To Place Documents In The Public Record avers that the Commission in denying respondent's earlier request for disclosure of Commission records made "statements of fact" in its opinion which are not supported by evidence of record. The motion argues that the Commission cannot "base findings upon matters which are outside the record" and asks that the documents forming the basis for the Commission's factual statements be produced and placed in the public record.

Respondent does not designate either the "findings" or the "statements of fact" which it feels require support, and in the absence of such designation the Commission is without knowledge both as to the alleged findings and statements to which reference is made. Respondent's counsel do state in their motion that they "do not agree with the accuracy of these statements" but, again, as in their earlier motion, they fail to make a showing to support their disagreement.

Presumably, the theory of respondent's motion is that the Commission's order of February 1, 1963, denying the motion for disclosure of records was based, at least in part, on certain unidentified "findings" and "statements of fact" which, in turn, reflect the content of memoranda and other material in the Commission's files. The opinion which accompanied the Commission's order clearly shows on its face that there is no validity to any such theory. As stated in both the opinion and order, the basis for the Commission's action denying respondent's motion was that the respondent had failed to show good cause for release of the requested documents.

Respondent having now failed again to show good cause for the request that documents be placed in the record:

It is ordered, That the Motion To Place Documents In The Public Record be, and it hereby is, denied.

Commissioner Elman not participating.

THE GRAND UNION COMPANY

Docket 8458. Order, Feb. 11, 1963

Interlocutory order granting respondent's counsel permission to examine special reports from some 180 competing food chains used by complaint counsel as the basis for statistical tabulations offered in evidence, and establishing conditions and safeguards upon such disclosure.

ORDER FOR EXAMINATION OF DOCUMENTS

Complaint counsel offered in evidence in this proceeding certain statistical tabulations based upon special reports filed by twenty food chains in response to Commission orders issued under Section 6(b) of the Federal Trade Commission Act. The hearing examiner refused to admit these exhibits in evidence unless counsel for respondent were first permitted to examine the special reports and other underlying information obtained from approximately 180 food chains who filed such reports with the Commission. The Commission, by its order of July 23, 1962, denied complaint counsel's interlocutory appeal from this ruling.

Complaint counsel subsequently applied to the Commission for permission to disclose to counsel for the respondent the special reports and other underlying information which were the subject of the examiner's ruling. Considering this request as a matter of internal administration, the Commission granted complaint counsel's request informally and accordingly, by order dated January 15, 1963, dismissed complaint counsel's motion requesting permission for such disclosure.

It now appears that complaint counsel and counsel for the respondent have been unable to agree upon the terms and conditions of the disclosure of the special reports and other underlying information received from the approximately 180 food chains, which were the subject of the examiner's ruling.

The Commission has considered this matter and has determined that the respondent's interest in examining these documents for the purpose of making its defense in this proceeding, and the Commission's interest in preventing the unnecessary or improper disclosure of information concerning the operations of the approximately 180 food chains, including competitors of respondent, which have filed special reports pursuant to Commission orders, can best be accommodated and satisfied by establishing certain conditions and safeguards upon the disclosure of these documents to counsel for the respondent. The Commission has further determined that these provisions should be specified in this order for the guidance of counsel and hearing examiners in this and other proceedings. Accordingly,

It is ordered, That counsel for respondent be, and they hereby are, granted permission to examine the special reports and other underlying information received by the Commission from approximately 180 food chains, which documents were the subject of the examiner's initial ruling in this matter, upon the following conditions:

1. Counsel for respondent who have filed an appearance and are actually engaged in the defense of this proceeding may ex-

amine the aforesaid documents on the Commission's premises, and may have made at their own expense and may remove from the Commission's premises one photocopy of each such document, or may make and remove summaries of the information contained in these documents, provided copies thereof are furnished to complaint counsel.

2. Except as expressly permitted by the hearing examiner, no additional copies may be made of the photocopies or summaries which are removed from the Commission's premises.

3. Except as provided in paragraph 4, the copies or summaries removed from the Commission's premises may be examined only by counsel for respondent who have filed an appearance and are actually engaged in the defense of this proceeding, and only for the purpose of preparing such defense; and no information contained in such copies or summaries shall be disclosed to any other person, including any officer or employees of respondent.

4. Counsel for respondent may make application to the hearing examiner for permission to disclose the copies or summaries removed from the Commission's premises, or any information contained therein, to other specified persons for use in the defense of this proceeding. Application for such permission shall identify the names and positions of the persons to whom the copies, summaries or information would be disclosed and the purposes for which they would be examined or used by those persons. Permission may be granted by the hearing examiner only upon a showing that such disclosure is necessary for the respondent's defense in this proceeding.

5. All copies or summaries removed from the Commission's premises, together with all notes, memoranda or other papers containing information obtained from such copies or summaries, must be returned to the Commission upon the termination of this proceeding.

By the Commission, Commissioners Anderson and MacIntyre dissenting on the ground that in their opinion it would be manifestly unfair to subject the materials furnished by the various people not parties to this action to examination by their competitors, Grand Union representatives.

Commissioner MacIntyre dissented, in addition, for the reason that the Commission's action provides for more than is required in order to accord due process, and even to the extent due process is afforded, it could be afforded in other ways than the manner provided for in the order.

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CAMPBELL TAGGART ASSOCIATED BAKERIES, INC.

Docket 7938. Orders and Opinions

ORDER ESTABLISHING PROCEDURE ON INTERLOCUTORY APPEAL, FEBRUARY 19, 1963

The Commission, by its order of January 30, 1963, granted the request of complaint counsel for permission to file an interlocutory appeal from the ruling of the hearing examiner refusing to admit in evidence in this proceeding certain special reports obtained by the Commission pursuant to Section 6(b) of the Federal Trade Commission Act. On January 29, 1963, respondent filed an answer to complaint counsel's request which did not oppose the consideration of this appeal by the Commission, but which requested that: (1) the Commission disclose to respondent certain documents in its files which set forth or refer to clearance procedures or arrangements with the Bureau of the Budget with respect to the Federal Reports Act of 1942; (2) complete legal memoranda be filed by both parties on the basis of the official transcript containing the examiner's ruling; (3) respondent be permitted to file its answering brief within fifteen days after service of complaint counsel's brief; and (4) the Commission hear oral argument on the interlocutory appeal.

The Commission has considered respondent's motions and the reply thereto filed by complaint counsel, and has determined that a procedure should be established for the orderly presentation of this appeal to the Commission whereby: (1) the proceeding now pending before the hearing examiner will not be unnecessarily delayed; (2) both parties will have available to them, prior to the briefing on this appeal, a statement of the issues to be considered, the transcript of the proceeding before the hearing examiner containing the ruling from which this appeal is taken, and the relevant materials reflecting the Commission's previously-expressed administrative interpretation of the applicability of the Federal Reports Act of 1942 to the obtaining of special reports pursuant to Section 6(b) of the Federal Trade Commission Act; and (3) both parties will have full opportunity to present argument on this interlocutory appeal to the Commission. Accordingly,

It is ordered:

1. That to the extent that the hearing examiner's refusal to admit in evidence in this proceeding the special reports offered by complaint counsel was based on the Commission's alleged failure to secure clearance by the Bureau of the Budget for the obtaining of these reports, the hearing examiner shall set aside his previous ruling and shall admit said special reports in evidence, subject however to being stricken later if it should ultimately be determined that the

reports were improperly obtained, and that they are for this reason inadmissible in this proceeding; and that the hearing examiner shall proceed with the expeditious conduct of this proceeding.

2. That the following issues will be considered by the Commission on this appeal:

(a) Whether Commission orders requiring the filing of special reports pursuant to Section 6(b) of the Federal Trade Commission Act for the purpose of eliciting evidence or information concerning possible violations of law must be cleared in advance by the Bureau of the Budget under the provisions of the Federal Reports Act of 1942.

(b) If the Commission's orders for the filing of the special reports which are involved in this proceeding were not cleared in advance by the Bureau of the Budget, whether the absence of such clearance makes such special reports inadmissible in evidence in this adjudicative proceeding.

3. That the Secretary is hereby directed to:

(a) Prepare an affidavit setting forth in detail the Commission's prior practice relating to the submission to the Bureau of the Budget of Commission orders for the filing of special reports pursuant to Section 6(b) of the Federal Trade Commission Act for the purpose of eliciting information concerning possible violations of law;

(b) Secure from the files of the Commission all letters from the Commission to the Bureau of the Budget or other documents in which the Commission has previously expressed its administrative interpretation of the applicability of the Federal Reports Act of 1942 to the issuance of orders for special reports pursuant to Section 6(b) of the Federal Trade Commission Act for the purpose of eliciting information concerning possible violations of law; and

(c) File copies of such affidavit and documents in the record of this interlocutory appeal for service on both parties.

4. That complaint counsel's appeal brief shall be filed within twenty (20) days after service of the affidavit and documents referred to in paragraph 3 above, and that respondent's answering brief shall be filed within twenty (20) days after service of the appeal brief, and that this interlocutory appeal will thereafter be set down for oral argument before the Commission.

Commissioner MacIntyre agrees with that part of the order relating to validity of the 6(b) reports without Bureau of the Budget clearance, but disagrees with that part of the order which appears to authorize divulgence of facts without regard to the provisions of 6(f).

ORDER DENYING PETITION FOR STAY, FEBRUARY 21, 1963

Respondent, by petition filed January 29, 1963, requests a stay by the Commission "of all further enforcement and compliance" with the Commission's order of May 25, 1962, which directed respondent to file a Special Report pursuant to Section 6(b) of the Federal Trade Commission Act. Respondent has objected to the introduction in evidence in this proceeding of certain Special Reports filed by other companies on the grounds that the Commission failed to receive clearance from the Bureau of the Budget for the obtaining of such reports, as allegedly required by the Federal Reports Act of 1942, and this matter is now before the Commission on the interlocutory appeal by complaint counsel from the ruling of the hearing examiner sustaining this objection.

It appears, however, that respondent, on June 18, 1962, filed a Special Report pursuant to the Commission's order of May 25, 1962, and that at no time has it made any objection to that order. It further appears that no proceedings for enforcement of the Commission's order of May 25, 1962, are now pending. Accordingly,

It is ordered, That respondent's petition be, and it hereby is, denied.

ORDER DENYING MOTION TO DISCLOSE PARTICIPANTS IN COMMISSION ADJUDICATIONS, FEBRUARY 21, 1963

By its motion filed February 7, 1963, respondent has requested disclosure by the Commission of the identity of every Commissioner or other Commission official who has or will participate or advise in the Commission's order of January 30, 1963, granting complaint counsel's request for permission to file an interlocutory appeal, the motions filed by respondent on January 29, 1963, relating to such appeal, and the ultimate consideration of the appeal itself.

The Commission has considered the matters set forth in respondent's motion, the exhibit attached thereto and the answer of complaint counsel. In considering this motion the Commission notes that its Rules do not provide for the filing of answers to requests for permission to file interlocutory appeals, and that the answer to complaint counsel's request for such permission which was nevertheless filed by respondent on January 29, 1963, did not oppose consideration of this interlocutory appeal by the Commission. The Commission further notes that the issues raised by this interlocutory appeal do not require the adjudication of any factual issues but involve solely questions of its administrative interpretation and of the application of the Federal Reports Act of 1942. The fact that the Commission, in the exercise of its statutory duties, has necessarily

expressed a position on these questions clearly does not disqualify the Commission or any of its members from the consideration of these legal issues on this appeal. Cf. *FTC* v. *Cement Institute*, 333 U.S. 683, 700–703 [4 S.&D. 676, 690–692].

It may be stated, further, that no person engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding has or will participate or advise in the Commission's consideration of this interlocutory appeal or of any motions made in connection therewith. The consideration and decision of these matters will be made solely by the Commissioners with the advice, where appropriate, of their assistants. Respondent should not be in further need of assurances from the Commission that it does not intend to act with impropriety in this or any other adjudicative proceeding. The matters set forth in respondent's motion and in the exhibit attached thereto provide no indication of any impropriety on the part of the Commission in its consideration of these matters, and in the absence of any such indication, the Commission sees no reason to list the names of the persons who have or will participate or advise in the consideration of these matters. Accordingly,

It is ordered, That respondent's motion be, and it hereby is, denied.

ORDER CONSOLIDATING FOR THE PURPOSE OF HEARING MOTION TO VACATE ORDERS REQUIRING FILING OF SPECIAL REPORTS WITH PENDING INTERLOCUTORY APPEAL GRANTED ON JANUARY 30, 1963, MARCH 22, 1963

Respondent on March 12, 1963, filed a motion to vacate all of the orders requiring the filing of special reports pursuant to Section 6(b) of the Federal Trade Commission Act which were issued by the Commission pursuant to its resolution dated March 6, 1962, entitled "Resolution Directing a Special Report be Filed by Companies Producing, Selling and Distributing Bakery Products." Reserving and not deciding at this time the question as to the standing of respondent to challenge the validity of the Commission's orders and resolution,

It is ordered, That respondent's motion to vacate orders requiring the filing of special reports be, and it hereby is, consolidated with the pending interlocutory appeal granted by the Commission's order of January 30, 1963, and is subject to the procedure established by the Commission's order of February 19, 1963, entitled "ORDER ESTABLISHING PROCEDURE ON INTERLOCUTORY APPEAL."

It is further ordered, That

1. the time for filing complaint counsel's appeal brief in the interlocutory appeal, which shall include an answer to respondent's mo-

tion of March 12, 1963, be, and it hereby is, extended to April 1, 1963, and

2. the time for filing respondent's answering brief, which shall include a reply to complaint counsel's answer to the motion of March 12, 1963, be, and it hereby is, extended to April 22, 1963.

Order Denying Intervention But Granting Leave to File Amicus Curiae Memorandum, April 26, 1963

Upon consideration of the motion of the American Bakers Association filed April 17, 1963, for leave to intervene in this proceeding,

It is ordered, That the American Bakers Association be, and it hereby is, denied leave to intervene in this proceeding, but the Association be, and it hereby is, granted permission to file an *amicus curiae* memorandum, provided such memorandum does not exceed 10 pages in length and is filed on or before May 3, 1963.

Memorandum of Chairman Dixon in Regard to Respondent's Motion That He Be Disqualified, May 2, 1963

By motion supported by an affidavit of counsel, respondent has requested that I be disqualified from participating in the Commission's decisions in this proceeding, including the agency's ultimate review on the merits. In the alternative, respondent moves for an order instituting "a full evidentiary hearing for the purpose of determining upon a complete record" whether I should be disqualified.

It is alleged, in substance, that by reason of my prior position and duties as Counsel and Staff Director of the Antitrust and Monopoly Subcommittee (hereafter "Subcommittee"), Committee on the Judiciary of the United States Senate, I have prejudged certain issues of fact involved in the instant adjudicatory proceeding and am thus barred by Sections 5(c) and 7(a) of the Administrative Procedure Act, 5 U.S.C. Secs. 1004(c) and 1006(a), and by the "due process" clause of the United States Constitution, from participation in the Commission's decision herein.

Since the facts upon which respondent relies to establish my alleged disqualification are set forth in full in the public record of the Subcommittee's proceedings, including the published transcript of its hearings [1] and its report [2] thereon, the "full evidentiary hearing" proposed by respondent in its alternative motion is plainly

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[1] "Study of Administered Prices in the Bread Industry," Hearings Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U.S. Senate, 86th Cong., 1st Sess., pursuant to S. Res. 57 (Part 12, 1959).

[2] S. Rep. No. 1923, 86th Cong., 2d Sess. (1960).

unnecessary.[3] There is no dispute that I was in fact Counsel and Staff Director of the Subcommittee from February 1957 until my appointment as Chairman of this Commission on March 16, 1961; that I actively participated in the Subcommittee's studies of a number of industries, including the baking industry; and that, in the course of the latter study, I interrogated witnesses (including one of respondent's officers) and offered documents on the subject of concentration and anticompetitive practices in the baking industry, including the competitive position and practices of this respondent. It is also true that some of this evidence touched upon some of the same factual matters that are in issue in the instant proceeding. Finally, as the transcript of the Subcommittee hearings plainly indicates, I did express on the record my opinion that some of the evidence received there should be forwarded to the Federal Trade Commission for its consideration in determining whether an investigation should be commenced by that agency.

From all this, and particularly from the phraseology in which I couched certain of my questions and comments to witnesses before the Subcommittee, respondent concludes that I displayed there "advocacy," "partiality," and "prejudgment" of certain of the issues involved here.

I

It seems to me that Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 1004(c) (the "separation of functions" provision) is, by its very terms, wholly inapplicable to the situation involved here. The pertinent part of that provision reads as follows:

> No *officer, employee, or agent* engaged in the performance of investigative or prosecuting functions *for any agency in any case* shall in *that* or a factually related *case*, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not * * * be applicable in any manner to the agency or any member or members of the body comprising the agency. (Emphasis added.)

Assuming that I am not exempted from this provision by the last sentence (because I was not an agency "member" at the time I per-

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[3] Section 7(a) of the Administrative Procedure Act, which is the statutory basis for respondent's demand here, does not require such a hearing in every case of alleged bias. "Some of the agencies have voiced concern that this provision would permit undue delay in the conduct of their proceedings because of unnecessary hearings or other procedure to determine whether affidavits of bias are well founded. The provision does not require hearings in every instance but simply requires such procedure, formal or otherwise, as would be necessary to establish the merits of the allegations of bias. If it is manifest that the charge is groundless, there may be prompt disposition of the matter. On the other hand, if the affidavit appears to have substance, it should be inquired into. In any event, whatever procedure the agency deems appropriate must be made a part of the record in the proceeding in which the affidavit is filed." *Attorney General's Manual on the Administrative Procedure Act* 133 (1947).

formed the allegedly disqualifying acts),[4] it seems to me that my work for the Subcommittee simply does not fall within either the letter or the spirit of the prohibition spelled out here. It should be noted at the outset that this provision does not purport to deal with *actual* bias or prejudice. Instead, it is a flat, statutory prohibition which rests on the *presumption* that certain kinds of activities, if pursued in certain circumstances, will produce a particular state of mind. That disqualifying state of mind, of course, is the advocate's "will to win," a viewpoint believed to be so fixed and unyielding that the statute assumes, without inquiry, that it will be carried onto the administrative bench. By the same token, however, the statute is carefully limited to those situations where, as reason and experience suggest, these activities are likely to produce in the individual a sense of "identification" with a "case" he regards as his own.

As I read Section 5(c), particularly the words emphasized above, an individual challenged thereunder can be disqualified only if, at the earlier period in question, he was (1) an "officer, employee, or agent" of an agency, (2) engaged in "the performance of investigative or prosecuting functions," (3) "for any agency," (4) "in any case." If he *then* attempts to participate in "the" decision "in that or a factually related case," he is disqualified.

Respondent apparently believes that my work on behalf of the Subcommittee was performed in a "case," and that the instant proceeding before this agency is a "factually related case." While the meaning of the term "factually related case" does not appear to have been authoritatively settled, it seems plain to me that this is an issue to be reached only *after* it has been demonstrated that the four requirements noted above have been met. That is, the question of whether the instant proceeding is the *same* case ("that" case) as the one allegedly investigated by the Senate Subcommittee, or one that is "factually related" to the Subcommittee's "case," cannot logically be reached until after it has been determined that there was, in fact, an earlier "case" of the character described in the statute. If there was no such "case," then there is nothing for the instant proceeding to be "factually related" to.

