INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

KNOLL ASSOCIATES, INC.*

Docket 8549. Supplementary Ruling, Feb. 25, 1965

Upon petition by respondent the Commission reopened this case for further proceedings on the question of whether respondent's constitutional immunity against unlawful search and seizure had been violated. The hearing examiner found that none of the respondent's constitutional rights had been infringed upon.

SUPPLEMENTARY RULING UPON RESPONDENT'S MOTION TO SUPPRESS BASED UPON RECORD AS REOPENED

CHRONOLOGY OF RELEVANT EVENTS
January 1, 1961—March 5, 1964

January 1, 1961 —Herbert Prosser goes to work for Joseph Dworski in Birmingham, Michigan showroom.

September 1, 1963 —Gary Beals of Knoll moves into Dworski showroom. Shortly thereafter Prosser seeks unsuccessfully to have Dworski and Knoll indicate what Prosser's business future will be. Knoll and Dworski ignore and evade Prosser's inquiries.

October 9, 1963 —Prosser makes personal call in the late evening upon Turiel and Brod at their hotel room in Detroit.

November 13, 1963 —Prosser telephones Turiel in his hotel room in Detroit in the morning to inquire "how case is going."

December 9, 1963 —At luncheon meeting at Kingsley Inn, Dworski and Knoll representatives still refuse to tell Prosser whether they will hire him after contract with Dworski is terminated in 3 weeks.

—Prosser telephones Turiel in Washington, D.C., and offers to testify for Federal Trade Commission and to turn over documents damaging to Knoll. Turiel refuses the offer. Dworski, Beals and William Nolan of Knoll are informed of Prosser's call to Turiel and

* This case is reported p. 311 herein.

	his, Prosser's, offer to be a witness and turn over documents.
	—In the evening, Dworski and Beals talk with Prosser over the telephone about his earlier telephone conversation with Turiel.
December 10, 1963 (About 7 a.m.)	—Prosser goes to Woodward Avenue showroom early in the morning and obtains documents.
(About 8:30 a.m.)	—Knoll's employee, Beals, goes into Woodward Avenue showroom "a little earlier that day * * * out of suspicion * * *" (Tr. 4466), and observes that someone has been in showroom before him, that morning.
January 1, 1964	—Beals changes locks on showroom door. Knoll terminates arrangement with Dworski. Prosser terminates arrangement with Dworski.
January 2, 1964	—Prosser calls Turiel at parents' home in New York City late in evening and persuades Turiel to permit him, Prosser, to send documents to Turiel.
January 5, 1964	—Prosser sends documents to Turiel.
January 6/7, 1964	—Turiel receives Prosser documents in New York office of Federal Trade Commission.
January 13, 1964	—Telephone call from Prosser to Turiel to inquire whether Turiel has received documents.
February 19, 1964	—Telephone call from Turiel to Prosser.
February 24, 1964	—Turiel and Brod file motion to admit authenticity of documents.
February 25, 1964	—Imberman receives copy of motion to admit with documents attached. Documents sent to Detroit for authentication.
February 28, 1964	—Imberman goes to Detroit and converses with "various persons in that city" (page 2 of Imberman affidavit of March 4, 1964).
	—Dworski, *not* Imberman, who is also in Detroit, calls Prosser by telephone concerning the documents.
March 5, 1964	—Knoll's lawyers file motion to suppress documents based upon alleged unlawful search and seizure.

The hearing examiner is faced, for the second time in this proceeding, with determining whether Knoll's constitutional immunity against unlawful search and seizure [1] has been violated. On March 24, 1964, after evaluating all of the evidence which counsel had offered on the search and seizure issue up to that time, the hearing examiner determined that Knoll's constitutional immunity had not been violated, and so found in his ruling dated March 24, 1964.[2]

On November 19, 1964 [66 F.T.C. 1577], the Federal Trade Com-

[1] Amendment IV, U.S. Constitution.

[2] The hearing examiner incorporates herein by reference and makes a part hereof his March 24, 1964, ruling.

mission ordered this record, which had been closed since August 24, 1964, to be reopened and additional hearings to be conducted; specifically directed Messrs. Bernard Turiel and Ernest Brod to testify under oath; ordered all pertinent material in the Commission's files to be exhibited to Knoll's lawyers; and ordered the hearing examiner to receive "such other evidence as the examiner deems pertinent to resolve the issues raised by the motions of respondent denied by the order of the hearing examiner of March 24, 1964."