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[4] "Members" of the agency are expressly exempted from Section 5(c)'s prohibition. The last sentence, quoted above, declares that: "This subjection shall not * * * be applicable in any manner to the agency or any member or members of the body comprising the agency." This means that, "if a member of the Interstate Commerce Commission actively participates in or directs the investigation of an adjudicatory case, he will not be precluded from participating with his colleagues in the decision of that case. Sen. Rep. p. 41 (Sen. Doc. p. 227)." *Attorney General's Manual on the Administrative Procedure Act* 58 (1947). It has been held, however, that this exempts agency members for investigative and prosecutive functions performed *after* becoming members (as where a commission reviews *ex parte* investigational files in order to determine whether a formal complaint should be issued), but not for such activities engaged in *before* their appointment. *Amos Treat & Co. v. Securities & Exchange Commission,* 306 F. 2d 260, 265, 266 (D.C. Cir. 1962).

Aside from the obvious fact that the Subcommittee's studies are not adversary proceedings,[5] have none of the characteristics of a "case" as that word is commonly understood,[6] and are therefore outside of the entire rationale of Section 5(c), the really conclusive factor here is that the prohibition of the statute can attach in the first place only if the "case" in question was an "agency" case. This is quite plain from the fact that it reaches only "the performance of investigative or prosecuting functions *for any agency* in any case" (emphasis added). And the word "agency" is defined in Section 2(a) of the Administrative Procedure Act to specifically exclude Congressional authorities:

"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States *other than Congress*, the courts, or the governments of the possessions, Territories, or the District of Columbia. * * * (Emphasis added.)

It can hardly be denied that the Senate Subcommittee for which I performed the functions pointed to by respondent is, in fact, an "authority" of Congress, and thus not an "agency" within the meaning of the Administrative Procedure Act. Hence, my work for the Subcommittee was not that of an "officer, employee, or agent" of an administrative "agency"; it was not performed "for" any such "agency"; and, as previously noted, it was not performed in the course of an agency "case."

II

Section 7(a) of the Administrative Procedure Act, unlike the "separation of functions" requirement of Section 5(c), goes beyond the question of "presumed" bias and presents, as its pertinent language plainly indicates, the more fundamental issue of whether the

[5] As I pointed out in my memorandum in *American Cyanamid Company, et al.*, Dkt. 7211 (Memorandum of Chairman Dixon in Regard to Respondents' Motions That He Be Disqualified, filed February 1, 1962) [60 F.T.C. 1881, 1882], "hearings before Congressional committees are *ex parte* and in no sense adversary in nature. Further, they cannot be said to be adjudicative, since they have as their sole purpose the amassing of facts in order that Congress may be adequately informed concerning the desirability or need for legislation. * * * It was my duty to assist in adducing all of the facts with respect to the subject being investigated and to refrain from presenting only one side of controversial subjects."

[6] Section 5 of the Administrative Procedure Act states that it is applicable, with certain exceptions not relevant here, to "every *case of adjudication* required by statute to be determined on the record after opportunity for an agency hearing * * *." (Emphasis added.) The reach of its various subsections, including 5(c), is of course similarly limited. "Section 5(c) applies only to the class of adjudicatory proceedings included within the scope of section 5, i.e., cases of adjudication required by statute to be determined after opportunity for an agency hearing, and then not falling within one of the six excepted situations listed at the opening of section 5." *Attorney General's Manual on the Administrative Procedure Act* 129 (1947). The word "adjudication" itself is defined by Section 2(d) of the statute as follows: " 'Adjudication' means agency process for the formulation of an order." Thus it would seem that Section 5(c)'s prohibition of adjudication by those officials who have performed investigative functions "for any agency in any *case*" (emphasis added) contemplates a situation in which the investigation is looking toward an adversary, adjudicatory proceeding by the agency.

administrator harbors *actual* bias or prejudice toward a particular party:

> The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an *impartial manner*. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of *personal* bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case. (Emphasis added.)

The standard laid down by this provision is quite similar to that set forth in the statute that governs the disqualification of federal judges:

> Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has any *personal* bias or prejudice either against him or in favor of any opposite party to the suit, the judge shall proceed no further, but another judge shall be designated * * *.[7] (Emphasis added.)

The key word in both of these statutory provisions is the term "personal." Disqualification cannot be based on the kind of generalized, diffused, and thus "impersonal" prejudice that is inherent in the situation where the judge or administrator has a "preconceived" or "crystallized" point of view about issues of "law or policy." Davis, 2 *Administrative Law Treatise* 130, 131 (1958). Hence, it is not enough to show that the judge or administrator has previously expressed strong convictions as to the proper interpretation of the particular law the party in question is said to have violated. "Our tradition rightly interpreted is that the judge should be neutral toward the question of whether the specific defendant is guilty. It is a perversion of that tradition to demand that the judge be neutral toward the purposes of the law." [8]

Respondent couches its objections to my qualification here in terms designed to suggest that my questions and comments on the record in the Subcommittee's hearings reflected a personal conviction on my part that respondent had, in fact, engaged in certain practices. For example, respondent quotes my comment that the testimony of one of the Subcommittee's witnesses amounted to a "serious accusation" against respondent,[9] and that it should be passed on to the Federal Trade Commission. This indicated, however, nothing more than my

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[7] 28 U.S.C. 25, 36 Stat. 1090 (1911). Perhaps the only notable distinction between this provision and Section 7(a) of the APA is that the judge must disqualify himself upon the mere filing of an affidavit that sufficiently *alleges* disqualifying facts, whereas 7(a), by requiring the agency to "determine" the matter, necessarily contemplates putting the affiant to his proof of the facts alleged, if challenged. See Davis, 2 *Administrative Law Treatise* 167 (1958). Here, as noted above, no such determination is necessary because the "facts" are already a matter of public record. Only their interpretation and legal effect are in issue.

[8] Jaffe, "The Reform of Administrative Procedure," 2 *Pub. Ad. Rev.* 141, 149 (1942). See also Davis, *op. cit. supra* at 137–138.

[9] See Hearings, note 1, *supra*, at p. 6461.

belief that the facts alleged by the witness, *if true*, might amount to a violation of law. Thus, my comment was simply an expression of my opinion on the *law*, not on the facts. Indeed, the very phrase relied upon by respondent—"serious accusation"—points up the fact that I was simply expressing my view that acts of the character described by the accusing witness might be a violation of law, not the view that respondent had in fact committed the acts charged by the witness. Every member of this Commission makes preliminary evaluations of a more serious character than this almost daily in the course of his duty to decide, on the basis of *ex parte* investigational files before him, whether there is "reason to believe" parties have committed acts that fall within the prohibitions of existing law, as each agency member understands it.[10] Unless we thought those investigational files amounted to "serious accusations" against the parties in question, we would be unjustified in issuing a formal complaint and thus instituting adjudicatory hearings to determine the truth or falsity of those "accusations."[11] Here, in suggesting the passing on to the Commission of the witness' accusation, I was recommending not the filing of a formal complaint, but only the commencement of an *investigation* by the Commission, a step that is preliminary to, and forms the basis of, its decision to issue a complaint and hold adjudicatory hearings.

Nor do I understand that such "personal" bias and prejudice can be automatically inferred from the particular phraseology in which an interrogator casts his questions to witnesses, or phrases his comments in response to answers given by witnesses. "It is elementary that the questions of a lawyer engaged in eliciting facts from a witness do not necessarily indicate his state of mind but are couched in terms best calculated to adduce the truth."[12] This is particularly true where, as here, the lawyer conducting the interrogation is not an "advocate" attempting to "build a case" for his own side, but is a neutral officer charged simply with the duty of searching out the truth. Where a lawyer is acting in such a role as this, penetrating questions and comments are no more indicative of bias and prejudice than the sharp queries and skeptical comments of judges who frequently participate in the questioning of witnesses. Indeed, judges not infrequently preside at proceedings they have themselves instituted (as in contempt cases), and the words in which they couch

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[10] Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall issue its formal complaint when it "shall have reason to believe" that any party "has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public. * * *"

[11] Unless the Commission so believed, it would be lacking the necessary conviction as to the "public interest" in the matter. *Ibid.*

[12] *American Cyanamid*, note 5, *supra*.

their "serious accusations" are seldom construed as an indication of "bias" or "prejudgment of the facts." [13]

There is, of course, a clear distinction between "adjudicative facts" and "legislative facts." [14] Prejudgment of the one disqualifies; prejudgment of the other does not. The latter principle derives from the well-established proposition, mentioned above, that "bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." [15] Judges and administrators do not acquire strong convictions as to policies or the proper interpretation of law in a vacuum; they get them from experience, from contact with particular factual situations that, over the years, "merge" into their individual preconceptions about the law and policy.[16]

Factual experience that includes contact with some of the "facts" about a particular party does not disqualify if it is merely a part of the general, "legislative" facts that go to make up an individual's views as to law or policy. This principle seems to be firmly established by *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700–703 (1948) [4 S.&D. 676, 690–692], and *Eisler* v. *United States*, 170 F. 2d 273, 277–278 (D.C. Cir. 1948), removed from docket, 338 U.S. 189 (1949).

The *Eisler* case appears to be squarely analogous to the instant situation. There an alien who described himself as a "German Communist" (although he had resided in the United States for seven years) had refused to testify before the Committee on Un-American Activities of the House of Representatives. He was subsequently

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[13] See, e.g., *O'Malley* v. *United States*, 128 F. 2d 676 (8th Cir. 1942), *rev'd on other grounds*, 317 U.S. 412 (1943), where a district judge directed the United States District Attorney to commence contempt proceedings against several parties with this comment: "It is apparent from the statement of counsel upon both sides here that there is, in the evidence in this regard, ground for believing that there has been a very gross imposition and fraud perpetrated in and upon this court by at least Pendergast, O'Malley and McCormack and there may be others." The reviewing court said: "There was no prejudgment of guilt in any remarks the court made directing contempt proceedings to be commenced * * *. The complaint of prejudgment of 'factual issues' can not be sustained." 128 F. 2d at 680, 685.

[14] Davis, *op. cit. supra* at 145, n. 53.

[15] *Id.*, 131.

[16] "Prejudgment of facts about a party is probably to be distinguished from prejudgment of facts that bear upon questions of law or policy. Prejudgment of *general* facts of the kind that *merge* with points of view concerning issues of law or policy is probably inevitable and cannot properly be deemed a ground for disqualification. For instance, all nine Justices of the present Supreme Court probably have prejudged the 'fact' that labor strife in manufacturing affects interstate commerce if either the raw materials or the products cross state lines. In the Cement Institute case, the Federal Trade Commission had previously investigated the facts concerning the operation of multiple-basing-point systems, and its preconceived 'views' that such systems violated the Sherman Act were made up not only of ideas about law and policy *but also of factual information developed in the previous investigations.* Ideas about law and policy are probably inseparable from impressions of general facts on which those ideas rest, and preconceptions about such facts are no more a ground for disqualification than preconceptions about law and policy." *Id.*, at 144–145. (Emphasis added.)

indicted for contempt, and tried and convicted in the United States District Court for the District of Columbia. The defendant filed an affidavit of bias and prejudice, alleging that the presiding judge—Judge Holtzoff—should disqualify himself because of his—

> background as a Special Assistant to the Attorney General of the United States. Appellant alleged, upon information and belief, that the judge had, in that prior capacity, directly assisted Federal Bureau of Investigation inquiries into the activities of aliens and Communists, *including appellant.* It was further alleged that the judge was a close personal friend of the Director of the FBI, whom appellant characterizes as "violently anti-Communist." The affidavit also contained an assertion that the judge had, in connection with his previous duties, sponsored legislation providing for the deportation of alien Communists. 170 F. 2d at 278. (Emphasis added.)

The Court of Appeals agreed that the affidavit was insufficient on its face because it alleged only "impersonal" bias, not the kind of "personal" bias that can disqualify:

> Upon review of such an affidavit we do not hesitate to uphold the ruling of the court below that the affidavit should be stricken, for it does not establish bias and prejudice in the *personal* sense contemplated by the statute, *assuming truth in all the facts stated.* Prejudice, to require recusation, must be personal according to the terms of the statute, and *impersonal* prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute. *Ibid.* (Emphasis added.)

In view of the defendant's allegation that Judge Holtzoff had "directly assisted" in the FBI's investigation of aliens and Communists, "including appellant," and the reviewing court's comment that it was "assuming truth in all the facts stated," the holding of the case is plainly premised upon the assumption that the trial judge, in the course of his activities in connection with the investigation of aliens and Communists *in general*, had in fact participated in the investigation of that defendant *in particular.* Hence, any bias or prejudice acquired by the judge during the course of his investigation of Communists was of an impersonal nature directed toward *all* Communists, and not a personal bias aimed at any one of the particular Communists whom he happened to have investigated while studying them as a group.

The application of this principle in the field of administrative law is clearly illustrated by *Federal Trade Commission* v. *Cement Institute*, *supra*, 333 U.S. 683 (1948) [4 S.&D. 676]. There, one of the numerous respondents sought to disqualify all five members of the Federal Trade Commission on the ground that, as summarized by the Court, "the Commission had previously prejudged the issues, was 'prejudiced and biased against the Portland cement industry generally,' and that the industry and Marquette in particular could not receive a fair hearing from the Commission." *Id.*, 700 [4 S.&D. 690]. The factual basis for these charges was the fact that the Commission,

in written reports to the President and to Congress, and in testimony given by members of the Commission before Congressional committees, had made "it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system *as they had studied it* was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Commission *as a result of its prior official investigations*. But we also agree with that court's holding that this belief did not disqualify the Commission." *Ibid.* (Emphasis added.)

As this language of the Court makes clear, the Commission had not reached its "prejudgment" as to the illegality of the multiple basing point system by abstract reasoning. It had conducted an official investigation into the precise manner in which that system operated in, among others, the cement industry itself; hence, that investigation naturally covered the activities of Marquette, the particular respondent who moved for the Commission's disqualification in the subsequent adjudicatory proceeding. The facts, therefore, were quite analogous to the *Eisler* case, *supra*, and the instant matter, in that a specific respondent based his claim of bias and "prejudgment" on a group-wide investigation that touched upon his personal activities only because he happened to belong to the group.

In *Cement Institute*, *supra*, the Court observed first that the Commission's publicly expressed opinion as to the illegality of the pricing system it had found in the cement industry did not suggest that the minds of the five Commissioners were "irrevocably closed on the subject":

> In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities. *Id.*, 701 [4 S.&D. 691].

Similarly, in the instant matter, respondent cannot reasonably believe that, in the comparatively casual contact I had with it during the Subcommittee's study of "administered prices" in the baking industry, I conceived for respondent alone (as contrasted with the baking industry in general) such a virulent "personal" animosity that my mind is "irrevocably closed on the subject" of its practices.

It will, like the respondents in *Cement Institute*, have every opportunity to present to the completely independent and unbiased hearing examiner [17] every scrap of evidence that it thinks will "[keep] these practices within the range of legally permissible business activities." If the Commission ultimately concludes that this record shows respondent has acted lawfully, the case will be dismissed and there will be no occasion to speculate on my alleged "bias." If, on the other hand, the Commission decides that the law has been violated and issues its administrative order to cease and desist, respondent will have an absolute, statutory right to test, in the courts, whether the agency's findings are "supported by evidence." [18]

The Court further noted in *Cement Institute*, *supra*, that Congress had not only made no provision for "substitute commissioners should any of its members disqualify," but had affirmatively expressed its desire that the commissioners should have the kind of "expertness" that comes from experience:

> Moreover, Marquette's position, if sustained, would to a large extent defeat the congressional purposes which prompted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized

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[17] Respondent has not suggested that the hearing examiner before whom the case is presently being tried has been contacted by me, improperly or otherwise, or that I have tried to influence the examiner in any manner whatsoever.

[18] Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. 45(c), provides in part that any party "required by an order of the Commission to cease and desist * * * may obtain a review of such order" in the appropriate circuit court of appeals. "Upon such filing of the petition the court * * * shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission * * *. The findings of the Commission as to the facts, *if supported by evidence,* shall be conclusive." (Emphasis added.)

See *National Lawyers Guild* v. *Brownell,* 225 F. 2d 552 (D.C. Cir. 1955), *cert. denied* 351 U.S. 927 (1956), where the United States Attorney General, contemporaneously with the service on a national bar association of an order to show cause why it should not be designated a "subversive" organization, made the following statement in a public address: "It is because *the evidence shows* that the National Lawyers Guild is at present a Communist dominated and controlled organization fully committed to the Communist Party line that I have today served notice to it to show cause why it should not be designated on the Attorney General's list of subversive organizations." The Court, in response to a charge of prejudgment, first noted the Attorney General's affidavit "denying his prejudgment and explaining that the only determination thus far made by him is that the evidence warranted his proposal to designate, a preliminary and *ex parte* determination. He reaffirms under oath his intention 'to make an impartial final determination on the basis of the administrative record before me.'" The Court concluded: "We cannot assume in advance of a hearing that a responsible executive official of the Government will fail to carry out his manifest duty. Our conclusion on the point is that the plaintiffs must await the event rather than attempt to anticipate it. It is to be noted that in *Marcello, Accardi,* and *Cement Institute* the Supreme Court treated the developments at the administrative hearings as determinative of the issue of claimed prejudgment. Implicit in this treatment is the thought that decision upon alleged prejudgment must await the presentment of proof of effect." 225 F. 2d at 555. (Emphasis added.)

any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated * * *.

There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan* v. *United States*, 313 U.S. 409, 421. * * * Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress. For Congress acted on a committeee report stating: "It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong., 2d Sess. 10–11. 333 U.S. at 701–702 [4 S.&D. 676, 691].

III

Respondent also relies upon the "due process" clause of the Constitution. It seems plain, however, that the APA, in those areas where it undertakes to set a standard of fairness, imposes one that is *higher* than that required by the Constitution alone. As the Supreme Court noted in *Cement Institute*, *supra*, in response to this same due process argument, "most matters relating to judicial disqualification [do] not rise to a constitutional level." 333 U.S. at 700 [4 S.&D. 690]. The Court also noted there that "the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court." *Id.*, 703 [4 S.&D. 692]. Since, as noted above, the facts relied upon here fall short of a showing of "prejudgment of the facts" under Section 7(a) of the APA, and would be equally or perhaps even more deficient if asserted against a Federal district judge under the statutory provision that governs such charges of disqualification, it would seem to follow *a fortiori* that these facts do not show the greater degree of unfairness or "prejudgment" that must appear before the matter can be said to have reached the "constitutional level."

IV

Finally, I would like to note that it is not my intention here to take refuge in the technical niceties of the law, or attempt to maintain my seat in this case in the face of the requirements of fairness. In common with most men, I desire not only to *be* fair, but to have my fairness made so obvious that the most superficial of critics will see and appreciate it. Hence, I am not indifferent to this respondent's suggestion that the "appearance" of fairness, if not the law, requires me to dis-

qualify myself. If this were the only case involved, I would forthwith yield to that suggestion, even though I am deeply persuaded that neither the letter nor the spirit of the law, nor any considerations of fairness impose any such duty upon me.

But this is not the only case that is involved. As noted above, during my work with the Subcommittee, I participated in its "investigation" of several of the largest and most economically significant industries in the nation, including steel, automobiles, milk, etc. The "facts" pertaining to the business practices of hundreds of firms, some of them among the largest of our great corporations, came to my attention in one way or another. All were treated in the same manner as this respondent. Therefore, if I am disqualified here, I could very well find myself disqualified in all cases this Commission might have, both now and in the future, against each of those hundreds of firms. I cannot lightly put aside such a substantial and significant part of the duties placed upon me by my oath of office. I do not believe that Congress, in expressly affirming the need for commissioners who had been informed by experience, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 702 (1948) [4 S.&D. 676, 691], *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), intended that experience acquired from working as a legislative counsel should be a handicap.