Hearings were conducted in Washington, D.C., on December 23, 1964, and in Detroit, Michigan, on January 5, 6, 7, and 8, 1965. Complaint counsel have exhibited to Knoll's lawyers all the documents in the Commission's files relating to this issue, and have delivered to Knoll's lawyers photostatic copies of all such documents which Knoll's lawyers requested.[3]

Messrs. Brod and Turiel have testified under oath, and have been grilled by Knoll's lawyers. Mr. Herbert Prosser testified, as well as Paul R. Copeland, national sales manager of Knoll.

Everything has been done that could be done to air fully Knoll's charges, and to develop a complete record. Such omissions, if any, as may be in the record may be ascribed to Knoll's lawyers' failure to place in the record certain evidence, or their refraining from asking certain pointed questions.

No restrictions were placed upon the length or scope of the hearings, and counsel were permitted to offer all evidence which they deemed pertinent to the issue of unlawful search and seizure. The reopened record was closed by order of the examiner dated January 11, 1965. Briefs and reply briefs have been filed.

The additional evidence (Tr. 4839–5647), which was received after the record was reopened, does not justify any modification or change in the basic findings and conclusions in the hearing examiner's ruling of March 24, 1964.

The hearing examiner heard and observed the witnesses in the hearing room and on the witness stand. He observed their demeanor and their manner of answering questions. He was able to and did form an opinion as to their reliability and credibility. He was able to and did form a judgment as to the weight and probative value of the witnesses' testimony in preparing this

[3] It is to be noted in passing that, although Knoll's lawyers insisted that Mr. Brod be available as a witness at the Detroit hearings, and although Mr. Brod was actually present in Detroit, Michigan, from January 4 through January 7, 1965, Knoll's lawyers refused to call Mr. Brod. Mr. Brod had testified on December 23, 1964, and the examiner had sought, unsuccessfully, to have the January hearings transferred from Detroit, Michigan, to Washington, D.C., in order to save substantial time and money. However, Knoll's lawyers rejected the suggestion and, even at this late date, the hearing examiner is unable to explain why the suggestion was rejected.

supplementary ruling. There are no material contradictions in the sworn testimony of Messrs. Turiel, Brod, and Herbert Prosser. There are, of course, human variations in skill of recollection and precision of memory.

The hearing examiner, after a careful study of the record made after reopening, finds no reason for changing the conclusion in his March 24, 1964, ruling.

The record shows, and the examiner finds:

Herbert Prosser (Tr. 5576, *et seq.*), who last testified on January 6, 1965, in Detroit, Michigan, was thirty-four years old at the time of his testimony. A native of Jersey City, New Jersey, he was educated in Jersey City, New York City, Allenville, New York, and had two years of college education which terminated in 1951. Mr. Prosser had never been a member of the armed services; had never married; was unemployed; and, throughout these proceedings, has never been represented by a lawyer.

At the time of his last testimony, Mr. Prosser had been out of college for approximately fourteen years. Those fourteen years had been spent representing Thayer, Incorporated, manufacturers of juvenile furniture, out of Gardner, Massachusetts. Mr. Prosser also represented Keystone Midwest Company, a drug manufacturer, and worked out of Chicago, Illinois. He had represented Union National and Burns Case Goods Company out of Jamestown, New York. He had worked for a brief period for a manufacturer of summer furniture located in Toledo, Ohio, and he had, of course, worked for Joseph Dworski, the Knoll representative in the Detroit, Michigan, area from January 1, 1961, through December 31, 1963. In 1956, Mr. Prosser went to the West Coast and worked for most of that year for the San Francisco Chronicle. After he terminated his services with the Chronicle, he went to work for the Toledo, Ohio, furniture manufacturer mentioned above.

At the time of his testimony on January 7, 1965, Mr. Prosser's family consisted of his father and one brother. Mr. Prosser had worked in Chicago, Des Moines, Milwaukee, New York City, San Francisco, Toledo, and Detroit.

When Mr. Prosser went to work for Joseph Dworski in January 1961, Dworski was a registered practicing architect in the State of Michigan, and a representative of Knoll Associates, Inc. The record does not contain a written contract embodying the business arrangement between Dworski and Knoll, although there is inference that such business arrangement was in writing.

When Prosser went to work for Dworski, Dworski owned the improved real estate at 1080 North Woodward Avenue, Birming-

ham, Michigan; paid taxes, maintenance, upkeep and utility bills thereon; and paid all other charges involved in the ownership and operation of the real estate. It was Dworski's property in every legal sense. The real estate was improved with a showroom. On the outside of the window of the showroom the word "Knoll" had been inscribed in the distinctive script which Knoll uses as its trademark.

Initially Dworski compensated Prosser on a straight salary basis. After one year, this arrangement was changed, orally, so that Prosser was compensated on a salary plus commission basis.

Prosser "was the sales representative employed by Mr. Dworski" and his "responsibilities were the showroom and they were of a very loose nature" (Tr. 5388). Also employed were: a full time secretary, Miss Rose Weishar; a part time secretary, Mrs. Kathryn Sanders; a porter who cleaned the showroom; and on a part time basis draftsmen and carpenters (Tr. 5388). During the latter part of 1963, Gary Beals, a Knoll employee, also used the showroom facilities, but his status was never specifically explained to Mr. Prosser.

Prosser secured design commissions for Dworski as an interior designer, but Prosser's principal job was to promote the sale of Knoll furniture. In so doing, Prosser called upon various dealers in, and prospective users of, Knoll furniture. Prosser did not know the specifics of Dworski's business arrangements with Knoll (Tr. 5389). Dworski was sales representative for Knoll in the State of Michigan and the western tier counties of Ohio, the city of Fort Wayne [Indiana] and several counties surrounding Fort Wayne (Tr. 5390–91). When Prosser helped with a sale of Knoll furniture, he received a commission from the sale.

Prosser was paid his salary by Dworski. Dworski was Prosser's employer. Prosser took his orders from Dworski, and carried out the instructions which Dworski gave him. Although Prosser devoted most of his time as Dworski's employee to promoting the sale of Knoll furniture, Prosser carried out other instructions from Dworski, which were not related to the sale of Knoll furniture.

Dworski, as a practicing architect, specified Knoll furniture in some of the submissions he made to prospective buyers, and was compensated by Knoll for the Knoll furniture that he sold by this, and other techniques. Prosser participated in Dworski's commissions under the terms of the employment contract between Prosser and Dworski.

Dworski maintained his architectural office in the Birmingham showroom, but he also practiced architecture from an office in

his home. Prosser's office was in the showroom where he had his own desk; was responsible for the day to day operations; and prepared papers and documents used in such day to day operations of Dworski's business.

In addition to his files in the showroom, Prosser also kept files in his residence quarters, where he had a typewriter upon which he wrote letters and other documents pertaining to Dworski's business.

Prosser had unrestricted access to, and full use of, all of the papers and documents in the showroom and in his residence quarters, with the exception of such papers, if any, which Dworski may have kept in his private desk.

On September 1, 1963, Gary Beals, who had previously been employed by Knoll Associates, Inc., in Dallas, Texas, was transferred from Dallas to Detroit as prospective regional manager. Knoll was terminating Dworski's agency and Beals was to take over as regional manager. Knoll would operate a factory showroom directly from Dworski's property on Woodward Avenue (Tr. 4456). Since January 1, 1964, the Dworski property has been used by Knoll as a factory showroom, and office.

Beals testified that Prosser knew that Beals was going to take over as regional manager for Knoll as of January 1, 1964 (Tr. 4457). However, the record proves, and the hearing examiner finds, that neither Dworski nor Knoll at any time apprised Prosser of what Prosser's business future would be after December 31, 1963. Knoll's refusal to inform Prosser concerning his business future prompted Prosser's outburst of temper at the luncheon meeting at Kingsley Inn in Bloomfield Hills on December 9, 1963 (see March 24, 1964 ruling).