I can assure this respondent that I have made no prejudgment of any of the facts involved in this case, and that, if the record compiled by the hearing examiner fails to prove by substantial evidence that the law has been violated, I shall vote with my fellow commissioners to dismiss the complaint. I know to a moral certainty that I have made no prejudgments in this case and that I harbor not the slightest shred of bias or prejudice against this respondent. I can do no more than repeat what I said in *American Cyanamid:*

> The respondents' motions are founded upon the assumption that I have prejudged the issues here involved, and I am incapable of rendering an impartial decision. Thus, what is here involved is the present state of my mind with respect to these issues. The state of a man's mind is by the nature of things known only to him and to his Maker. I have carefully and conscientiously considered the question here presented and have concluded, and hereby state, that I have not formed a definite opinion with respect to any of the material issues involved in this proceeding and honestly believe that I have a free and open mind with respect thereto, and I am fully capable of rendering a completely impartial decision based solely upon the facts contained in the record.[19]

I shall not withdraw from participation in this proceeding.

In view of the nature of the instant motion, I am not participating in the Commission's deliberations and decision upon it.

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[19] Note 5, *supra*.

ORDER DENYING MOTION TO DISQUALIFY, MAY 7, 1963

Respondent has filed on March 28, 1963, a motion pursuant to Sections 5(c) and 7(a) of the Administrative Procedure Act for the disqualification of Chairman Paul Rand Dixon, *sua sponte*, or by order of the Commission, from participation in any action pertaining to the merits in this proceeding, and, in the alternative, for a hearing for the purpose of determining whether Chairman Dixon should be disqualified.

Chairman Dixon, by memorandum dated May 2, 1963, has stated that he has made no prejudgment of any of the facts involved in this case and that he has determined not to withdraw from participation in this proceeding.

Respondent's motion and supporting affidavit do not assert that Chairman Dixon has, as an officer, employee, or agent of the Commission, at any time been engaged in the performance of investigative or prosecuting functions for the Commission in this or any factually related case, and the Commission has therefore determined that respondent's motion is not within the scope of Section 5(c) of the Administrative Procedure Act. Insofar as respondent's motion is made pursuant to Section 7(a) of that Act, the Commission has previously set forth the considerations involved in dealing with such a motion: *American Cyanamid Company, et al.*, Docket 7211, Order Denying Motions to Disqualify, December 20, 1961 [59 F.T.C. 1488]. The Commission there stated:

> Section 7(a) of the Administrative Procedure Act clearly empowers the Commission to determine whether a presiding officer conducting a "hearing" on behalf of the Commission is subject to "personal bias or disqualification." It is less clear that it was meant to apply to participation of individual agency members in final or appellate determinations. The inquiry called for by a motion for disqualification is necessarily subjective in nature. It is extremely difficult and delicate for a tribunal to assume the responsibility of weighing, objectively, the ability of one of its own members to make an objective judgment in a case. Further, the existence of such a power to disqualify carries with it an inherent danger of abuse, as a potential instrument for suppression of dissent.
>
> Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion. The Commission believes this practice to be proper and consistent with the law.

In the instant proceeding, no sufficient grounds for Commission action have been shown.

It is ordered, therefore, That respondent's motion be, and it hereby is, denied.

Commissioner Dixon not participating.

ORDER DENYING RECONSIDERATION OF REFUSAL TO DISQUALIFY, MAY 10, 1963

On May 9, 1963, respondent filed a petition for reconsideration of the Commission's order of May 7, 1963, denying its motion to disqualify Chairman Dixon from participation in all Commission actions pertaining to the merits of this proceeding. The Commission finds nothing in the petition for reconsideration to justify vacation or modification of its order of May 7. The decision of the Court of Appeals for the District of Columbia Circuit in *Amos Treat & Co.* v. *Securities & Exchange Commission*, 306 F. 2d 260 (1962), is plainly distinguishable on its facts, and is not controlling here. Accordingly,

It is ordered, That respondent's petition for reconsideration be, and it hereby is, denied.

Commissioner Dixon not participating.

STAUFFER LABORATORIES, INC., ET AL.

Docket 7841. Order and Opinion, Feb. 21, 1963

Order vacating and remanding to the hearing examiner, because of inadequacy of the findings, order requiring a Los Angeles concern to cease making allegedly false weight reduction and muscle-firming claims for its electric "Magic Couch" or "Posture Rest" device.

ORDER VACATING INITIAL DECISION AND REMANDING CASE TO HEARING EXAMINER

This matter having come on to be heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined that the initial decision should be vacated and set aside and the matter remanded to the hearing examiner for the preparation of a new initial decision for the reasons given in the accompanying opinion:

It is ordered, That the initial decision in this proceeding be, and it hereby is, vacated and set aside.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for his further consideration in light of the Commission's views expressed in the accompanying opinion and for the preparation and filing of a new initial decision in accordance with the provisions of § 4.19(b) of the Commission's Rules of Practice on or before May 1, 1963.

Commissioner MacIntyre not concurring.

OPINION OF THE COMMISSION

BY ANDERSON, *Commissioner:*

The complaint charges respondents with dissemination of false and misleading advertisements promoting the sale of its "Posture Rest" device, alleging that the device has no value in reducing overall weight or particular areas of the body and that use of the device will neither tone nor firm sagging muscles as represented in respondents' advertisements. The hearing examiner found that the evidence sustained the charges and issued an order to cease and desist. Respondents appeal, chiefly contending that the hearing examiner failed to consider fairly the whole record and that his decision is not supported by substantial evidence.

The record as to the issue of the effectiveness of respondents' device covers in comprehensive detail the medical aspects of weight reduction and muscle toning. The parties submitted elaborate proposed findings with reference to evidence in the record, including the testimony of fourteen witnesses presented as experts. However, the review and analysis of this evidence in the initial decision is covered in three short paragraphs which are little more than an outline of the types of evidence presented. In the circumstances, the findings in the initial decision are inadequate.

It is well established that the Commission in deciding its cases must appraise the credibility of witnesses, weigh the evidence and draw inferences therefrom. If there is expert testimony, the Commission makes evaluations as to any conflicts which appear. *Carter Products, Inc.* v. *Federal Trade Commission*, 268 F. 2d 461, 487, 492–493, 496–497 (9th Cir. 1959) [6 S.&D. 598], *cert. denied* 361 U.S. 884; *Erickson* v. *Federal Trade Commission*, 272 F. 2d 318. 321 (7th Cir. 1959) [6 S.&D. 697], *cert. denied* 362 U.S. 940.

As an integral part of the administrative law process, the hearing examiner has specific functions and duties set forth in the Administrative Procedure Act. Section 8(b) of the Act provides that the initial decision of the hearing examiner shall include a statement of findings and conclusions, as well as the reasons or basis therefor, upon all material issues of fact, law or discretion presented on the record, and an appropriate order. In a discussion of this provision, the Attorney General's Manual states that decisions must indicate findings on material issues of fact, law or discretion with such specificity as to advise the parties and reviewing courts of the record and legal basis of the decisions.[1] Section 4.19(b) of the Commis-

[1] Attorney General's Manual on the Administrative Procedure Act (1947), pp. 85–87.

sion's Rules of Practice corresponds to Section 8(b) of the Administrative Procedure Act.[2]

The record basis for the broad conclusions by the hearing examiner in the instant matter is not clear due to the sketchy analysis in the initial decision of the relevant evidence. There should have been a more detailed treatment, particularly in light of the large amount of expert testimony from witnesses with varying qualifications, some of whom differed on certain issues. We do not believe that the hearing examiner in his findings complied with the requirements of the Administrative Procedure Act and the Commission's Rules of Practice. Accordingly, the initial decision will be vacated and set aside and the matter will be remanded to the examiner for the preparation of a new initial decision containing adequate findings.

Commissioner MacIntyre did not concur in the decision in this matter.

THE B. F. GOODRICH COMPANY AND TEXACO, INC.

Docket 6485. Order and Opinion, Feb. 26, 1963

Order denying motion for the disqualification of Chairman Dixon.

Respondent Texaco, Inc., by motion filed February 18, 1963, having requested that Commissioner Dixon withdraw from participation in this proceeding, or, in the alternative, that the Commission determine that Commissioner Dixon be disqualified from such participation; and

The Commission having determined that respondent has failed to show justification for departure from the Commission's practice of treating disqualification as a matter primarily for determination by the individual concerned; and

Commissioner Dixon having filed with the Commission a memorandum denying the existence of any grounds for his disqualification from participation in this proceeding:

It is ordered, That the motion directed to the Commission requesting that it disqualify Commissioner Dixon from participating in this proceeding, be, and it hereby is, denied.

Commissioner Dixon and Commissioner MacIntyre not participating.

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[2] We note that the National Labor Relations Board recently twice remanded a case to their trial examiner for the writing of supplemental intermediate reports. He had made broad conclusions without analysis of evidence. In remanding, the Board held that the trial examiner's report did not satisfy Section 8(b) of the Administrative Procedure Act and the Board's corresponding Rules and Regulations. *Funkhouser Mills, Division of the Ruberoid Company*, 132 N.L.R.B. 245 (1961).

MEMORANDUM OF CHAIRMAN DIXON IN RESPONSE TO THE MOTION OF RESPONDENT TEXACO, INC.,* THAT HE WITHDRAW FROM THE PROCEEDING

The respondent Texaco, Inc., by motion filed February 18, 1963, has asked me to withdraw from further participation in this proceeding. The motion is alternatively directed to the Federal Trade Commission and asks that it "determine" that I be disqualified from such participation.

It is Texaco's contention that my speech of July 25, 1961, before the National Congress of Petroleum Retailers, Inc., "reflects personal bias and a pre-judgment in favor of the allegations of the instant complaint." The allegedly objectionable parts of the speech are quoted in the motion. As I read it and recall it, the only thought conveyed by the speech was that the Commission had challenged the legality of "overriding commissions" and certain other practices engaged in by the various oil and rubber companies, including respondent Texaco, Inc., and The B. F. Goodrich Company. By using the word "challenged," I indicated only that the Commission had determined there was reason to believe that the practices were in violation of law. This determination is an absolute, statutory prerequisite to any complaint, is in fact declared in the first paragraph of the instant complaint, and I fail to see how my repetition of it in a speech indicates bias or prejudgment of the ultimate issue.

The complaint in this matter was issued long before I assumed my present position as a member of the Commission and my direct knowledge of the proceeding is limited to that obtained from a cursory reading of the initial pleadings. I am not possessed of sufficient knowledge to have formed any opinion, pro or con, with respect to the legality of the practices engaged in by these respondents. When the matter is ultimately presented to the Commission for decision, I will then apprize myself of the facts contained in the record and cast my vote in accordance therewith.

As I view it, bias or prejudgment are conditions of the mind, whose existence is known only to the person accused of harboring them. As the accused here, I can flatly say that I have not prejudged the issue in this matter and that I do not have any bias with respect thereto. Therefore, it is my decision not to withdraw from participation in this proceeding.

In view of the circumstances, I shall not participate in the Commission's deliberation and decision upon the respondent's motion to the Commission for a determination that I be disqualified from participation in this matter.

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* Formerly known as The Texas Company.

MASON, AU & MAGENHEIMER CONF. MFG. CO. INC.

Docket 7733. Order and Opinion, Feb. 26, 1963

Interlocutory order placing on suspense—pending investigation of the current pricing practices of respondent's new parent company—proceeding charging a candy manufacturer with discriminating in price between certain vending machine operators and other customers, and with granting promotional allowances to certain retail food chains without making such payments available to their competitors.

ORDER OF THE COMMISSION PLACING THE PROCEEDING IN SUSPENSE

This matter having come before the Commission on the exceptions of counsel supporting the complaint to the initial decision of the hearing examiner and upon briefs and oral argument in support of said exceptions and in opposition thereto; and

The Commission having determined for the reasons stated in the accompanying opinion that the public interest would be best served by placing this proceeding on suspense, pending an investigation of the pricing practices of Bayuk Cigars, Inc., sole owner of respondent corporation:

It is ordered, That the adjudicatory proceedings pending against respondent, Mason, Au & Magenheimer Conf. Mfg. Co. Inc., in this matter be, and they hereby are, placed on suspense until further order of the Commission.

Commissioners Anderson and Higginbotham not participating.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

The complaint in this proceeding issued January 7, 1960, charging Mason, Au & Magenheimer Conf. Mfg. Co. Inc. (Mason), a candy manufacturer, with violation of Sections 2(a) and 2(d) of the Clayton Act as amended. Specifically, respondent was charged with discriminating in price between certain vending machine operators and other customers and granting promotional allowances to certain retail food chains without making such payments available to their competitors. The matter is now before us on the exceptions of counsel supporting the complaint to the initial decision dismissing this proceeding for lack of public interest.

The case-in-chief of counsel supporting the complaint was presented intermittently from May 2, 1960, to May 25, 1961. At the close thereof, Mason moved to dismiss the case on the ground that there was no public interest in continuing the proceeding since the challenged practices had been discontinued and because respondent had become subject to different management and control as a result

of the purchase of all of respondent's stock by Bayuk Cigars, Inc. In the alternative, Mason's motion stated that Count I of the complaint, relating to alleged violations of Section 2(a), should be dismissed for failure to establish a prima-facie case. Subsequently, on October 4, 1961, respondent requested the hearing examiner to take further testimony in support of the motion to dismiss the complaint for lack of public interest arising out of the alleged discontinuance of the challenged practices. By his order filed October 24, 1961, the hearing examiner denied respondent's motion to dismiss the complaint insofar as it requested dismissal on the ground no prima-facie case had been established but granted Mason the opportunity to produce evidence to indicate the "inability" of respondent to further pursue the practices challenged by the complaint. A hearing was held in February of 1962 for that purpose and the motion to dismiss the proceeding for lack of public interest in a continuation thereof was renewed. The examiner, in his initial decision filed May 8, 1962, granted the motion.

The hearing examiner, although concluding in his initial decision that a prima-facie case had been established by counsel supporting the complaint, dismissed the proceeding for lack of public interest on the ground that respondent had discontinued the challenged practices in good faith and that there was no likelihood of a resumption thereof. The evidentiary facts on which the hearing examiner based his conclusion that a recurrence of the allegedly illegal activities was unlikely were primarily the testimony of respondent's president, Fred E. Magenheimer, that Mason had discontinued the prices and promotional payments alleged to be unlawful as of May 1, 1959, some eight months prior to the issuance of the complaint. The hearing examiner also relied on the fact that Mason, on June 9, 1961, had become the wholly owned subsidiary of another corporation, Bayuk Cigars, Inc., which had acquired respondent's stock. In connection with this transaction, the examiner found that new directors and officers were elected to supervise and manage the activities of respondent and that a majority of both the new board of directors and the new slate of officers was composed of individuals from Bayuk, none of whom had had previous connection with respondent or Mason's practices challenged by the complaint. The examiner further found that on June 22, 1961, the new board of directors created an executive committee whose responsibility it was to keep informed of all pricing, merchandising and promotional activities of respondent and to insure the conformity of such practices with the applicable provisions of local, state, and federal laws.

Counsel supporting the complaint, who made numerous exceptions to the examiner's findings, disputes, among others, the examiner's

finding that respondent had voluntarily terminated the practices alleged to be unlawful as of May 1, 1959, some eight months prior to issuance of the complaint. Counsel supporting the complaint, viewing the matter from a different perspective, in effect contends that Mason's discriminatory pricing practices were only discontinued some three months after the inception of the investigation, if they were, in fact, discontinued on May 1, 1959. Counsel supporting the complaint also points to two Commission exhibits which showed on their face that respondent was contracting for special promotional payments in June and September of 1959 to Food Fair and Penn Fruit, respectively, to take place in the fall of that year.

On the basis of the record, we are not satisfied that we can realistically appraise the circumstances surrounding respondent's asserted discontinuance of the practices allegedly violative of the Sections 2(a) and 2(d) of the Robinson-Patman Act so as to determine whether these practices have been surely stopped. At any rate, we cannot adopt some of the examiner's reasoning in support of his decision. For example, we are not persuaded by the hearing examiner's conclusion that, since a consent cease and desist order under Section 2(d) is already outstanding against Bayuk, it is unlikely that this corporation will permit its wholly owned subsidiary, Mason, to embarrass it by practices violative of the Robinson-Patman Act. Nor can we accept the examiner's view that it is unlikely that further violations of law on the part of respondent can be anticipated, since he had ruled that the Commission had established a prima-facie case; the examiner reasoned that his finding of a prima-facie case constituted a warning to Mason that the evidence as presently viewed by him would support a finding of illegal pricing practices unless respondent managed to rebut such evidence and that respondent would be deterred by such warning.

We are not convinced that the public interest would best be served by dismissing the complaint at this time. The situation here is somewhat unusual in that there is evidence that the parent company, Bayuk, is attempting to insure that its subsidiary will comply with the Robinson-Patman Act. The effectiveness of Bayuk's attempts to insure compliance with the law can best be determined by examining its current pricing practices. This procedure will avoid the possibility of an unnecessary expenditure of the Commission's funds and man power in this proceeding. An investigation will, therefore, be initiated by the Bureau of Restraint of Trade concurrently with the issuance of this decision and this proceeding will be placed on suspense pending completion thereof.

Commissioners Anderson and Higginbotham did not participate in the decision herein.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

Docket 8512. Order, Feb. 26, 1963

Order granting respondent permission to inspect certain special reports to Commission.

ORDER FOR EXAMINATION OF DOCUMENTS

Complaint counsel has requested permission to disclose to respondents' counsel the special reports filed by ABC-Paramount Records, Inc., and Decca Records, Inc., in response to a Commission order issued under Section 6(b) of the Federal Trade Commission Act. Complaint counsel intends to introduce these reports or information taken therefrom into evidence and disclosure to opposing counsel in advance of hearings would appear to be appropriate unless some overriding consideration making disclosure inimical to the public interest intervenes.

These special reports are part of a group of 56 received from phonograph record manufacturers. Complaint counsel previously requested and received permission to disclose the contents of the 54 reports then in his possession and is now requesting permission to accord similar treatment to these two belatedly filed reports.

Inasmuch as there appears no reason why the two reports here involved should be withheld and thus treated differently than the 54 others of which they are a part, the Commission has determined that they should be disclosed to respondents' counsel. However, the Commission has recently formulated and promulgated a procedure for such disclosures which is designed to preserve the secrecy of such reports to as great an extent as possible. This procedure is described and was utilized in our interlocutory Order For Examination Of Documents, issued February 11, 1963, *The Grand Union Company*, Docket No. 8458. It is the Commission's view that the disclosure of these special reports should be made pursuant to this new procedure.

From the date of service of this order, all of the 56 special reports and the information obtained therefrom shall be dealt with in strict accordance with the terms of this order.

Accordingly, it is ordered, That counsel for respondents be, and hereby are, granted permission to examine the special reports filed by ABC-Paramount Records, Inc., and Decca Records, Inc., upon the following conditions:

1. Counsel for respondents who have filed an appearance and are actually engaged in the defense of this proceeding may examine the aforesaid documents on the Commission's premises, and may have made at their own expense and may remove from the Commission's premises one photocopy of each such document, or may make and

remove summaries of the information contained in these documents, provided copies thereof are furnished to complaint counsel.

2. Except as expressly permitted by the hearing examiner, no additional copies may be made of the photocopies or summaries which are removed from the Commission's premises.

3. Except as provided in paragraph 4, the copies or summaries removed from the Commission's premises may be examined only by counsel for respondents who have filed an appearance and are actually engaged in the defense of this proceeding, and only for the purpose of preparing such defense; and no information contained in such copies or summaries shall be disclosed to any other person, including any officer or employee of respondents.