Beals, Knoll's employee and witness, testified in part (Tr. 4458–4459):

Q. Just tell us what the discussion was between Mr. Prosser and Mr. Helm concerning Prosser's personal position.

A. Herb Prosser generally pressed Helm. He said, "Am I going to be held by Knoll Associates? What am I going to be earning?" The exact words were, "What's the payoff going to be?" Helm said, "I'm not in a position to tell you at the present time. I cannot tell you what we anticipate, and I can't tell you what the arrangements will be." He said he wished he could tell him whether he would be wanted in Detroit but he couldn't tell him for a week or ten days.

Q. What were Prosser's remarks?

A. He was very angry. He said that he was extremely unfair and that he had been working for two and a half years, "And I think by this time you should be in a position to make an offer to me." John agreed and said, "Yes, I agree with you, but I am prevented from doing so at the present time."

And Herb kept harping on the point and he kept saying he thought that it was extremely unfair of them and Johnny went along, and Herb said, "I owe you $1200 for some furniture I purchased," and he intimated that if he didn't get a good deal he wouldn't be paying for this furniture, and I remember John said, "This is enough to prevent us from hiring you," and at this point Herb became furious and in an extremely loud voice, shouting at the top of his voice and pounding on the table and he used some swear words—is it all right if I quote these? He said, "I have given a lot of my god-damn time to this god-damn company," at the top of his voice and it was said extremely loud. John said, "Calm down, it's not good to lose your temper." (Tr. 4458–59.)

Knoll's business conduct toward Prosser from September 1, 1963, on was justification for Prosser's behavior and probably accounts for Prosser's call to Turiel's hotel room on October 9, 1963, and his subsequently expressed desire to help Turiel against Knoll. Knoll was under no *legal* obligation to tell Prosser what his business future would be after December 31, 1963, but Dworski probably had such obligation. Dworski and Knoll would appear to have been under a compelling *moral* obligation to tell Prosser, "What's the payoff going to be?" (Tr. 4458). We can only speculate whether Knoll directed Dworski not to tell Prosser what his business future would be as far as Knoll was concerned.

Beals' presence in the Birmingham, Michigan, office was never explained to Prosser, nor was any explanation given of how Beals' presence and Beals' status would affect Prosser's future. Beals was promoting the sale of Knoll furniture in the Detroit, Michigan, area.

Dworski [4] informed Prosser that Dworski's contract with Knoll would terminate on December 31, 1963, and Dworski had led Prosser to believe that several options were open to Dworski, including Dworski's remaining as Knoll's representative, or Knoll's direct operation of the showroom.

Prosser's efforts to obtain from Knoll, its officers, employees, or from Dworski, any positive statement as to what his, Prosser's, future would be was met by what Prosser characterized as Knoll's "smug indifference" (Tr. 5429).

During the week of October 7, 1963, hearings in this proceeding were going forward in Detroit. One evening that week, probably October 9, 1963, Bernard Turiel and Ernest Brod were working in their hotel room at the Sheraton Cadillac Hotel in Detroit when they received a telephone call around 10:30 p.m. from Prosser, asking that he be allowed to come up to talk to them. Turiel and Brod were suspicious that Prosser had been sent to

[4] Dworski had died since the record was originally closed on August 24, 1964, and was, therefore, not available as a witness during the reopened proceedings.

them by Knoll's lawyers, and were wary of Prosser's motives, and circumspect in their conversations with him.

Prosser's conversations with Turiel and Brod in their hotel room lasted about three-quarters of an hour, possibly a little longer. The conversations were wide ranging and general. They included a discussion of the generalities of the furniture business in the Detroit area, and of competition within the furniture business.

Prosser told Turiel "that he [Prosser] was pretty much in charge of the office and that Mr. Dworski spent most of his time in the architectural practice" (Tr. 5217–18). Prosser was responsible for keeping the files and maintaining the files (Tr. 5219). Prosser was *not* a file clerk. He was responsible for maintaining and preparing documents in the usual course of Dworski's business, including the sale of Knoll furniture. Prosser indicated that he also maintained files at his residence (Tr. 5220).

In these October 1963 conversations, Prosser did not, by innuendo or otherwise, offer either to be a witness in support of the complaint, or to supply documentary evidence to Turiel and Brod.

In discussing the severity of competition in the industry, Prosser mentioned Finsterwald's bankruptcy, and expressed accord with the Federal Trade Commission's efforts to police the pricing practices in the furniture business in Detroit.

After Prosser left, Turiel and Brod were no less suspicious of his motives than when he first called. Turiel and Brod felt that Prosser had wasted a lot of their time which could have been better spent working on the case.

Neither Brod nor Turiel heard from Prosser again until November 13, 1963, when Turiel received an early morning telephone call in their hotel room in Detroit from Prosser. Prosser inquired how Turiel thought the proceeding was going. Turiel, still suspicious of Prosser's motives, and believing that Prosser had made the telephone call at the instigation of Knoll's lawyers, was wary, and replied in general terms that he, Turiel, did not believe that Knoll's evidence made a very good defense.

The next significant date is December 9, 1963. The happenings on that date are detailed in my ruling of March 24, 1964. The heated argument at the luncheon on December 9, 1963, in Kingsley Inn is not disputed. After lunch, Prosser returned to the showroom and telephoned Turiel in Washington, D.C., offering to be a witness for Turiel and to turn over damaging documents.

Telephone slips show that Prosser called Turiel on December 9 and on December 10. Neither Turiel nor Prosser was able to

separate into tidy cubbyholes the essence of each day's conversation. Prosser contrived to have other Dworski employees in the showroom overhear his conversation with Turiel. Such conversation was overheard, and Prosser's offer to become a witness for Turiel and furnish Turiel "damaging" documents was known by Joseph Dworski, Gary Beals, and William Nolan, Knoll's vice president and general manager, on the same day the offer was made by Prosser. Beals and Dworski spoke by telephone to Prosser about his call to Turiel on the evening of the same day that the call was made. Neither Dworski, Beals, nor Nolan made any effort to forestall Prosser's offer to assist Turiel against Knoll.

Neither Dworski, Beals, nor Nolan made any effort (even though they all had knowledge by the evening of December 9, 1963) to prevent Prosser from being a witness or furnishing "damaging" documents.

Did those three gentlemen have a legal and moral responsibility to Knoll to prevent Prosser's helping Knoll's adversaries? Did they believe (or were they told) that it might enure to Knoll's greater advantage if Prosser were permitted to defect?

In any event, Turiel was no less suspicious of Prosser after the December 9–10 telephone calls than he had previously been. Turiel told his supervising superior, Frank Mayer, that he intended to have nothing to do with Prosser. Turiel had been advised by F. P. Favarella, another trial attorney with the Commission, to eschew all of Prosser's offer of assistance.

Turiel had rejected all of Prosser's offers of assistance in the December 9–10 conversations, and had concluded on a note of "Don't call me—I'll call you—if I change my mind."

Prosser took some of CX 1914A–CX 1959B, the questioned documents, from the files after he had talked to Turiel on December 9, 1963. However, there was absolutely nothing in the Prosser-Turiel December 1963 telephone conversations which motivated Prosser, directly or indirectly, to take the documents from the files.

Prosser's uncontradicted testimony is:

> Q. Now, I want you to examine your recollection and think about this closely. During the period October, November and December, 1963, did Mr. Turiel and/or Mr. Brod tell you to take anything out of the files of the Dworski showroom?
>
> A. Absolutely not.
>
> Q. Was that your own idea for your own purposes?
>
> A. That is exactly so. I was more interested in my own way of thinking of making these documents available to the Commission. (Tr. 5512.)

After the luncheon at Kingsley Inn on December 9, 1963, Pros-

ser, Dworski, Helm and Beals returned to the Woodward Avenue showroom. Beals took Helm out to the airport to catch a plane. Upon Beals' return to the showroom, Rose Weishar and Kay Sanders told Beals of Prosser's telephone call to Turiel. Beals testified (Tr. 4461–64):

A. I was back at the showroom about a half an hour and Herb returned to the showroom, and he came in and he looked somewhat upset, and I can't recall for sure, I think it was back in the back room, the little cubicle, but at any rate, we both ended up back there and I told him, I said, "I don't know whether this is going to mean anything to you, but I think it was very unfair that they haven't told you something about the time," and he said, "Well, I think I have been extremely mistreated by Knoll, too, and if Knoll is going to knife me, I am going to knife Knoll in return," and I said something, I questioned him further, and asked him what he meant. He said, "Well, I am in a position to get even with Knoll."