4. Counsel for respondents may make application to the hearing examiner for permission to disclose the copies or summaries removed from the Commission's premises, or any information contained therein, to other specified persons for use in the defense of this proceeding. Application for such permission shall identify the names and positions of the persons to whom the copies, summaries or information would be disclosed and the purposes for which they would be examined or used by those persons. Permission may be granted by the hearing examiner upon a showing that such disclosure is necessary for the respondents' defense in this proceeding.

5. All copies or summaries removed from the Commission's premises, together with all notes, memoranda or other papers containing information obtained from such copies or summaries, must be returned to the Commission upon the termination of this proceeding.

It is further ordered, That insofar as it is possible the 54 special reports previously ordered revealed to respondents' counsel be afforded treatment in accordance with the above set out provisions of this order.

Commissioners Anderson and MacIntyre dissented for the reason that it would be manifestly unfair to subject the materials furnished by the various people not parties to this action to examination by their competitor, Columbia Broadcasting System, Inc. Commissioner MacIntyre did not concur in the action of the Commission in making available to Columbia Broadcasting System, Inc., the other 54 reports of its competitors.

THE DAYTON RUBBER COMPANY

Docket 7604. Order and Opinion, Feb. 28, 1963

Interlocutory order denying—no sufficient showing having been made as to the relevancy or materiality of the documents concerned—application for release of confidential information, improperly presented as an application

for issuance of a subpoena duces tecum directing the Commission's Secretary to appear and produce certain records relating to compliance reports.

ORDER DENYING APPLICATION FOR CONFIDENTIAL MATERIAL

This matter having been heard upon respondent's appeal from the hearing examiner's denial of its application of January 16, 1963, for the issuance of a subpoena duces tecum; and

The Commission, for the reasons appearing in the accompanying opinion, having determined that the matter should be treated as an application for the release of confidential information and that such application should be denied:

It is ordered, That respondent's appeal from the hearing examiner's denial of its application for a subpoena duces tecum, treated as an application for the release of confidential information, be, and it hereby is, denied.

OPINION ON APPEAL FROM DENIAL OF REQUEST FOR SUBPOENA

BY THE COMMISSION:

This matter is before the Commission upon respondent's appeal from the hearing examiner's denial of its application filed January 16, 1963, for the issuance of a subpoena duces tecum directing the Secretary of the Commission to appear and produce certain records relating to compliance report matters in Docket Numbers 6837, 6888 and 7590. The Commission previously, by its letter of December 10, 1962, denied respondent's application for release of reports of compliance in these same matters.

Respondent in its present application is seeking records and documents showing (1) dates when compliance reports were received and filed in the three aforementioned matters, (2) directions given the custodian of the reports relative to their confidential nature, and (3) the dates when directions were given said custodian to treat the reports as confidential and not to release them to the public.

The documents and information so sought are confidential under the Commission's Rules of Practice and the hearing examiner had no authority to require their production. *Thomasville Chair Company*, Docket No. 7273 (Order Denying Respondent's Appeal From Hearing Examiner's Rulings And Application For Release Of Information, November 6, 1959) [56 F.T.C. 1651]. The proper procedure to follow in seeking the release of confidential information is set forth in § 1.164 of the Commission's Rules of Practice. This procedure is elaborated upon in *L. G. Balfour Company*, Docket No. 8435 (Opinion and Order Remanding Respondent's Motion to Inspect and Copy Documents, October 5, 1962) [61 F.T.C. 1491].

We believe that, although improper procedure was followed, the request of the respondent should be considered, and, therefore, we will treat the matter as an application for the release of confidential information under § 1.164 of the Commission's Rules of Practice. Under this rule, confidential information may be released only for good cause shown. Respondent asserts that the documents and information requested are needed for its defense in this proceeding, but no sufficient showing has been made as to their relevancy or materiality. Accordingly, the request should be denied. An appropriate order will be entered.

J. WEINGARTEN, INC.

Docket 7714. Order and Opinion, Mar. 25, 1963

Order setting aside hearing examiner's initial decision and remanding case for certain factual evidence needed by Commission to arrive at a final decision, and to file a new initial decision.

ORDER VACATING INITIAL DECISION AND REMANDING MATTER TO HEARING EXAMINER

This matter having come on to be heard upon respondent's appeal from the hearing examiner's initial decision holding it in violation of Section 5 of the Federal Trade Commission Act; and

The Commission having determined that the initial decision should be vacated and the matter returned to the hearing examiner for further proceedings;

It is ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings and consideration in light of the views expressed in the attached opinion.

It is further ordered, That the hearing examiner and the parties make every effort, including postponement, where necessary, of other Commission matters, to complete the reception of evidence within ninety (90) days from service of this order.

Commissioners Anderson and Elman, without joining in the opinion of Commissioners Dixon and MacIntyre, agree that the matter should be remanded to the hearing examiner for the taking of further evidence, and should be promptly disposed of on remand; and Commissioner Higginbotham did not participate by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

OPINION

BY DIXON AND MCINTYRE, *Commissioners:*

This matter is before the Commission for consideration of the respondent's appeal from the hearing examiner's decision holding it in

violation of Section 5 of the Federal Trade Commission Act. The initial decision contains an order to cease and desist which would enjoin respondent from engaging in the practices found to be unlawful.

The respondent, a grocery retail chain, is charged in Paragraph Five of the complaint as follows:

> In the course and conduct of its business in commerce, respondent has knowingly induced or received the payment or contracted for the payment of something of value to respondent or for respondent's benefit as compensation or in consideration for services and facilities furnished by or through respondent in connection with respondent's offering for sale or sale of products sold to respondent by many of its suppliers, and which payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondent in the sale and distribution of such suppliers' products.

In essence, the practice challenged by the complaint is the knowing inducement or receipt of promotional allowances from suppliers who violated Section 2(d) of the Robinson-Patman Act by granting said allowances. The alternative to an approach of this type is to bring complaints against each supplier suspected of granting a discriminatory promotional allowance to the respondent. This could, of course, result in a myriad number of suits with attendant expense. This case, therefore, is fraught with a great deal of public interest, for its successful prosecution may affect the cessation of a whole series of law violations.

We turn now to a consideration of the questions raised by the respondent's appeal. Two of respondent's exceptions go to the Commission's jurisdiction and logically must be dealt with first. In the first of these challenges, respondent alleges that the Commission does not have jurisdiction to utilize Section 5 of the Federal Trade Commission Act to bring an action based upon an alleged and knowing inducement or receipt of a promotional allowance violative of Section 2(d) of the Robinson-Patman Act. Respondent does not seriously argue this point, for it recognizes that three circuit court opinions have dealt with this same question and have supported the Commission in its views.[1] The disposition of this question in *Giant Foods, Inc.* v. *Federal Trade Commission* is typical of the approach taken by the courts to respondent's plea. In that proceeding Judge Bastian, writing for a unanimous court, stated:

> The Commission's decision in this case cannot be read as if the Commission were attempting to render illegal a practice which was once lawful. The situation is to the contrary: the Commission is merely declaring to be an unfair

[1] *Grand Union Co.* v. *Federal Trade Commission,* 300 F. 2d 92 (2nd Cir. 1962) [7 S.&D. 329]; *American News Co.* v. *Federal Trade Commission,* 300 F. 2d 104 (2nd Cir. 1962) [7 S.&D. 346]; *Giant Foods, Inc.* v. *Federal Trade Commission,* 307 F. 2d 184 (D.C. Cir. 1962) [7 S.&D. 483].

method of competition a practice which is plainly contrary to the policy of the Clayton Act as amended by the Robinson-Patman Act. (307 F. 2d at 186.) [7 S.&D. 486.]

In its second attack on the Commission's jurisdiction, the respondent charges that it is a live poultry dealer within the meaning of Section 218(b) of Title 7, U.S.C., and is therefore subject to the exclusive jurisdiction of the Secretary of Agriculture under the provisions of Section 227 of Title 7, U.S.C. With this appeal, respondent is asking us to reverse our prior ruling of September 9, 1960, denying respondent's interlocutory appeal from the hearing examiner's denial of its motion to dismiss based in part upon this contention. Respondent presents no new facts or legal justification in support of its plea and there is nothing before the Commission to support a conclusion that its prior decision was in any way incorrect.

The most serious charge which respondent levels at the hearing examiner's decision is that the basic allegations of the complaint have not been established by reliable and substantial evidence. Respondent contends that the record is devoid of probative evidence to establish (1) that its suppliers granted it discriminatory promotional allowances, and (2) that it had knowingly received or induced such allowances. Resolution of these questions requires a brief sojourn into the facts which are firmly established and not in dispute.

Respondent is a corporation operating sixty-three retail grocery stores in Texas, Louisiana and Tennessee. In addition to food items, many of respondent's stores make substantial sales of cosmetics and a wide variety of household products. Total sales of the corporation in a recent fiscal year exceeded $137,000,000.

For some years past the respondent has conducted special or feature sales of certain of its goods with attendant extensive promotional activity. Such sales usually have a theme which serves to identify and distinguish them from less exceptional promotions. In this matter, the principal promotions of interest were held in 1957 and 1958, and were labeled: Fifty-Seventh and Fifty-Eighth Anniversary Sales (AS); Twentieth and Twenty-First Texas and Louisiana Products Sales (TLPS); Ninth and Tenth Annual May Health and Beauty Carnivals (AMHBC); and Twelfth and Thirteenth Home Center Birthday Sales (HCBS).

The aim of these promotions is, of course, to increase sales of the products featured and to this end respondent utilizes all advertising media, including radio, television and newspapers. As every business man knows, extensive use of these media costs a good deal of money and respondent's efforts to defer these costs to others led to this complaint.

Prior to each planned promotion, it is respondent's practice to send solicitory letters to a selected group of its suppliers whose prod-

ucts are deemed appropriate for the sale. The letter extends an offer of an "opportunity to participate" and refers to an attachment which lists the costs of "participation". If a supplier agrees to the solicitation, its goods are advertised and specially promoted by the respondent to the extent of the payment made by the supplier.[2] The monies requested were in addition to any which may have been received pursuant to a supplier's standard cooperative advertising program.

Respondent's solicitations of its suppliers have been marked with substantial success, as the following tabulation indicates:

Promotion	Approximate No. Solicited	Participated	Amount
1958			
57th AS	350	90	$23, 538. 37
20th TLPS	325	40	15, 744. 52
12th HCBS	170	71	7, 955. 10
9th AMHBC	37	21	17, 939. 86
1959			
58th AS	300	75	$21, 974. 90
21st TLPS	275	45	12, 271. 93
13th HCBS	250	42	3, 600. 00
10th AMHBC	37	21	20, 791. 45

There is no longer any question that the Federal Trade Commission Act is violated by the knowing inducement and receipt of a promotional allowance which is discriminatory in that its grantor did not affirmatively offer it on proportionally equal terms to persons competing with the recipient of the allowance in the distribution of the grantor's goods (*Giant, Inc.* v. *Federal Trade Commission*, *supra*). The basic factual elements of the violation are:

1. The solicitation and receipt by respondent in commerce of payments for promotional services in connection with the resale of a supplier's product.

2. That at approximately the time of the solicitation and receipt, other customers of the supplier were competing with the recipient in the distribution of the grantor-supplier's goods of like grade and quality.

3. The payments received by respondent were not affirmatively offered by the suppliers to such competing customers on proportionally equal terms.

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[2] The complaint charges that respondent did not utilize all of the money received from its suppliers to pay for advertising the suppliers' goods but devoted substantial amounts of such payments "to its own use". The hearing examiner dismissed this count, holding: "The record herein does not establish that payments received by the respondent were in excess of the value of the services rendered by it." Complaint counsel has not appealed this dismissal and at this juncture the Commission will not decide upon its correctness.

4. That respondent possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the granting suppliers were making such payments available to its competitors on proportionally equal terms.

Respondent does not question that the record contains substantial and adequate proof of the first element.

Proof sufficient to establish the second criteria should not be difficult to adduce, since it involves merely a showing of the exact identity of the products purchased by the respondent from a supplier who granted it an allegedly discriminatory promotional allowance and the same showing for any of respondent's competitors who did not receive the allowance. Yet respondent contends that this meager showing was not made in this record and, upon review of all of the evidence, we must conclude that it is right.

To prove this element of the case, complaint counsel relies upon the testimony of ten witnesses who were employees or officers of retailers or wholesalers distributing goods in one or more of the trade areas served by respondent. These witnesses were probably in command of the facts needed to satisfy this criteria but the examination by counsel failed to elicit them. Perhaps a few examples will illustrate the defects in the evidence.

A witness named Jack Oltman testified that he was the manager of Marine Drug Store, Inc., located at 6602 Canal Street, in Houston, Texas. This store owns another pharmacy located at 209 Milby Street, in Houston. Marine Drug Store, Inc., is presumably a corporation but the witness' position, if any, with respect to the corporation and the other store was not explored. The witness was then asked whether "he" purchased the products of Max Factor & Co. and Shulton, Inc.,[3] during 1958 and 1959. He responded in the affirmative and stated the dollar amounts of purchases made from each company during each of the two years. The only specific product identified in the testimony as purchased from the two suppliers is Shulton's "Desert Flower Creme Deodorant". This, then, is the only product which we know that both Weingarten and the witness purchased and resold in 1958 and 1959. We have no idea how extensive the witness' purchases of this item were; whether it was stocked in both stores; and whether it was stocked and resold at or during the time when the respondent was soliciting and receiving the allegedly discriminatory allowance from Shulton.

[3] These are two suppliers alleged in other Commission proceedings to have granted discriminatory promotional allowances to the respondent. Commission complaints issued charging these two cosmetic companies with violating Section 2(d) in granting promotional allowances to Weingarten. Neither of these 2(d) matters has been finally resolved. The *Max Factor* case (Docket 7717) is still pending before the hearing examiner. The *Shulton* matter (Docket 7721) is currently involved in litigation before the United States Court of Appeals for the Seventh Circuit.

Another witness relied upon is Oliver Thomas Cochrane. This witness was affiliated in some unknown manner with two pharmacies located in Houston. The record does not reveal whether he was an owner, official or employee, nor does it give any indication from which it can be concluded that he was the properly qualified person to testify with respect to the operations of the two pharmacies with which he was affiliated.

Four officials of three grocery chains competing with Weingarten were called as witnesses for the complaint. The record clearly establishes that certain specific stores operated by these competing chains were located in sufficiently close proximity to Weingarten stores that competition between them is a certainty. The record also establishes that these chains purchased specified items from suppliers who participated in one or more of the Weingarten promotions in 1958 and 1959. With one exception, the record shows that these competing chains were not offered allowances proportionally equal to those given to Weingarten. But not all of the stores of any of these chains are in competition with Weingarten and there is no showing in this record that the stores shown to compete with Weingarten were actually stocking and selling an allegedly discriminating supplier's goods at approximately the time when Weingarten induced and received its promotional allowances. There is some evidence in the record from which it can be concluded that certain of the chains definitely do not stock and sell all items in all stores. For example, one of the A & P officials testified that Shreveport Macaroni products are carried in the A & P Shreveport stores but not in all of the other stores. The same witness testified that all of the A & P stores carried Carnation products but he was not asked to identify the specific type of products carried. This witness also stated that he could not testify as a fact that any particular A & P store handled and sold any given item at any of the times pertinent to this inquiry.

Counsel called to the stand three witnesses who were officials of food wholesaling concerns which conducted a substantial part of their business with voluntary groups of cooperating retailers. These cooperative groups were composed of small retailers who trade under the same name and purchase the bulk of their supplies from the wholesalers who testified. Complaint counsel urges that we should consider these groups of retail grocers, together with their sponsoring wholesalers, as a competitive unit and hence in competition with Weingarten in the distribution of goods. Doubtless the record does show that the retailers utilize the services of the wholesaler for a wide variety of functions, including advertising, warehousing and financing. But opposed to this evidence is the showing that the proprietors of the retail stores are free to buy from any source they

choose and are free to carry or reject any item which the sponsoring wholesaler carries. One witness testified that it was quite possible that as many as half of the stores sponsored by his organization might not carry any particular item. Moreover, the wholesalers conduct a substantial amount of business with retailers who are not members of a group and there is no showing as to the group's portion of the wholesalers' purchases from the allegedly discriminating suppliers. While the Commission is sympathetic to the proposition that voluntary cooperative retail groups of the type here involved are entitled to the protection of the Act, we are faced in this instance with a dirth of factual information upon which to predicate a finding that the sponsoring wholesalers and their affiliate groups were, or were not, "customers" of their suppliers. Minimally we must know whether suppliers considered them as a unit and paid promotional allowances to them as a unit. There should also be a more detailed showing as to the operations of the groups, particularly with respect to their dependence upon the participating wholesalers.

We do not view the question of whether a wholesaler and his sponsored cooperative group of retailers can be considered as a customer within the meaning of Section 2(d) of the Robinson-Patman Act or within the ambit of the violations spelled out in this proceeding as firmly decided. It is true that we have heretofore refrained from an affirmative finding on this point,[4] but then, as now, the holding is predicated upon the facts and not upon the law.

The wholesaler testimony adduced in this record is defective in another respect in that it fails to identify the particular stores serviced which are in competition with Weingarten or, in the instance where stores are shown to compete, there is no showing that these stores handled and sold items similar in grade and quality to those purchased by Weingarten from suppliers who granted it an allegedly discriminatory promotional allowance.

There is a good deal more which could be said concerning the evidence adduced to support the element of competition between Weingarten and others in the distribution of items purchased from suppliers who gave Weingarten an allegedly discriminatory promotional allowance, but it is felt that the above brief outline of the principal deficiencies found in this evidence should suffice to inform the parties and the hearing examiner of the Commission's feeling with respect thereto. Antitrust cases and, in particular, Robinson-Patman cases require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions or presumptions, for these matters are susceptible of exact proof and this is the type of showing

[4] E.g., Giant Foods, Inc., Docket No. 6459, page 3 of the slip opinion.

which must be made. The evidence adduced in this record in support of the element under consideration is, of course, not totally lacking in probative value, for a good deal of reliable and important information was secured from the ten "competitor" witnesses. But the evidence does not quite reach the level of reliability and substantiality necessary for a concrete finding on this particular point.

We turn now to a consideration of the third element necessary to prove the violations charged, that payments proportionally equal to those received by the respondent were not affirmatively offered by its suppliers to customers competing with respondent. While each of the ten "competitor" witnesses testified that they were not offered a proportional promotional allowance by the suppliers who participated in the Weingarten promotion, this evidence has little significance until it is definitely determined that the ten witnesses' companies actually competed with Weingarten in the distribution of the same suppliers' goods of like grade and quality. Thus a definitive finding on this point must await resolution of the prior factual question. The Commission concludes that the same reasoning applies to criteria number four, that of knowledge on the part of Weingarten that the payments made to it were discriminatory.

The remand of the case to the hearing examiner for further proceedings is never lightly ordered, but it is the Commission's decision that remand is the only possible course in these premises. This matter has now been in litigation for slightly more than three years and both the public and the respondent have incurred substantial expense in its trial. As we stated earlier, this case is attended with a great deal of public interest and to now order dismissal for failure of proof without finally deciding the legality or illegality of the respondent's acts would waste all of the money and effort heretofore expended. This would be a disservice both to the respondent and to the public and cannot be seriously contemplated. There is no question but that the public interest cannot be permitted to suffer because of the mistakes of Commission personnel.[5]

This remand does not envision a complete retrial of all of the issues involved in this proceeding. Only evidence pertaining to the questions which this opinion points out cannot be decided upon the present record because of insufficient facts should be received. It is not contemplated that more than five full hearing days for each side will be needed to adequately shore up this record although the Commission sees no need to actually order a limitation on the length of

[5] "It must not be forgotten that the Commission is not a private party, but a body charged with the protection of the public interest; and it is unthinkable that the public interest should be allowed to suffer as a result of inadvertence or mistake on the part of the Commission or its counsel where this can be avoided." *P. Lorillard Co. v. Federal Trade Commission,* 186 F. 2d 52, 55 (4th Cir. 1950) [5 S.&D. 210].

the hearings. However, the Commission does feel that this matter should be concluded with dispatch and will order that the hearing examiner and the parties make every effort to complete the reception of evidence within 90 days.

The deficiencies in this record are not entirely the fault of complaint counsel, for even if the record did contain a complete exposition of all the facts which the Commission needs to arrive at a final decision, this matter would still have to be remanded to the hearing examiner for the preparation of a new initial decision. Both the Administrative Procedure Act and the Commission's Rules require that initail decisions must state the reasons or basis for findings and conclusions upon all material issues of fact, law or discretion presented on the record.[6] The initial decision filed in this matter does not conform to this requirement.

A primary function of an initial decision is to make factual findings based upon the evidence of record. An initial decision which disposes of hundreds of pages of testimony and documentary evidence with a single conclusionary sentence or paragraph is not an adequate initial decision. It does not apprise the parties, the Commission or the public of the disposition which was made of the welter of conflicting contentions made by the two parties. Such a decision forces the reader to guess at what evidence was relied upon and what evidence was rejected. In this initial decision, the testimony of the ten "competitor" witnesses was disposed of with the following sentence:

> Ten witnesses from nine companies competing with the respondent testified with regard to the allowances, if any, received from the eight suppliers heretofore specifically named and their testimony established that the said suppliers did not offer or otherwise make available payments or allowances for advertising or other services or facilities, on terms proportionately equal to those granted by them to respondent to all others of their customers who were competing with respondent in the sale and distribution of their products. (Foonote omitted.)

The quoted sentence is not a factual finding but a factual conclusion of the type which could be made by a high appellate court. Insofar as the facts are concerned, the hearing examiner's position is similar to that of a trial judge. His conclusions must be based upon facts and his decision must point out the facts upon which he relies. Of course this does not mean that an initial decision must delve into and deal at length with all of the conflicting factual evidence adduced in the record or it would approach in length the record itself. All that is required is that the basic factual evidence necessary to an informed decision be pointed out and described. A mere conclusion

[6] Administrative Procedure Act, Section 8(b) (15 U.S.C. § 1007(b)); Federal Trade Commission Rules of Practice, § 4.19(b) (June 1962).

that the record contains such facts will not do. The Commission's responsibility, and hence the hearing examiner's, with respect to findings of fact was prescribed by the Supreme Court in *Automatic Canteen Co.* v. *Federal Trade Commission* (346 U.S. 61, 81 [5 S.&D. 531] (1953)), as follows:

> * * * While this Court ought scrupulously to abstain from requiring of the Commission particularization in its findings so exacting as to make this Court in effect a court of review on the facts, it is no less important, since we are charged with the duty of reviewing the correctness of the standards which the Commission applies and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review.

Thus, at the conclusion of the hearings to be held pursuant to the accompanying order of remand, the hearing examiner is directed to prepare a new initial decision in accordance with the Commission's views here expressed.

One final point requires comment in this opinion. The respondent charges that the order to cease and desist proposed by the hearing examiner is unlawfully vague and broad in scope. Of course, we cannot predict at this stage what the hearing examiner's decision will be and thus the remarks we make here are only appropriate in the event that upon completion of the remand hearings he is still of the view that an order to cease and desist should issue. In such event, the Commission feels that the hearing examiner should examine the evidence adduced in the light of the recent court decisions, including the above-cited *Grand Union Co.* v. *Federal Trade Commission* and *American News Company, et al.* v. *Federal Trade Commission.* In particular, the statements of Judge Clark in the *American News* opinion to the effect that inducement standing alone has never been held to violate Section 5 and that inducement without concomitant receipt of a discriminatory allowance should not be enjoined without some showing as to its necessity.[7] At this juncture, the Commission voices no opinion as to whether this record will support a conclusion that inducement without receipt should be enjoined. We are merely pointing out that the courts have refused to affirm orders with prohibitions of this nature and are asking the hearing examiner to consider this factor in his next initial decision.

An appropriate order remanding this case to the hearing examiner for further proceedings in conformity with the Commission's views expressed above will issue.

Commissioners Anderson and Elman, without joining in this opinion, agree that the matter should be remanded to the hearing exami-

[7] 300 F. 2d at 111 [7 S.&D. 346, 354].

ner for the taking of further evidence, and should be promptly disposed of on remand. Commissioner Higginbotham did not participate in the decision of this matter.

KORBER HATS, INC., ET AL.

Docket 8190. Order, March 29, 1963

Order reopening and remanding case to hearing examiner for further proceedings in accordance with the opinion of the Court of Appeals, First Circuit.

The order to cease and desist in this matter having been set aside by the United States Court of Appeals for the First Circuit by its decree entered on December 31, 1962 [7 S.&D. 611], and the Court having directed that further proceedings be held by the Commission in accordance with its opinion of the same date:

It is ordered, That this matter be, and it hereby is, reopened.

It is further ordered, That the matter be, and it hereby is, remanded to the hearing examiner for further proceedings in accordance with the opinion of the Court, for the taking of additional relevant evidence if deemed necessary by him to resolve the factual issues raised by the Court and for no other purpose, and for the preparation of a new initial decision, including an order to cease and desist, in accordance with the provisions of Section 4.19(b) of the Commission's Rules of Practice.

MAGNAFLO COMPANY, INC., ET AL.

Docket 8422. Order and Opinion, Mar. 29, 1963

Order vacating initial decision and remanding case to hearing examiner for further proceedings.

This matter having come on to be heard by the Commission upon exceptions to the initial decision filed by respondent Magnaflo Company, Inc., and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission by order issued June 29, 1962, having placed the case on its docket for review as to respondent Webster B. Harpman; and

The Commission, for the reasons stated in the accompanying opinion, having determined that said initial decision should be vacated and the case remanded to the hearing examiner:

It is ordered, That the initial decision filed May 25, 1962, be, and it hereby is, vacated and set aside.

It is further ordered, That this case be remanded to the hearing examiner for further proceedings as to Paragraph Six of the complaint, as amended, in conformity with the views expressed in the aforesaid opinion.

It is further ordered, That after such proceedings have been terminated, the hearing examiner shall forthwith make and file a new initial decision in disposition of all the charges, based on the record as then constituted.

Opinion of the Commission

By Anderson, *Commissioner:*

Respondents have been charged with violation of the Federal Trade Commission Act in connection with their promotion and sale of a battery additive product. The following representations used in promoting the sale of the additive are challenged in Paragraph Three of the complaint:

(1) Is guaranteed;
(2) Is backed by an insurance company;
(3) Is approved by millions of users;
(4) Is in effect approved by a leading battery maker;
(5) Will result in year-long driving without battery trouble;
(6) Will charge and permanently charge a battery;
(7) Is Government approved;
(8) Has been found by a Ford Plant to hold a charge three times the normal time;
(9) Is backed by free winter start insurance.

Respondents have agreed by stipulation to a cease and desist order which would prohibit them from using the first eight of these representations. As to the ninth representation, the respondents have agreed to an order which would prohibit them from claiming that they insure winter starting of automobiles, unless they pay for every starting of the automobile that may be required.

In addition to the foregoing representations, the complaint as originally issued contained the following charge:

PARAGRAPH SIX: Through the use of the trade name "Lifetime Charge" respondents have represented that their product will keep a battery charged for life or that the product will charge or recharge batteries that have become discharged. In truth and in fact, said product will not of itself charge or recharge a battery.

On the basis of a stipulation between counsel, this paragraph was amended by the hearing examiner to allege:

PARAGRAPH SIX: Through the use of the trade name "Lifetime Charge" respondents have represented that their product will keep a battery charged for

life or that the product will charge or recharge batteries that have become discharged. The name "Lifetime Charge" is false and deceptive. Among other things, said product will not of itself charge or recharge a battery, and it is not a lifetime charge.

Counsel have stipulated that respondents for the preceding two years have not used the name "Lifetime Charge" in their advertising without the addition of other language, such as "Doubles Battery Life", "Gives New Power to Your Battery", and "Automatically Helps Keep Your Battery Fully Charged". The respondents have stipulated that the name "Lifetime Charge" used alone "may be deceptive", but contend that the additional language used by them removes any deceptiveness that may exist in the trade name. Respondents have also stipulated, in regard to an allegation in Paragraph Three of the complaint, that their product "will not charge a battery." On the basis of these stipulations and certain exhibits of advertising material, the hearing examiner found the respondents' trade name has a tendency to deceive when used alone and that the deceptive tendency is not removed when used in conjunction with the three claims referred to. His order would prohibit respondents from using "Lifetime Charge" or any other name of similar import for their product. Respondent Magnaflo has taken exception to the hearing examiner's findings and order on this issue.

During oral argument before the Commission it was stated by counsel for respondent Magnaflo that the reason Magnaflo conceded that the trade name used alone "may be deceptive" is that it realized that some members of the public might erroneously believe that its product will be effective for the lifetime of the user. It is Magnaflo's contention that the word "lifetime" in the trade name is intended to refer only to the lifetime of the battery and that this is clarified for the consumer by use of the claim "Doubles Battery Life" in conjunction with the trade name. Complaint counsel's contention is that the trade name is deceptive even when used with this and the other two claims for two reasons: (1) that the word "lifetime" is still deceptively ambiguous, and (2) that the public would understand the word "charge" in Lifetime Charge to mean that the product will impart a new charge to a battery. Respondent Magnaflo's response to the second argument is that the public would understand the word "charge" to mean only that the use of this product will "keep" the battery charged.[1] We take Magnaflo's argument to mean that their product will *preserve an existing charge* in a battery.

We agree with the hearing examiner that the three conjunctive claims used by respondents do not relieve the trade name of its

[1] The complaint itself apparently recognizes this as one meaning of the trade name, although not the only one.

deceptive tendency. It is our view that to the purchasing public the word "charge" is subject to either of the two interpretations placed thereon by the parties. With particular reference to complaint counsel's assertion, we believe that the public's knowledge of the many remarkable contributions of modern chemistry may well serve to strengthen the erroneous belief that this product is a new scientific discovery that will introduce a new charge into a battery. Respondents have conceded that their product does not perform this function. Thus, even under respondents' argument that the product will preserve an existing charge, as to which we make no finding, any qualification to be acceptable would have to clearly eliminate the deceptive meaning and leave standing the meaning they urge as truthful. Respondents' purported qualifications fail to do this. "Gives New Power To Your Battery" strengthens rather than removes the possible deception. "Doubles Battery Life" and "Automatically Helps Keep Your Battery Fully Charged" do not aid the consumer in discovering the truth, as these claims are entirely consistent with the belief that the product will charge or recharge a battery.

Moreover, these three conjunctive claims do not establish a definite meaning for the word "Lifetime" so as to relieve that word of a capacity to deceive. The claim "Doubles Battery Life" is clearly not consistent with the word "Lifetime" and, in addition, the word "Life" in that claim is subject to being construed synonymously with the word "liveliness". As previously noted, counsel for respondent Magnaflo has taken the position that the word "Lifetime" refers to the life of the battery. However, this in itself is ambiguous as the life of the battery may refer to various concepts such as the structural life or, as stated by the individual respondent in oral argument before the hearing examiner, lifetime from an "electrical standpoint and from a use standpoint" may refer to "the time that it takes for that battery to discharge."

We have found that the three claims used by respondents do not constitute adequate qualification of the trade name. There remains, therefore, the trade name alone which, in this posture, respondents concede may be deceptive. On this record, we have no evidence from which to determine whether the trade name may be qualified so as to relieve any tendency to deceive or whether complete excision is required. Obviously, to make such a determination, it is necessary to know all bases for the possible deception. We have respondents' concession that the product will not impart a charge to a battery. Therefore, it is our view that, in order to determine whether to require excision or permit qualification of the trade name, evidence is first required as to whether the product will preserve an existing

charge in a battery. If so, the extent of this preservation must be determined so that, as to the word "Lifetime", the life referred to may be defined.

Under the circumstances, we are remanding this case to the hearing examiner for further proceedings. As we are of the opinion that the charges in Paragraph Three of the complaint are adequately and appropriately disposed of by the stipulation between counsel relating thereto, the proceedings on remand are to be confined to the allegations in Paragraph Six, as amended. Specifically, the hearing examiner is directed to receive such additional evidence as may be required for a finding on the issue of whether or not respondents' product will preserve an existing charge in a battery to the extent necessary to give a purposeful and truthful meaning to the word "Lifetime" in the trade name.

MARCUS ROSENFELD ET AL. trading as TOWEL SHOP, ETC.

Docket 7533. Order, April 15, 1963

Order denying request to reopen cease and desist order of March 12, 1960, 56 F.T.C. 1049.

This matter having come on to be heard upon respondents' motion, filed January 30, 1963, requesting the Commission to reopen this proceeding for the purpose of permitting the taking of testimony or the filing of affidavits and the presentation of oral argument in support of respondents' contention that the order to cease and desist entered herein on March 12, 1960 [56 F.T.C. 1049], should be modified or set aside, and upon the answer of counsel supporting the complaint in opposition thereto; and

It appearing that respondents have stated as grounds for said request that the order to cease and desist entered in this proceeding, unlike an order issued by the Commission against one of respondents' competitors, requires an affirmative disclosure to be made in connection with the description of their products, and that respondents have been placed at a competitive disadvantage as a result thereof; and

It further appearing that no showing has been made that the aforesaid disclosure requirement is not necessary to prevent deception in the advertising of respondents' products or that the circumstances are such that the public interest would be better served by the elimination of this requirement; and

The Commission being of the opinion that the allegations in respondents' motion do not provide sufficient grounds to support the

conclusion that conditions of fact or of law may have so changed since the issuance of the order to cease and desist as to require a modification of said order or that the public interest may now require such modification:

It is ordered, That respondents' motion be, and it hereby is, denied.

UNITED BISCUIT COMPANY OF AMERICA

Docket 7817. Order and Opinion, Apr. 19, 1963

Interlocutory order in price discrimination case denying respondent's request for release of compliance reports of competitors, and order denying petition for reconsideration.

ORDER DENYING REQUEST FOR RELEASE OF CONFIDENTIAL INFORMATION

Respondent, pursuant to § 1.164 of the Commission's Rules of Practice, having requested on March 6, 1963, that the Commission release to it compliance reports in the matters of *National Biscuit Company*, Docket No. 5013 [38 F.T.C. 213; 50 F.T.C. 932], and *Sunshine Biscuits, Inc.*, Docket No. 6191 [51 F.T.C. 25; 52 F.T.C. 110]; and

The Commission having determined, for the reasons stated in the accompanying opinion, that the request should be denied:

It is ordered, That the respondent's request for the release of the aforementioned compliance reports be, and it hereby is, denied.

ON REQUEST FOR THE RELEASE OF DOCUMENTS

BY THE COMMISSION:

Respondent, pursuant to § 1.164 of the Commission's Rules of Practice, on March 6, 1963, filed a motion requesting that the Commission release to it compliance reports in the matters of *National Biscuit Company*, Docket No. 5013 [38 F.T.C. 213; 50 F.T.C. 932], and *Sunshine Biscuits, Inc.*, Docket No. 6191 [51 F.T.C. 25; 52 F.T.C. 110]. The National Biscuit Company meanwhile has moved to intervene in this proceeding for the purpose of opposing such motion, contending among other things that its reports contain names of customers and other intimate details of its business which ought not to be revealed to competitors.

Section 1.162(f) of the Commission's Rules of Practice in part provides: "After having been received and filed, reports of compliance filed under § 5.6, describing the manner and form in which respondents allege they have complied with the Commission's orders to cease and desist, are available at the principal office of the Commission for inspection and copying at reasonable times, unless in the

opinion of the Director of the Bureau, through which the reports of compliance were originally submitted, they contain information of a confidential nature, in which case request for release may be made to the Commission pursuant to the provisions of § 1.164." Respondent, having made a preliminary request for the aforementioned reports and having received a letter from the Commission's Bureau of Restraint of Trade stating that the reports cannot be made available, now petitions the Commission under § 1.164 for the release of the documents.

In the case of *National Biscuit Company*, Docket No. 5013, on the original order issued in 1944 a report of compliance was received and filed. In 1954, the Commission modified the order in the matter and directed a further report of compliance. Under the modified order no report of compliance has been received and filed as showing compliance. In *Sunshine Biscuits, Inc.*, Docket No. 6191, no report of compliance has been received and filed as showing compliance. In other words, the reports in both matters, aside from the report received prior to modification in *National Biscuit*, have not been formally acted upon by the Commission and are still pending before it for consideration.

The records sought, at least in one case, contain information which has been specifically determined by the Commission's Bureau of Restraint of Trade to be of a confidential character. This determination was made pursuant to Commission's Rule 1.162(f). Thus, those records presumably contain trade secrets, names of customers, or other business data which might prove detrimental to the reporting party if revealed. National Biscuit Company, in moving to intervene, asserts that its reports contain intimate details of its business, including names of customers, which should not be revealed to competitors.

Respondent requests the compliance reports for use in its pending appeal to the Commission from an initial decision of the hearing examiner in this proceeding, filed November 9, 1962, on the ground that the information might aid in its presentation of the asserted issues of (a) whether the cease and desist order is to be construed as prohibiting all quantity discounts, as such, or only specific discount practices like those charged, and (b) whether, if construed to prohibit all quantity discounts, such order is unduly broad and oppressive.

Each matter before the Commission must be considered on its own merits. Therefore, the Commission in this proceeding, if it finds that the law is violated, will enter an order in such terms as to adequately and effectively prohibit the unlawful activity. In so doing, the Commission would look at the facts as developed in this particu-

lar case. Orders in other cases, even though involving competitors, may have little relevance. Respondent has failed to sufficiently show the relevance of other orders to this case.

In addition, respondent has ample opportunity to challenge the order contained in the initial decision. If respondent believes this order is inappropriate for any reason, including the breadth of its terms as compared to orders in similar cases, it may, of course, fully pursue this question.

Finally, since the Commission has not as yet acted upon any relevant compliance reports pending before it in the *National Biscuit* and *Sunshine Biscuits* cases, it obviously will be of no use to respondent to refer to such reports as indicative of the way in which the order contained in the initial decision will be construed.

Accordingly, respondent's request for the release of compliance reports in the aforementioned cases will be denied.

ORDER DENYING PETITION FOR RECONSIDERATION

On April 19, 1963, the Commission issued its order denying, for the reasons set forth in an accompanying opinion, respondent's motion requesting the release to respondent of compliance reports relating to *National Biscuit Company*, Docket No. 5013, and *Sunshine Biscuits, Inc.*, Docket No. 6191.

On May 6, 1963, respondent filed petition for reconsideration of the Commission's action in denying such request. On May 7, 1963, National Biscuit Company requested permission to submit a supplemental answer relating to respondent's petition for reconsideration.

The Commission having considered the petition for reconsideration filed by the respondent and the request of National Biscuit Company for permission to file supplemental answer thereto and having determined that the petition and the request should be denied:

It is ordered, That respondent's petition for reconsideration of the Commission's order of April 19, 1963, and the request of National Biscuit Company for permission to file supplemental answer relating thereto be, and they hereby are, denied. (Dated May 23, 1963.)

WHITE LABORATORIES, INC.

Docket 8500. Order, April 19, 1963

Order dismissing motion to the Commission to hold settlement conference.