That was in substance what he said, and then he said, "I have placed a call to the Federal Trade Commission in Washington," and this shocked me. I was, you know, kind of stunned, and because I wasn't expecting this at all, and he said, "I had a conversation with Turiel and a couple other attorneys in Washington," and he said, "I have offered myself as a witness. I told them that I have information that will be very helpful to their case." I was surprised and I said "What did you do this for"? I couldn't believe he had done this thing and he said, "Well, I am just telling you that if I get knifed by Knoll, and they don't make me the kind of offer for employment, I will make myself available for the Federal Trade Commission." I asked him how he could expect our relationship to continue after making these threats, and this was important to me, because this was a man that was going to be working with me in the showroom. He said "I am not saying that I will, but I am just telling you. Incidentally, I would appreciate it if you didn't tell anybody with Knoll Association." I said, "How can you expect me not to. I think that information is very critical and should be passed on to somebody." He said "You are a man of honor." He said "Do what you think is best," and we talked about it a little longer.

I don't think much more was discussed. He left at this point and I read the mail and left, too, and shall I keep going?

Q. Tell me the next time you saw Mr. Prosser or talked with him?

A. Well, I talked to him on two more occasions that evening on the telephone.

Q. Yes. Did he say anything to you about his telephone call to the Federal Trade Commission?

A. Well, he called me after I had gotten home, and I had told him that I had called Mr. Nolan, the Vice-President of Knoll, and told him. I also talked to Joe Dworski on the phone, and he called me. Evidently he talked to him, in fact, he said that he had, and he said, "I want to tell you not to worry. That the only reason I called the Federal Trade Commission was to find out who was going to be testifying at the next hearing in New York."

Q. Did he say when they were going to be?

A. He said the first week in January. I don't think he gave me an exact date.

Q. Go ahead.

Q. And I said "Oh, well, I still think it was the wrong thing to do," and he asked me, "Did you tell anybody with Knoll what I have done?" I said "Yes, I have told Bill Nolan," who was the Vice-President and Manager and he got very upset when he heard this. He said, "I don't think you had any right to do this, for this is the type of thing that is kept in the family." This in substance is what he said.

I said, "I had no choice. I had to do it." So, he hung up on me, and I think I talked to Bill Nolan on another occasion.

In about an hour he called me back. I can't recall the time for sure. He was furious again, and he said, "I want to tell you it was very presumptuous of you to tell—this is the exact words, "to tell Bill Nolan," and said "You have really screwed Knoll, now," and hung up.

Q. This was the last time you talked with him on December 9?

A. Yes.

In the early morning hours of December 10, 1963, before other personnel had arrived on the premises, Prosser entered the Woodward Avenue showroom and took papers which included CX 1914A through CX 1959B (Tr. 4428).

At page 5521, *et seq.*, of the transcript, Prosser testified:

HEARING EXAMINER GROSS: Now, were you offered any reward or paid anything for any of your activities in connection with this litigation?

THE WITNESS: None.

HEARING EXAMINER GROSS: Were you ever promised anything by the Federal Trade Commission?

THE WITNESS: None, whatsoever.

HEARING EXAMINER GROSS: When you first offered these documents to Mr. Turiel, which would appear was either December 9th, or December 10, 1963, what was Mr. Turiel's reaction to your offer?

THE WITNESS: I would say that he expressed very indifferent attitude of my offering him the documents.

HEARING EXAMINER GROSS: And, then you called him again on the 1st [2nd] of January, and repeated the offer, is that right?

THE WITNESS: Yes, sir.

HEARING EXAMINER GROSS: And, was his attitude changed?

THE WITNESSS: Somewhat. But, I wasn't aware of any particular change.

HEARING EXAMINER GROSS: Well, why did you send him the documents after the January 2nd, 1964, conversation, and not send him the documents after the December 10th, 1963, conversation—December 9th, 1963, conversation?

THE WITNESS: Well, there was a question in my mind, I think, as to—

HEARING EXAMINER GROSS: Did he tell you not to send them on December 9?

THE WITNESS: No, there was no question of that that ever arose.

HEARING EXAMINER GROSS: I mean, did you offer them to him in December?

THE WITNESS: Yes.