Respondent, on April 17, 1963, having filed motions addressed to the hearing examiner and to the Commission requesting that either the hearing examiner or the Commission hold a conference for the settlement of this proceeding, or for alternative relief; and it appearing that Section 4.13(c)(6) of the Commission's Rules of Practice

provides that "Hearing examiners shall have the duty to conduct fair and impartial hearings, to take all necessary action to avoid delay in the disposition of proceedings, and to maintain order. They shall have all powers necessary to that end, including the following: * * * (6) To hold conferences for settlement, simplification of the issues, or any other proper purpose"; and that the hearing examiner therefore has full authority to take the actions requested by respondent's motion:

It is ordered, That respondent's motion addressed to the Commission be, and it hereby is, dismissed as premature.

LLOYD A. FRY ROOFING COMPANY ET AL.

Docket 7908. Orders, April 24, 1963 and May 28, 1963

Interlocutory orders denying appeal under Rule 4.15(e).

Upon consideration of the appeal filed by the respondents on April 8, 1963, from the hearing examiner's ruling quashing a subpoena duces tecum which had previously been issued and served at the instance of the respondents upon an official of the Barrett Division of Allied Chemical Corporation; and

It appearing that the subpoena would be burdensome to Allied Chemical Corporation in that it requires production of over one million documents; and

It further appearing that respondents have failed to indicate the relevance of the information sought,

It is ordered, That respondents' appeal be, and it hereby is, denied.

Order Denying Appeal Under Rule 4.15(e)

Respondents on May 20, 1963, filed an appeal from the hearing examiner's denial of their applications for subpoenas duces tecum directed to six competitor firms. The applications were filed with the hearing examiner on May 8, 9, and 10, 1963, and were denied on the grounds that they were filed too late, were too broad, and their relevance, if any, was outweighed by the heavy burden which production of the documents would impose on third parties. It appears that the subpoenas called for a large number of documents, the production of which would be a lengthy, burdensome, and expensive task. The subpoenas are returnable on or before May 27, 1963, giving the parties approximately nine working days to comply therewith. Complaint counsel rested their case-in-chief on July 18, 1962, and respondents have waited ten months to request these subpoenas. In these circumstances, the hearing examiner's refusal to issue the subpoenas will not be disturbed. Accordingly,

It is ordered, That respondents' appeal be, and it hereby is, denied.

FAWCETT PUBLICATIONS, INC., ET AL.

Docket 8187. Order, April 30, 1963

Order denying respondents' motion for modification of order to cease and desist of May 16, 1961, 58 F.T.C. 761.

This matter having come on to be heard by the Commission upon respondents' petition filed March 26, 1963, joined in by American Book Publishers Council, Inc., requesting clarification or modification of the order to cease and desist contained in the initial decision, as adopted by the Commission on May 16, 1961 [58 F.T.C. 761], and requesting oral argument, and upon answer in opposition to said request filed by counsel supporting the complaint; and

It appearing that the order, among other things, requires respondents to cease using or substituting a new title for the original title of a reprinted book without a disclosure of the original title and the fact that the book has been published previously under such title, such disclosure to appear both on the book and in advertising in the manner prescribed by the order; and

It further appearing that the purpose of respondents' petition is to have said provisions of the order construed or limited so as to apply only to books previously published in the United States; and

The Commission being of the opinion that the order as issued is clear in its application to all of respondents' reprinted books having a substitute title; and

The Commission being of the further opinion that respondents' petition fails to establish a reasonable probability that material changes in conditions of fact or of law have occurred since the order was entered or to demonstrate a probability that the public interest requires the modification requested; and

It appearing that the briefs are entirely adequate to fully advise the Commission as to the matters in issue and that no useful purpose would be served by oral argument thereon:

It is ordered, That respondents' petition filed on March 26, 1963, and their request for oral argument be, and they hereby are, denied.

SCOTT PAPER COMPANY

Docket 6559. Order, May 9, 1963

Order denying request for the release of certain documents from *in camera* status.

This matter is before the Commission upon the transmittal by the hearing examiner of evidence received pursuant to the Commission's order of April 18, 1962, and upon the order directing the filing of briefs and oral argument. In this status of the proceeding, respond-

ent has moved the Commission for release of certain exhibits from *in camera* status, contending, among other things, that it will be unable to cope effectively with the issues raised if the evidence must be dealt with in confidential memoranda and oral argument conducted "under wraps."

It appears, however, that this matter, including part of the evidence on which release is now sought, was heretofore briefed and argued before the Commission and the United States Court of Appeals for the Third Circuit, and as far as the Commission is aware there was then no difficulty in presenting the issues effectively because of the *in camera* status of evidence.

In the circumstances, the Commission is of the opinion that no adequate showing has been made which would justify the release from *in camera* status of the exhibits referred to; and, accordingly,

It is ordered, That respondent's motion be, and it hereby is, denied.

Commissioner MacIntyre not participating.

L. G. BALFOUR COMPANY ET AL.

Docket 8435. Order and Opinion, May 10, 1963

Interlocutory order granting respondents' application to inspect documents in Commission files.

ORDER DIRECTING DISCLOSURE OF DOCUMENTS

In accordance with the Commission's order of October 5, 1962, the hearing examiner has again referred to the Commission his recommendation as to the disposition which should be made of respondents' request for the right to inspect documents in the Commission's confidential files. Pursuant to permission granted, respondents have filed a memorandum in opposition to the decision recommended by the hearing examiner and complaint counsel have filed in support thereof; and

The Commission having determined for the reasons stated in the accompanying opinion that the hearing examiner's recommendation should not be followed and that the respondents should be afforded substantially full disclosure of the information they seek:

It is ordered, That complaint counsel have copies made of all documents in the Commission files which fit the descriptions supplied by respondents in their motion of August 27, 1962, which were at one time in respondents' possession and are now otherwise unavailable to them; that the identity of confidential informants who may have supplied any of the documents be screened from respondents by dele-

tion of names or any effective procedure which appears reasonable; and that the copies made be turned over to counsel for respondents without further delay.

Commissioner MacIntyre not concurring.

INTERLOCUTORY OPINION OF THE COMMISSION

BY THE COMMISSION:

The complaint in this proceeding, issued June 16, 1961, charged respondents with violation of Section 5 of the Federal Trade Commission Act. Specifically alleged were unfair methods of competition and unfair acts and practices, the alleged effect of which has been or may be to restrain competition and to create a monopoly in the several lines of commerce in which respondents are engaged. On August 27, 1962, respondents filed a motion pursuant to §§ 1.163 and 1.164 of the Commission's Rules of Practice for an order directing complaint counsel to permit them to inspect and copy certain documents in the possession of the Commission. The documents requested concerned 28 enumerated matters and fell within four categories:

(a) Documents obtained by the Commission from the respondents;

(b) Four specific documents or groups of related documents;

(c) Documents obtained by the Commission from other sources which were prepared or published by respondents or which were addressed to or received by them; and

(d) All correspondence between respondents and the Commission.

By order of September 12, 1962, the examiner certified respondents' motion to the Commission, recommending that only that portion should be granted which is limited to "the request to examine certain documents submitted to the Commission by the Respondents." According to the examiner's order, "The remaining matter it appears would fall within the privileged category and should not be disclosed." The Commission, by order of October 5, 1962, remanded the matter for further consideration because of the examiner's failure to give any explanation for his recommendations. The Commission's order pointed out that: "the determination * * * of good cause for the release of documents in the Commission's files entails, primarily, consideration of issues of fact which require for their determination a detailed knowledge of the issues of the proceeding which, at this state of the case, is possessed by the examiner." For this reason, the Commission concluded that questions of good cause, privilege, and similar matters should be initially considered by the examiner in the light of the particular facts and issues of the case with which he is presumably familiar.

Pursuant to the Commission's order of remand, the examiner by order filed January 29, 1963, has again certified respondents' motion to the Commission. The examiner's new order, without considering the matters of privilege previously raised, concludes that, with the exception of the documents described under (b) above, the respondents have failed to show good cause for the requested disclosure or to identify the documents requested with sufficient specificity.

This matter brings into focus a series of problems and questions which have arisen concerning the latitude or scope of discovery permitted respondents under the Commission's Rules of Practice.[1] Prior to amendment of the Rules, hearings in adjudicative proceedings were held at uncertain intervals and in different locales. Under this type of practice there was little need to afford respondents the right to pre-trial discovery for they were customarily afforded an ample interval to prepare their defenses subsequent to the close of the case in chief.[2] But the revised rules now require that, insofar as it is possible and practical, the hearings must be held in one place and continue without interval until all evidence, in support of and in opposition to the complaint, has been received.[3] Thus, respondents must now be prepared to offer their evidence immediately after the close of the case in chief and, accordingly, must be afforded all of the rights necessary for them to prepare before trial. To provide for this changed circumstance and to assure that the Federal Trade Commission's hearings were not conducted under the "sporting theory" of litigation where the goal is to surprise and confound your opponent, the Commission promulgated Rule 4.8, which provides for the convening of prehearing conferences to discuss and determine the most expeditious procedure to be followed in adjudicative hear-

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[1] The current Rules were published June 29, 1961. Practice under these Rules showed the need for several comparatively minor revisions which were made and the current Rules, published June 1962, reflect these changes.

[2] E.g., *Joseph A. Kaplan & Sons, Inc.* (57 F.T.C. 1537, 1539). "Under the Commission's method of procedure the respondent will not be prejudiced by the denial of its request [for discovery subpoenas]. At the close of the case in chief, it may make application to the hearing examiner for such subpoenas as it deems necessary to its defense. At that time the hearing examiner having heard the evidence supporting the complaint will be better able to determine the permissible scope of the requested subpoenas and will, of course, cause those to issue which in his judgment are reasonable and proper."

In *Standard Distributors, Inc., et al.* v. *Federal Trade Commission,* the Second Circuit upheld the Commission's refusal to permit respondent to copy or photograph the documentary evidence to be introduced, holding that denial of such a request was not erroneous, for, as was said "* * * in N.L.R.B. v. Remington Rand, Inc., 2 Cir., 94 F. 2d 862, 'it is of slight value in a trial by hearings at intervals.'" (211 F. 2d 7, 11 (1954).) [5 S.&D. 619, 623.]

[3] Rule 4.14(d): *"Expedition.* Hearings shall proceed with all reasonable expedition. Unless the Commission otherwise orders upon a certificate of necessity therefor by the hearing examiner, all hearings will be held at one place and will continue without suspension until concluded. (This shall not bar overnight, week end, or holiday recesses, or other brief intervals of the sort normally involved in judicial proceedings.)"

ings. Among the specific matters which may be considered at the conference are:

> Such other matters as may aid in the orderly disposition of the proceeding, including disclosure of the names of witnesses or furnishing for inspection or copying of non-privileged documents, papers, books or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody or control of any party to the proceeding. (§ 4.8(a)(6))

While this was the first appearance of this procedural step in the Rules, it is not an entirely new concept in Commission practice, for the authority of a hearing examiner to order discovery of the type described in the Rule has been recognized for a number of years.[4] And, although the complaint in this proceeding was issued prior to the effective date of the Rule, the respondents were afforded discovery before trial coextensive with the Rule's provisions. Just as the Rule provides, they were given the names of all witnesses complaint counsel intended to call and copies of all documents he intended to introduce in evidence.[5]

The questions presented by prehearing discovery requests must be considered in a broad context. To enable it to carry out its functions, the Commission has been given unique, extensive powers of visitation which authorize it to search into and examine in detail the business secrets and other confidential data concerning persons or corporations being investigated or who possess information relevant to an investigation or proceeding.[6] The material adduced through exercise of these broad powers is placed in the Commission's confi-

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[4] *American Metal Products Company, et al.,* Docket No. 7365, interlocutory order of July 2, 1959, affirming the hearing examiner's right to require complaint counsel to furnish respondents' counsel with copies of all documents which he intended to offer in evidence. *Gulf Oil Corp.* (54 F.T.C. 1891 (1958)), interlocutory order affirming the hearing examiner's power to order complaint counsel to disclose names and addresses of witnesses two weeks in advance of hearing.

[5] Related questions arising during the trial are handled similarly. We have held, for example, that a signed prior statement of a witness may be released by order of the hearing examiner when necessary. Our pronouncement to this effect was made in *Sun Oil Company,* Docket No. 6934, interlocutory opinion of September 15, 1958. The authority is not unqualified and must be circumspectly used. A pertinent part of the opinion reads:

"In regard to the latter situation, we believe that the afforesaid rule should not be so interpreted as to deprive the examiner of authority to order in his sound discretion production of a record in the Commission's files for cross-examination where such is a prior statement of a witness, which statement is identified and known to exist, and where it is shown to relate to the subject matter of the testimony of the witness. In this connection, the examiner should prudently exercise his discretion and should not release any document (or any part thereof) which is privileged or irrelevant. In particular, the identity of an applicant or complaining party should be strictly protected from disclosure. Consequently, a document so produced must first be inspected by the examiner before it may be turned over to the respondent, a procedure which the examiner proposed to follow in this instance."

[6] For a recent discussion of the Commission's investigative powers, see *Hunt Foods and Industries, Inc.* v. *Federal Trade Commission,* 286 F. 2d 803 (9th Cir. 1960) [6 S.&D. 850].

dential files and its unauthorized disclosure subjects the offender to serious criminal penalties.[7] This restriction on unauthorized disclosure applies as well to hearing examiners as to other employees, and the Commission has held that as a general proposition hearing examiners have "no authority to require the production of information or material from the Commission's files by subpoena duces tecum or otherwise." [8] The guarding of the products of Commission investigations is founded in the realization that much of it was considered as highly confidential by the persons from whom it was secured.

The only manner in which confidential information may be released from the Commission's files other than that referred to in Rule 4.8 is by order of the Commission pursuant to § 1.164 of the Rules of Practice. The Commission will release such material to applicants only if they are able to show "good cause" therefor and if the release will not do violence to any statute, rule or the public interest.[9]

In cases in which the release of such materials is requested, the threshold question to be decided is whether the applicant has shown good cause.[10] In adjudicative proceedings the application is made to the hearing examiner who intially considers the matter and then certifies the question to the Commission with his recommendations and reasons therefor.[11] This is the procedure which has been followed here.

In considering whether or not good cause has been shown in support of a particular request, the Commission, of course, is cognizant of the fact that a marked distinction must be drawn between discovery of a party's own documents—for example, business records

[7] Section 10 of the Federal Trade Commission Act provides in part: "Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court."

[8] *Postal Life and Casualty Insurance Company,* 52 F.T.C. 651, 653 (1956); *Thomasville Chair Company,* 56 F.T.C. 1651 (1959).

[9] The pertinent parts of § 1.164 provide:

"(a) Upon good cause shown, the Commission may by order direct that certain records, files, papers, or information be made public or disclosed to a particular applicant.

"(b) Application by a member of the public for such disclosure shall be in writing, under oath, setting forth the interest of the applicant in the subject matter; a description of the specific information, files, documents, or other material inspection of which is requested; whether copies are desired; and the purpose for which the information or material, or copies, will be used if the application is granted. Upon receipt of such an application the Commission will take action thereon, having due regard to statutory restrictions, its rules, and the public interest."

[10] E.g., *Shell Oil Company,* Docket No. 8537, Interlocutory Opinion of February 1, 1963 [p. 1488 herein].

[11] *Union Bag-Camp Paper Corporation,* Docket No. 7946, Order Denying Applications For Disclosure and Special Reports, July 30, 1962.

peculiarly within its possession and not otherwise available to the adversary, and documents that reflect the result of investigation by lawyers in preparation for possible litigation.[12] That distinction takes on added significance when the investigation as to which discovery is sought is by government lawyers acting in the public interest.[13]

It is neither necessary nor desirable to frame a firm rule of general application defining with particularity the elements of a showing of good cause for the release of material from the Commission's files. It is impossible to anticipate the wide variety of situations which may arise and which should be met with flexibility and discretion; not rigid formula. In general, however, it may be said that an applicant must satisfy the Commission not only that the material sought is relevant and useful for defensive purposes, but also that its release would not impair any overriding public interest in preserving its confidentiality.[14] In making its judgment the Commission will also necessarily take into account such considerations as basic fairness to the parties and the need for avoiding delay.[15] But it must be emphasized that an effort to obtain discovery of Commission files merely for "fishing" purposes to determine whether material might be extracted therefrom which could be exploited by the defense will not be allowed.

It is obviously not possible to show "good cause" without a fairly well drawn designation of the material sought. But, the question of the sufficiency of designation, like that of good cause, should not be solved by resort to rules, whether strict or liberal, for in order for justice to be done each problem which arises should be approached without the handicap of an arbitrary formula.[16] Moreover, the problem of designation is subservient to that of good cause. It is impossible to make the latter showing without first identifying the material needed.

Applying the foregoing reasoning to these respondents' application, there appears to be a serious question whether they have made

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[12] *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

[13] *United States* v. *Deere & Company, et al.*, 9 FRD 523 (D. Minn. 1949).

[14] In this connection, we note that while the Federal Rules of Civil Procedure do not apply to Commission proceedings, the standards which have been used by the district courts in their interpretations of Rule 34 are informative. See § 34.08, Moore's Federal Practice, and cases there cited.

[15] E.g., *The Texas Company*, Docket No. 6898, Interlocutory Opinion of March 9, 1962 [60 F.T.C. 1887]; *Giant Food, Inc.*, Docket No. 7773, Interlocutory Opinion of April 20, 1961 [58 F.T.C. 1193]; *Thomasville Chair Co.*, 56 F.T.C. 1651, 1653 (1959); *Postal Life & Casualty Ins. Co.*, 52 F.T.C. 651, 654 (1956).

[16] Even under Rule 34, Federal Rules of Civil Procedure, there appears to be no uniformity among the court rulings as to the degree of specificity required. Under one view, represented by *United States* v. *American Optical Co., et al.*, 2 FRD 534, 536 (S.D.N.Y. 1942), a fairly exact description of each item is required, while under another, set forth in *United States* v. *United States Alkali Export Assn., Inc.*, 7 FRD 256, 258 (S.D.N.Y. 1946), designations by general category are permitted.

the necessary showing. The hearing examiner's order certifying the question to us suggests that the respondents may be actually engaged only in a fishing expedition to determine whether something of value may be found. Their motion calls for disclosure in such general terms as to indicate that they possess no real knowledge that much of the material requested even exists. And yet, in this instance, the Commission feels that disclosure should be made.

Here respondents are trying to recover only their own documents and, in this factual situation, denial of their request probably would cause them some hardship. The factual complex framing respondents' request is somewhat unique. Over a period of more than 30 years, the Commission has conducted a series of more or less interrelated investigations of respondents' business activities. These investigations produced a sizable file of documents which, except for those which have been heretofore placed in evidence in this proceeding,[17] are still in the Commission's possession. Respondents claim that a diligent search of their files has revealed that they failed to retain copies of all documents turned over to the Commission during the various investigations. Respondents state that some of the missing documents contain exculpatory material, but are unable to supply specific details to support this claim.

The complaint in this proceeding is necessarily broad, covering a long period of respondents' business life. Moreover, the charge of monopolizing is capable of proof and defense by an almost infinite variety of evidence. Thus, there is little doubt that the documents which respondents seek bear some relevance to the issues here involved. In this instance and on these peculiar facts, we are not inclined even to insist upon a definitive showing of relevance because we feel that basic fairness dictates our decision and overrides all deficiencies in respondents' showing.

In the trial of a lawsuit a lawyer deprived of the information his client has given to the opposing party must of necessity cause the lawyer much discomfort. It could even result in misjudgment fatal to his case. A lawyer working under such a handicap could never be sure that a defensive gambit would not be met with the crushing rebuttal of his client's prior inconsistent statements or actions. To subject respondents and their counsel to this hardship simply because of a failure to retain copies of all documents which may have relevance to this action would, we feel, be unfair.

Complaint counsel protests that some of the documents sought, while originally in respondents' possession, were not secured from it but from third parties whose identity is disclosed thereon. Re-

[17] More than 700 have been offered and received to date.

spondents aver they have no interest in the identity of such third parties and have no objection to an order which would protect this information. Accordingly, our order providing for disclosure will authorize complaint counsel to delete names of confidential informants from any documents made available to respondents.

Commissioner MacIntyre does not concur.

THE PURE OIL COMPANY

Docket 6640. Memorandum and Order, May 13 and 15, 1963

Memorandum of Chairman in response to motion of respondent that he withdraw from this proceeding, and order of Commission denying respondent's motion for disqualification of the Chairman.

MEMORANDUM OF CHAIRMAN DIXON IN RESPONSE TO THE MOTION OF RESPONDENT, THE PURE OIL COMPANY, THAT HE WITHDRAW FROM THIS PROCEEDING

By motion filed May 3, 1963, respondent requests that I withdraw from participation in the appeals now pending before the Commission from the initial decision of the hearing examiner herein.

As the reason for its request, respondent quotes, in part, from my address of July 25, 1961, before the National Congress of Petroleum Retailers, Inc., in Denver, Colorado. Respondent states that it is one of the companies referred to in the speech and that one of the plans referred to therein is that designated in this complaint. On the basis of similar contentions with respect to this same speech, I was requested to withdraw from participation in the *Goodrich* matter.[1] Although not specifically stated in this present motion, I assume that respondent's contention here is the same as that in the *Goodrich* case, that is, that this speech reflects on my part, personal bias and a prejudgment in favor of the allegations of the complaint.

After careful reflection, I declined to withdraw from participation in the *Goodrich* proceeding. In answer to respondent and for the record herein, I repeat the grounds for that decision which are equally applicable to this request.

I stated in my speech that the Commission had challenged the legality of plans of various oil companies including that of this respondent. This is evidenced by the complaint itself which, by statute, can issue only after the Commission has determined that it has reason to believe that such plans are in violation of the law. My rephrasing of this determination does not represent a prejudgment of the final decision.

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[1] *In the Matter of B. F. Goodrich Company and The Texas Company,* Docket No. 6485.

As in the *Goodrich* case, the complaint in this matter was issued long before I assumed my position as a member of the Commission. Also, I have no direct knowledge of this proceeding other than that obtained from an examination of the initial pleadings. In direct response to the charges which I must assume are the grounds for respondent's request, I have not prejudged the issues in this matter, nor do I harbor any personal bias. Accordingly, it is my decision not to withdraw from participation in the appeals from the initial decision in this proceeding.

I shall not participate in any deliberations by the Commission on respondent's alternate request. (Dated May 13, 1963.)

ORDER DENYING MOTION TO DISQUALIFY

The respondent, by motion filed May 3, 1963, having requested that Chairman Paul Rand Dixon withdraw from participation in this proceeding, and that he be disqualified from such participation; and

The Commission having determined that respondent has failed to show justification for departure from the Commission's practice of treating disqualification as a matter primarily for determination by the individual concerned; and

Chairman Dixon having filed with the Commission a memorandum denying the existence of any grounds for his disqualification from participation in this proceeding:

It is ordered, That the motion for disqualification of Chairman Dixon from participation in this proceeding be, and it hereby is, denied.

Commissioner Dixon not participating. (Dated May 15, 1963.)

STERLING DRUG, INC., ET AL.

Docket 8554. Order and Opinion, May 16, 1963

Order denying respondent's motions that Commission disqualify itself from adjudicating issues in Paragraph Seven (1) of the amended complaint.

ORDER DENYING MOTIONS

Respondents, by motions filed April 22, 1963, and April 23, 1963, having requested the Commission to declare itself disqualified to make any adjudication on the issues presented by Paragraph Seven (1) of the amended complaint herein; and

The Commission for the reasons stated in the accompanying opinion having determined not to declare itself disqualified:

It is ordered, That respondents' motions be, and they hereby are, denied.

Memorandum Opinion

By the Commission:

Respondents have filed motions requesting the Commission to declare itself disqualified to make any adjudication on the issue raised in Paragraph Seven (1) of the amended complaint and respondents' answer thereto. In substance, that issue is whether or not the United States Government endorsed or approved certain findings reached by clinical investigators who conducted a study referred to in respondents' advertising. Respondents state as grounds for their motion that the issue involves the conduct and credibility of the Commission.

In pertinent part, Paragraph Seven of our amended complaint states that "In truth and in fact: (1) The findings and conclusions reached by the clinical investigators * * * have not been endorsed or approved by the United States Government, * * *." Respondents apparently believe that in view of this statement, the Commission should not sit in judgment on the issue since, in their contention, it was the Commission that endorsed or approved the findings.

In support of their motion, respondents refer to "all of the proceedings and facts of record" in the case on appeal from the order of the District Court denying the Commission's motion for preliminary injunction pending disposition of the complaint herein.[1] Although respondents' reference to that case is somewhat vague, it is apparently their contention that the injunction proceeding indicates that the Commission had prejudged this issue and was thereby requesting the court to enjoin a practice which the Commission, of its own knowledge, had determined was in violation of the statute. To have any validity, this argument must rest on the premise that to obtain the injunction, the Commission was required to present evidence to the court sufficient to prove a violation. That this is not the proper legal principle to be applied in such a proceeeding was recognized by the District Court in its statement that "the Court in this proceeeding has only to resolve whether there was *reasonable cause* to believe that the alleged violation had taken place" (italics supplied).[2] Thus, it is not required in an application for a preliminary injunction that a full presentation of all of the facts with

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[1] Subsequent to the filing of the motion herein, the Court of Appeals issued its decision affirming the action of the District Court. 317 F. 2d 669 (2d Cir. 1963) [7 S.&D. 683].

[2] *Federal Trade Commission* v. *Sterling Drug, Inc., et al.*, 63 Civ. 335 (USDC SD NY, 1963). The Court of Appeals, in affirming the District Court's decision, applied this principle (Slip Opinion, p. 1968) [7 S.&D. 655].

reference to an issue be made to the court.[3] It is sufficient for the Commission to show a justifiable basis for believing that such a state of facts probably existed as reasonably would lead it to believe that respondents were engaging in the practice charged.[4] Respondents' position that the application for an injunction reflects a final decision by the Commission on this issue is in error and is rejected.

In further support of their motion requesting the Commission to declare itself disqualified, respondents refer to a statement by counsel supporting the complaint at the prehearing conference to the effect that he proposed to offer the quoted statement in Paragraph Seven of the complaint as proof of the charge. Respondents are mistaken if they assume, on the basis of the prehearing statement, that we will accept the allegation in Paragraph Seven as proof of anything. Obviously, the purpose of that statement is procedural. It is an allegation of fact which requires proof to establish a violation. Respondents may be assured that our decision will depend upon whether or not the facts of record concerning the study warrant a finding of Government endorsement. Their reliance on complaint counsel's statement in support of their motion to disqualify is misplaced.

We shall not declare ourselves disqualified to make an adjudication on the issue raised in Paragraph Seven (1) of the complaint. An appropriate order will be entered.

STANDARD OIL COMPANY (INDIANA)

Docket 7567. Memorandum and Order, May 22 and 31, 1963

Memorandum of Chairman in response to respondent's motion that he withdraw from case and Commission's order denying the motion to disqualify.

MEMORANDUM OF CHAIRMAN DIXON IN RESPONSE TO THE MOTION OF RESPONDENT STANDARD OIL COMPANY (INDIANA) THAT HE WITHDRAW FROM THIS PROCEEDING

Respondent Standard Oil Company (Indiana), by motion filed May 2, 1963, has requested that I withdraw from participation in this proceeding or alternatively, that the Commission determine that I be disqualified from such participation.

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[3] *Federal Trade Commission* v. *Koch*, 3 S.&D. 720 (1942), not reported in Federal Reporter. This principle was likewise recognized by the Court of Appeals in the injunction proceeding herein in its statement that:

"Our affirmance of the order of the District Court should not, however, be thought to render fruitless the Commission's activities in its pending administrative proceeding against Sterling Drug, Inc. Should further evidence there be adduced in support of its allegations of violation of the Federal Trade Commission Act, a cease and desist order may well be valid and its issuance properly sustained upon judicial review." (Slip Opinion, p. 1978.) [7 S.&D. 683, 695.]

[4] *Rhodes Pharmacal Co., Inc.* v. *Federal Trade Commission*, 191 F. 2d 744 (7th Cir. 1951) [5 S.&D. 301].

Respondent refers to the fact that complaint herein issued August 7, 1959, and that the hearing examiner filed his initial decision dismissing the complaint in October, 1962. Respondent then states that a speech I made on July 25, 1961, before the National Congress of Petroleum Retailers, Inc., demonstrates that I am strongly prejudiced against this respondent, that I have prejudged the case against respondent and that I cannot impartially consider the appeal in this proceeding. Respondent sets forth certain of my remarks in support of its motion.

These same remarks have prompted requests by two other companies that I withdraw from participation in proceedings in which they are respondents.[1] My decision was not to withdraw from participation in those proceedings. The memoranda which I filed in response to those motions express the meaning I then and now attribute to my remarks.

As I previously stated, my remark that the Commission had challenged the legality of the practices of certain oil companies, including this respondent, indicated only that the Commission had determined that there was reason to believe that the practices were in violation of law. The Commission itself made this determination, as required by statute, in issuing this complaint. Restating this determination does not preclude a consideration of "conditions of the trade practices under attack" which respondent believes "kept these practices within the range of legally permissible business activities." [2]

The complaint in this proceeding, as in both the *Goodrich* and *The Pure Oil Company* matters, was issued before I became a member of the Commission. I can state without reservation that I have not prejudged the issues in this case nor am I prejudiced against this respondent. My vote in this matter will be based on all of the facts contained in the record when the case is presented to the Commission for decision. Accordingly, it is my decision not to withdraw from participation in this proceeding.

I shall not participate in any deliberation or decision by the Commission on respondent's alternate request. (Dated May 22, 1963.)

ORDER DENYING MOTION TO DISQUALIFY

Respondent, by motion filed May 2, 1963, having requested that Chairman Paul Rand Dixon withdraw from participation in this proceeding, or, in the alternative, that the Commission determine that Chairman Dixon be disqualified from such participation; and

The Commission having determined that respondent has failed to show justification for departure from the Commission's practice of

[1] *In the Matter of B. F. Goodrich Company and The Texas Company,* Docket No. 6485 [pp. 1513, 1514 herein]. *In the Matter of The Pure Oil Company,* Docket No. 6640 [p. 1548 herein].

[2] *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683 (1948) [4 S.&D. 676].

treating disqualification as a matter primarily for determination by the individual concerned; and

Chairman Dixon having filed with the Commission a memorandum denying the existence of any grounds for his disqualification from participation in this proceeding:

It is ordered, That the motion directed to the Commission requesting that it disqualify Chairman Dixon from participatiing in this proceeding, be, and it hereby is, denied.

Commissioner Dixon not participating. (Dated May 31, 1963.)

AUSTIN PACKING COMPANY

Docket 7730. Order and Opinion, May 23, 1963

Order granting complaint counsel's motion to issue an amended and supplemental complaint by adding as a respondent the concern's legal successor.

ORDER GRANTING MOTION OF COUNSEL SUPPORTING THE COMPLAINT AND DIRECTING ISSUANCE OF AMENDED AND SUPPLEMENTAL COMPLAINT

The hearing examiner having, on January 2, 1962, certified to the Commission for its consideration and appropriate action a motion filed by counsel supporting the complaint requesting issuance of an order amending the complaint in this proceeding in respects therein designated, together with a brief in opposition thereto and a motion to dismiss the complaint filed by counsel for respondent and answer filed by counsel in support of the complaint in opposition to the motion to dismiss; and

The Commission having duly considered the motions filed by the respective parties and answer and brief in support thereof and in opposition thereto and the Commission, for reasons stated in the accompanying opinion, having determined that the information contained in the record and that developed in investigation constitutes adequate grounds for preliminary administrative determination or "reason to believe" that in the distribution and sale of food products respondent, Austin Biscuit Corporation, and Fairmont Foods Company, a corporation, have violated, and Fairmont Foods Company is now violating, the provisions of subsection (a) of Section 2 of the Clayton Act, as amended; and

The Commission having determined that exercise of its administrative responsibility to issue an amended and supplemental complaint is required in the public interest and it appearing that the right of the respondent and Fairmont Foods Company to full and fair hearing on the charges against them is protected under procedures provided for the conduct of the Commission's adjudicative proceedings;

It is ordered, That the amended and supplemental complaint of the Commission issue herewith and be served on the respondent, Austin Biscuit Corporation, and on Fairmont Foods Company, and that the hearing examiner fix a time for the resumption of hearings not less than thirty (30) days from the date of service of this order and amended and supplemental complaint.

It is further ordered, That the evidence heretofore introduced in the proceeding under the original complaint shall have the same force and effect as though received at hearings under the complaint, as amended and supplemented, this action being without prejudice to the hearing examiner's authority and duty to rule upon the merits of any motion which may be filed requesting opportunity to further cross-examine witnesses heretofore appearing in the proceeding or to strike evidence or to take such further action as may be appropriate to protect any of the respondent's rights.

MEMORANDUM ON QUESTION CERTIFIED BY HEARING EXAMINER

BY THE COMMISSION:

This matter is before the Commission for disposition of a question certified by the hearing examiner which has been raised by a motion filed by complaint counsel to amend the complaint. Respondent has interposed objection to the granting of the motion. Although not certified to the Commission, the hearing examiner notes in the order of certification that respondent Austin Packing Company had previously filed a motion to dismiss the complaint; that complaint counsel had interposed objection thereto; that he has not ruled on respondent's motion to dismiss; and that the Commission may wish to consider respondent's motion to dismiss in connection with its consideration of the certified motion to amend the complaint.

The salient facts in the chronology of this matter are: On January 6, 1960, the Commission issued its complaint charging the Austin Packing Company, a corporation, with violation of Section 2(a) of the Clayton Act, as amended, in selling food products through the use of a rebate system based on cumulative monthly volume of purchases. Therefore, in June, 1960, all of the capital stock of respondent Austin Packing Company was acquired by Fairmont Foods Company, a corporation engaged in the manufacture and distribution of food products in dairy and related lines on a nationwide basis.

At the hearing on the complaint held on April 18, 1961, it transpired that on December 31, 1960, Fairmont Foods Company had caused Austin Biscuit Corporation (name changed from Austin Packing Company in July, 1959) to be dissolved and that thereafter the business was conducted by Fairmont Foods Company under the designation "Austin Biscuit Company, Division of Fairmont Foods

Company". The former president of Austin was hired as manager of this Division. The rebate system based on cumulative monthly volume of purchases which formed the basis for the complaint issued by the Commission on January 6, 1960, was continued in effect until August, 1961. At that time a new pricing policy was formulated and placed in effect. This new pricing policy supplanted the challenged monthly rebate system.

Following the certification of the matter by the hearing examiner on January 2, 1962, the Commission directed investigation of the sales practices of the Austin Biscuit Company, Division of Fairmont Foods Company. This investigation disclosed that the revised pricing system embodies a discount schedule whereby the customer is granted a discount ranging from 1% to 3½% of each invoice, computed on the basis of the dollar amount of qualifying products on the invoice. The essential difference between the present system and the one it replaced is that the discounts are now based upon the amount of each individual order, whereas under the previous system rebates were granted in accordance with the total purchases during the preceding month. Although the plans differ in respect to the basis for computing the discounts granted, the Commission has reason to believe that both provide for varying discounts to different purchasers and may result in violations of Section 2(a) of the amended Clayton Act.

The amended and supplemental complaint challenges both plans. Respondent Fairmont Foods Company was a party in interest during a period of over a year and a half in which the pricing system challenged in the complaint was employed. For some seven months prior to discontinuance of that plan and the substitution of a revised pricing method, Fairmont conducted the business as an integral part of its corporate operations. At the times that the hearings were held in this matter (April, 1961) the business was being so conducted. Thus, Fairmont is a party properly chargeable in any action which challenges the legality of the two pricing systems.

It is our preliminary administrative determination that the information developed in this matter is sufficient to give us "reason to believe" that Section 2 of the amended Clayton Act has been and is being violated. We are likewise convinced that the interests of both parties and the public interest will best be served by the issuance of an amended and supplemental complaint in this proceeding rather than by the initiation of a new proceeding through the issuance of a new and separate complaint.

Four days of hearings were held in this matter in April, 1961, at which testimony was taken as to the extent of competition and the substantiality of competition in the sale of the type of products

involved in this proceeding. As has been indicated herein, at the time these hearings were held Fairmont Foods Company was operating the business, had done so for several months and had owned the stock of the corporation conducting the business for some seven months prior thereto. Under those circumstances we believe that it is proper that the evidence developed in the hearings that have been held in this mater should be available for consideration against Fairmont Foods Company. In order to insure that its rights will be fully protected and safeguarded, Fairmont shall have the right to recall for further cross-examination those witnesses who have already testified and shall have the right to file motions to strike evidence which it contends to have been objectionable when offered.

Accordingly, the motion of complaint counsel for the issuance of an amended and supplemental complaint is granted and the record made in this case is preserved as to respondent Fairmont Foods Company, subject to its rights of further cross-examination and motions to strike. As the action taken herein is inconsistent with the motion of respondent to dismiss the complaint, its motion is by this action denied. An order directing the issuance of an amended and supplemental complaint shall issue.

J. C. MARTIN CO. ET AL.

Docket 8520. Order, May 31, 1963

Order denying respondent's motion to file appeal from hearing examiner's order suspending case until Court of Appeals, District of Columbia, rules on respondent's petition.

Order Denying Respondent's Motion to File Interlocutory Appeal

Respondent John Kaslow has filed on May 16, 1963, a request for permission to file an interlocutory appeal from the hearing examiner's order of May 10, 1963, providing (1) that in the event the Court of Appeals for the District of Columbia Circuit fails to grant respondent's Petition for Stay Pending Appeal, answer to the complaint herein and other motions are to be filed within five days from the date said Court issues its ruling, and (2) that the hearing set for June 17, 1963, be cancelled subject to being reset upon five days notice. Respondent also objects to the hearing examiner's deferring his ruling on respondent's motion to dismiss the complaint until the conclusion of complaint counsel's case-in-chief.

Upon consideration of respondent's motion, the Commission has determined that the matters set forth therein do not satisfy the re-

quirements of Section 4.18 of the Commission's Rules of Practice. Accordingly,

It is ordered, That respondent's motion be, and it hereby is, denied.

ARK-LA-TEX WAREHOUSE DISTRIBUTORS, INC., ET AL.

Docket 7592. Order, June 5, 1963

Order vacating initial decision and remanding case to hearing examiner for new initial decision.

This matter is before the Commission upon the appeal of respondents from the hearing examiner's initial decision filed October 13, 1961. The Commission, while satisfied of its jurisdiction in respect of the acts and practices alleged, has determined that the initial decision does not contain necessary findings of fact and conclusions of law set forth with the specificity required by Section 4.19(b) of the Commission's Rules of Practice. The Commission has also determined that this proceeding should be remanded to the examiner and be further considered by him in the light of the opinion of the Court of Appeals in *Alhambra Motor Parts, et al.* v. *FTC*, 309 F. 2d 213 (9th Cir. 1962)) [7 S.&D. 550], which was issued subsequent to the initial decision herein. Accordingly,

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

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for the entry of a new initial decision containing findings of fact and conclusions of law upon all of the issues of fact and law raised by the record, and for the reception of such further evidence as may be necessary. Upon issues of fact as to which respondents have the burden of proof, or of going forward with the evidence, such burden shall not be deemed by this order of remand to have been shifted to complaint counsel. Such new initial decision shall include specific findings, and reference to the evidence relied upon, with respect to all such issues, including but not limited to the following:

1. Whether respondents' suppliers discriminated between respondents and other customers in the sale of goods of like grade and quality, and if so, whether such discriminatory sales were sufficiently contemporaneous to be compared for purposes of determining whether the requisite discriminations and proscribed effects on competition existed.

2. Whether the respondents and non-favored jobber-customers of their suppliers competed in the sale of the products which were the subject of the alleged price discriminations.

3. Whether the alleged price discriminations had the requisite injurious effect upon competition in the distribution of automotive parts and, in particular, whether the non-favored jobbers were able to purchase the same products at the prices charged respondents, either from Ark-La-Tex or as a member of it or a similar group.

4. Whether respondent Ark-La-Tex was a legitimate wholesale distributor, entitled as such to a wholesale distributor discount, or whether it was merely a sham whose jobber-members should be viewed as the actual purchasers of the products involved, for purposes of Section 2(f) of the Robinson-Patman Act.

5. Whether respondents knew or should have known that the quantity and warehouse distributor discounts allegedly induced and received by them could not be cost justified.

Commissioners MacIntyre and Higginbotham not participating, Commissioner MacIntyre for the reason that he did not hear oral argument and Commissioner Higginbotham by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

THE TEXAS COMPANY

Docket 6898. Order, June 17, 1963

Order, with opinions, denying motion of respondent that Chairman and Commissioner MacIntyre withdraw from this proceeding.

Order Denying Motion to Disqualify

Respondent Texaco, Inc., by motion filed May 22, 1963, having requested that Chairman Dixon and Commissioner MacIntyre withdraw from participation in this proceeding, or, in the alternative, that the Commission determine that they be disqualified from such participation; and

The Commission having determined that respondent has failed to show justification for departure from the Commission's practice of treating disqualification as a matter primarily for determination by the individuals concerned; and

Chairman Dixon and Commissioner MacIntyre each having filed with the Commission a memorandum denying the existence of any grounds for his disqualification from participation in this proceeding:

It is ordered, That the motion directed to the Commission requesting that it disqualify Chairman Dixon and Commissioner MacIntyre from participating in this proceeding be, and it hereby is, denied.

Chairman Dixon and Commissioner MacIntyre not participating.

MEMORANDUM OF CHAIRMAN DIXON IN RESPONSE TO THE MOTION OF RESPONDENT TEXACO, INC., THAT HE WITHDRAW FROM THIS PROCEEDING

Texaco, Inc., respondent herein, has requested that I declare myself as ineligible to participate in this proceeding, including the hearing and determination of the pending review.

Respondent advances two grounds in support of its request. First, it contends that my address of July 21, 1961, before the National Congress of Petroleum Retailers, Inc., reflects a prejudgment of the issues herein as well as a personal bias. Respondent advanced this same argument in support of its request that I withdraw from participation in the Goodrich case [1] in which Texaco, Inc., was also named as a respondent. My views concerning that speech are recorded in my memorandum in response to that former request. Those views, which are equally applicable to the present request, are as follows:

As I read it and recall it, the only thought conveyed by the speech was that the Commission had challenged the legality of "overriding commissions" and certain other practices engaged in by the various oil and rubber companies, including respondent Texaco, Inc., and the B. F. Goodrich Company. By using the word "challenged," I indicated only that the Commission had determined there was reason to believe that the practices were in violation of law. This determination is an absolute, statutory prerequisite to any complaint, is in fact declared in the first paragraph of the instant complaint, and I fail to see how my repetition of it in a speech indicates bias or prejudgment of the ultimate issue.

As a second ground in support of its request, respondent contends that my participation in a "legislative investigation leading to the institution of proceedings by the Commission" represents adequate grounds for disqualification. Specifically, respondent refers to my service as Co-counsel and Staff Director to the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee in March 1957 when the Subcommittee took testimony regarding the price war in Norfolk, Virginia.

My duties with the Subcommittee staff have prompted requests that I withdraw from participation in several other proceedings.[2]

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[1] *In the Matter of The B. F. Goodrich Company and The Texas Company,* Docket No. 6485 [pp. 1513, 1514 herein].

[2] *In the Matter of Chas. Pfizer & Co., Inc.,* Docket No. 7780 [61 F.T.C. 1493, 1494]; *In the Matter of Campbell Taggart Associated Bakeries, Inc.,* Docket No. 7938 [pp. 1494, 1498 herein]: *In the Matter of American Cyanamid Company, et al.,* Docket No. 7211 [60 F.T.C. 1881].

I am on record in my memoranda in those cases as to my position with respect to those duties. For the record herein, I repeat the statement I made in the *Pfizer* case which expresses that position:

> It seems to me that this motion is founded upon a misconception of the role played by a Congressional investigating committee. Proceedings before such a committee are not in any sense adversary in nature. As everyone knows, the hearings are conducted for the sole purpose of supplying Congress with information so that it may determine the need for and the form of legislation. To that end it is the clear duty of the committee staff, including its counsel, to present to the committee all information available and pertinent to any question under investigation including the opposing views of both sides in any controversial matter. The committee's staff counsel is definitely not an advocate of any side of any question but acts properly only as the conduit whereby relevant material is presented to the committee.

An examination of the public record will disclose that I took no part in the questioning of any of the witnesses who appeared at the hearing referred to in respondent's motion. My advice to the Subcommittee, to which respondent also refers, was in response to a request for my views as to the adequacy of the Robinson-Patman Act amendment to the Clayton Act with respect to certain alleged practices in the oil and gasoline industry. This, in substance, was the purpose of the hearing and my remarks were made with that purpose in mind. I had not at that time, and I have not now, irrevocably closed my mind on the subject of this respondent's alleged practices as a result of *ex parte* testimony of dealers.[3]

As I have previously stated in response to requests that I not participate in a proceeding because of my service with the Subcommittee, "I do not believe that Congress, in expressly affirming the need for commissioners who have been informed by experience, [citing cases], intended that experience acquired from working as a legislative counsel should be a handicap."[4]

In direct response to charges in this motion, I state that I have not prejudged the issues in this matter nor do I harbor any personal bias. I am capable and will render an impartial decision based on all of the facts of record when the case is presented for decision.

It is my decision not to withdraw from participation in this proceeding.

Dated: June 11, 1963.

Memorandum of Commissioner MacIntyre in Regard to Respondent's Motion that he Withdraw from this Proceeding

Respondent, by Motion filed herein on May 22, 1963, has requested that I withdraw from this proceeding and that I neither participate in nor advise the Commission regarding its decision herein.

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[3] *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948) [4 S.&D. 676].

[4] *In the Matter of Campbell Taggart Associated Bakeries, Inc.*, Docket No. 7938, Memorandum dated May 2, 1963 [pp. 1494, 1498 herein].

The reasons upon which respondent's Motion is based are stated in the following language in the Motion:

*** * * respondent deems it its duty to remind the Commissioner that, during the period that he was in charge of the Division of Investigation and Litigation within the Bureau of Antimonopoly of the Commission, numerous investigations were conducted of complaints regarding supplier aid to service station dealers during gasoline price wars of a kind similar to that involved in this proceeding. Thereafter, while Commissioner MacIntyre was Staff Director and General Counsel of the House Select Committee on Small Business and Staff Director to various of its subcommittees, hearings were held and reports were issued by these committees censuring supplier aid as illegal price discrimination and recommending that the hearings be forwarded to the antitrust enforcement agencies for appropriate action.**

In response to respondent's Motion, respondent should be informed that I resigned from the service of the Federal Trade Commission effective February 14, 1955 and had not served as Chief of its Division of Investigation and Litigation of the Bureau of Antimonopoly since June 1954. I am informed that the records of the Federal Trade Commission show that this matter was not even docketed for investigation until March 8, 1957. In other words, it was on that date that the Commission directed the commencement of an investigation for the accumulation of factual information about the matter.

It was not until September 26, 1961 that I returned to the Federal Trade Commission by taking the oath of office as a member of the body. This was under appointment by President Kennedy.

As a consequence of these and other relevant circumstances, I have less knowledge than other members of the Commission about this matter. Certainly those members of the Commission who voted for the issuance of the complaint in this matter and therein stated that they "had reason to believe" that the respondent was engaging in the acts and practices therein alleged, had some knowledge upon which they based that statement. I have not been sufficiently informed about this matter to say at this time that I would agree or disagree with the judgment thus expressed by my colleagues at that time. I am not aware of any participation by me in any determination that the respondent in this case has violated the law as alleged by the complaint herein.

Moreover, I recall no matter in which I had any responsibility as the General Counsel and Staff Director of the House Select Committee on Small Business during the period from February 15, 1955 to and including September 25, 1961, which leads me to conclude that I should not participate in the Commission's decision in this matter.

In addition to my conclusion that my participation as a member of the Commission in its decision in this matter would be appropriate, I have no reason to believe that any such participation would be tainted with any *appearance* of impropriety.

In view of the foregoing and other related facts and circumstances, I am aware of no reason why I should withdraw from the proceeeding or refrain from participating with the Commission in any decision in this proceeding. One thing is clear: I am determined that whatever I do in this proceeding shall be without bias or prejudice, but on the contrary, be expressive of sound and fair judgment.

Dated: March 27, 1963.

KORBER HATS, INC., ET AL.

Docket 8190. Order, June 21, 1963

ORDER PLACING APPLICATION FOR INITIATION OF TRADE PRACTICE RULE PROCEEDINGS ON SUSPENSE AND DENYING REQUEST TO PLACE CASE ON SUSPENSE

This matter having come on to be heard upon application of respondents to initiate proceedings for establishment of Trade Practice Rules on use of the word "Milan" and for suspension of further proceedings in this matter pending issuance of such Rules and reply of counsel supporting the complaint; and

It appearing that the First Circuit Court of Appeals having affirmed the Commission's finding that respondents' unqualified use of the word "Milan" and similar terms, including "Genuine Milan" and "Genuine Imported Milan", in labelling braid hats made of hemp instead of wheat straw was deceptive and violative of Section 5 of the Federal Trade Commission Act but having rejected the geographical restriction placed on the word "Milan", questioned the scope of paragraph (3) of the Commission's order and having returned the case to the Commission for further findings and redrafting of the order, including a possible modification which would permit braid hats made of the hemp variety to be labelled "Milan" with an appropriate qualification; and

It further appearing that the Commission having remanded this matter to the hearing examiner to make, in the first instance, the necessary findings and preparation of a new order in conformity with the Court's direction; and

It further appearing to the Commission that utilization of the informal, voluntary trade practice procedure would not be in compliance with the Court's direction that further proceedings are to be in accordance with its opinion, that the substantive issues remaining to be adjudicated should be determined before the Commission should undertake to consider the labelling practices of the entire

men's hat industry, and, further, that the conclusion of this matter need not be burdensome or time-consuming as neither side is required to rebrief the matter nor adduce additional testimony, although the hearing examiner is authorized by the Commission's remand order to allow testimony to be offered for a very limited purpose if he deems it necessary:

It is ordered, That respondents' application for the initiation of proceedings for the establishment of Trade Practice Rules be placed on suspense pending the conclusion of the instant matter.

It is further ordered, That respondents' request for placing the instant matter on suspense is denied.

RUSSELL-WARD CO., INC.

Docket 8207. Order, June 24, 1963

DECISION AND ORDER DENYING PETITION TO REOPEN

This matter is before the Commission upon the petition of respondent Russell-Ward Co., Inc., filed May 7, 1963, requesting the reopening of this proceeding and complaint counsel's answer in opposition to such petition filed June 6, 1963.

The complaint charged respondent with violation of Section 2(c) of the Robinson-Patman Act in connection with the purchase of citrus fruit. Respondent subsequently entered into an agreement containing a consent order to cease and desist, in connection with the purchase of citrus fruit or other food products, from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of citrus fruit or other food products for respondent's own account, or where respondent is the agent, representative, or other intermediary acting for or in behalf, or is subject to the direct or indirect control, of any buyer.

This agreement was accepted by the examiner, and the Commission's final order was issued on May 17, 1961 [58 F.T.C. 792].

Respondent's petition to reopen this proceeding is based upon the contention that its operations in the purchase of citrus fruit were the same as the operations of *Hruby Distributing Company*, (D. 8068, Dec. 26, 1962) [61 F.T.C. 1437] which were found not to violate Section 2(c). Complaint counsel, in opposing respondent's petition, dispute this contention. Since the order to cease and desist was based upon consent agreement, and no evidence was taken or findings of fact made, the Commission does not have before it a record on which the merits of respondent's present contention may be determined. In any event, it is immaterial for present purposes whether,

had the matter been fully litigated and a record been made, the evidence would have supported findings of violation of Section 2(c). Any issue in that regard was obviated by respondent's consent to the entry of the order which, as is customary in such cases, is framed in the language of Section 2(c) and broadly prohibits respondent from violating that provision in connection with its purchase of citrus fruit or other food products.

If, as respondent contends, its present and future practices are not in violation of Section 2(c) as that section is construed by the Commission and the courts, the order poses no obstacle to its lawful activities. A respondent seeking in good faith to comply with an order to cease and desist need not proceed at its peril. Under the Commission's practice, the Commission reviews reports of compliance and will advise a respondent whether the actions set forth therein constitute compliance with the order. Further, a respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order. See *Vanity Fair Paper Mills, Inc.* v. *FTC*, 311 F. 2d 480, 488 (2d Cir. 1962) [7 S.&D. 583, 592]; *Giant Food, Inc.* v. *FTC*, decided by the Court of Appeals for the District of Columbia Circuit, June 13, 1963, slip opinion pp. 19–20 [7 S.&D. 710]; *Foremost Dairies, Inc.*, Docket 7475, May 23, 1963 [p. 1344 herein]. Accordingly,

It is ordered, That respondent's petition to reopen be, and it hereby is, denied.

THE ATLANTIC REFINING COMPANY

Docket 7471. Order, June 28, 1963

Order denying respondent's motion for a rehearing by the Commission *en banc*.

This matter has come on to be heard upon respondent's motion for rehearing before the full Commission, sitting *en banc*, of the Commission's decision consisting of an opinion and [proposed] order issued on May 16, 1963; and

The decision of the Commission was and is that of a majority of the Commissioners who participated in that decision. Three of the five members of the Commission participated and therefore constituted a quorum for action by the Commission in accordance with its rules and the accepted practice through the years. The argument of the respondent is that the validity of an Order of the Commission should be sustained only where a minimum of three out of the entire membership of the Commission approved such order. Here a majority of the Commissioners who participated in this matter

approved the Order but not a majority of the entire membership of the Commission if we are to take into account those members of the Commission who did not participate. It is on this point that respondent has rested its argument and motion for a rehearing regarding the legal sufficiency of the Order. Respondent has made the further argument that, because of the questions presented, the full Commission as a matter of policy and discretion should participate in hearing and deciding this case.

The full Commission considered the pending motion and has determined that respondent has shown no sufficient basis to justify a rehearing as requested.

It is ordered, That respondent's motion for rehearing be, and it hereby is, denied.

Commissioner Elman not concurring.

CHESEBROUGH-POND'S, INC.

Docket 8491. Order, June 28, 1963

Interlocutory order denying respondent's motion that Commission hear its argument that hearing examiner should adopt an order the respondent had proposed.

Order Denying Request for Permission to File an Interlocutory Appeal

This matter is before the Commission upon respondent's petition, filed May 31, 1963, requesting permission to file an interlocutory appeal from the hearing examiner's oral ruling denying respondent's motion to certify to the Commission for its determination the question whether respondent's proposed order to cease and desist may be entered in final disposition of this proceeding. In a supplemental motion, respondent requested a hearing before the Commission on its petition.

The Commission is of the opinion that the respondent has made no showing of circumstances such as to require immediate decision, as provided by § 4.18 of its Rules of Practice. Moreover, in view of the statement by counsel supporting the complaint, on the record, that additional evidence as to the challenged practices would be offered, an immediate decision as to the scope of an order to cease and desist obviously is not appropriate at this time. Accordingly, respondent's request should be denied on this ground. However, in view of the history of this proceeding and in light of the significance attached by respondent to certain evidence which has been stipulated into the record, the Commission has considered the merits of respondent's arguments.

It is the Commission's view that there is no error in the hearing examiner's ruling that the record as now constituted does not provide an adequate basis for factual findings as required by the Commission's order of November 26, 1962. In this same connection, the Commission notes that neither respondent's motion to the hearing examiner for entry of an order to cease and desist nor its present request to the Commission contemplates such findings. Moreover, the Commission is of the opinion that the stipulated evidentiary material is so lacking in detail as to render it extremely difficult to determine the appropriate scope of an order to cease and desist.

As to procedure, the Commission's Rules of Practice make no provision for the final disposition of a formal proceeding in the manner urged by respondent. And, complaint having issued, the consent order procedure provided by Part 3 of the Commission's Rules of Practice is not available.

The Commission is of the opinion that it is sufficiently informed as to the matters in issue and that oral argument thereon is not warranted.

In view of the foregoing, *It is ordered*, That respondent's requests for permission to file an interlocutory appeal and for oral argument be, and they hereby are, denied.

Commissioner Elman concurring in the result.

WHITE LABORATORIES, INC.

Docket 8500. Order, June 28, 1963

Respondent's request for oral argument on proposed form of order and stipulation denied.

The Commission, on June 13, 1962, issued its formal complaint in this proceeding. On April 17, 1963, while this proceeding was before the hearing examiner, respondent filed a motion with the Commission requesting a settlement conference or alternative relief. The Commission, in its order issued April 19, 1963, pointed out that the hearing examiner has full authority to take the actions requested and dismissed the motion as premature. Thereafter, the hearing examiner in his order of June 10, 1963, after noting that negotiations had failed to produce a mutually agreeable settlement between the parties, denied the motion. Respondent has now renewed its motion of April 17, 1963, to the Commission and has attached thereto a proposed form of order together with a stipulation which it contends shows the scope of the practices covered by the complaint. Respondent requests oral argument on its motion and counsel sup-

porting the complaint have filed an answer in opposition to said motion.

The Commission's Rules of Practice make no provision for the filing and consideration of respondent's motion. The proper procedure for presenting this matter to the Commission is through a request for permission to file an interlocutory appeal from the hearing examiner's ruling of June 10, 1963.

The procedural irregularity notwithstanding, the Commission has decided to consider respondent's request on the merits in order to avoid further delay in this proceeding.

The only hearing of record in this proceeding is a pre-trial conference held on April 11, 1963. The subject matter of respondent's proposed stipulation was discussed at that time and no agreement was reached between the parties. Thus, there is no basis in this record for a determination by the Commission as to the validity of respondent's argument that its proposed stipulation shows the scope of its practices as challenged in the complaint. Nevertheless, the Commission has reviewed the proposed stipulation and, even assuming a record basis therefor, is of the opinion that the evidentiary material set forth therein is so lacking in detail as to render it extremely difficult to determine the appropriate scope of an order to cease and desist. Therefore, the Commission considers that the proposed stipulation does not provide a sufficient basis for disposition of this proceeding. Moreover, the Commission notes that neither respondent's proposed stipulation nor its present motion contemplates factual findings which are required by the Commission's order of November 26, 1962. And complaint having issued, the consent order procedure provided by Part 3 of the Commission's Rules of Practice, suggested in respondent's motion, is not available.

The Commission is also of the view that the petition herein is entirely adequate to fully advise it as to the matters in issue and that no useful purpose would be served by oral argument thereon.

In view of the foregoing, *It is ordered*, That respondent's motion of June 11, 1963, and its request for oral argument be, and they hereby are, denied.

Commissioner Elman concurring in the result.

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