HEARING EXAMINER GROSS: Did he tell you to keep them?

THE WITNESS: He said he had no interest in them whatsoever.

HEARING EXAMINER GROSS: Are those his words?

THE WITNESS: Something in that context.

HEARING EXAMINER GROSS: Now, between December 9th, 1963, and sometime in the early part of January, 1964, he changed his mind, so to speak, and agreed to permit you to send them on, is that right?

THE WITNESS: In essence, this is what occurred, I think.

HEARING EXAMINER GROSS: Now, what did you say to him that you think caused him to change his mind? Did you describe the documents in greater detail, or what–

THE WITNESS: No. In my own mind I just thought these would be of interest and valuable, and I possibly had described what I thought—

HEARING EXAMINER GROSS: Did anyone in the Federal Trade Commission, including Bernard Turiel or Ernie Brod, or anyone, ask you at any time to take these files?

THE WITNESS: No, sir.

HEARING EXAMINER GROSS: It was on your own initiative?

THE WITNESS: Yes.

Around 8:30 a.m. on the morning of December 10, 1963 (Tr. 4466), Gary Beals went into the showroom "a little earlier that day. I think out of *suspicion* or something, * * *" (italic supplied). He found wet footmarks on the showroom floor, as though someone had been inside the showroom before he had arrived that morning. Beals, who knew Knoll was going to operate the showroom directly and terminate its arrangement with Dworski, did not have the locks changed until the first of January, 1964—three weeks later. Beals, Dworski and Nolan knew on December 9, 1963, that Prosser had offered to deliver damaging documents to Turiel, and they could have changed the locks on the Woodward Avenue showroom immediately if they wanted to prevent such occurrence. Were Dworski, Beals and Nolan intentionally making it easy for Prosser to carry out his threat?

About December 19, 1963, Prosser went from Detroit to New York City to spend the Christmas holidays with his family. Prosser's employment by Dworski was terminated as of December 31, 1963. The record is silent as to the specifics of such termination; whether Prosser was fired; or whether he quit; what communications, if any, or whether oral or in writing, passed from Dworski and/or Knoll to Prosser, or vice versa.

Mary Stevens, an employee in the Herman Miller (one of Knoll's competitors) showroom in Birmingham, Michigan, testified (Tr. 4421, *et seq.*) to Prosser coming into the Miller showroom after the December 9, 1963, argument at the luncheon at Kingsley Inn. Miss Stevens testified (Tr. 4424–25):

Q. Do you remember him [Prosser] telling you that he just had the argument?

A. Yes.

Q. What was his attitude about Knoll at that time? What did he say?

A. Well, he was very upset and angry, not only with Knoll, but with the fellow handling the agency at that time, Joe Dworski, and he felt that he had been mistreated because he had not received an offer to continue working with Knoll.

Q. Was he mistreated because he was not going to head the agency starting January 1 and somebody else was going to be the head of it?

A. I don't think he had been made an offer to stay with the firm.

Q. Did he say he was going to get even with Knoll?

A. Yes.

Q. Did he say that he was going to do what he could to hurt them?

A. I'm not sure if it was in those words.

Q. But in substance?

A. Yes.

On January 1, 1964, Prosser was no longer in the employ of Dworski. On January 2, 1964, Prosser attempted unsuccessfully to telephone Turiel at the Federal Trade Commission in Washington, D.C., but late that evening reached Turiel via long distance telephone at Turiel's parents' home in New York City. This was a lengthy telephone call, but, after it was over, Prosser had persuaded Turiel, who was still wary and suspicious of Prosser, that he, Turiel, had a professional obligation to examine documents which Prosser had characterized as damaging to Knoll. Without consulting with anyone, Turiel agreed to reverse his previous judgment, and to examine the documents.

On January 2, 1964, and at all times thereafter, Turiel had no reason whatsoever for believing there was the slightest cloud upon Prosser's right to possess the documents. Prosser, similarly, did not believe there was any cloud upon his, Prosser's, right to possession of the documents. The examiner finds that the documents did not come into Prosser's possession wrongfully. If the documents were "stolen," as alleged repeatedly by Knoll's lawyers, why didn't Dworski and/or Knoll take action against Prosser, or cause criminal action to be instituted, based upon the theft of the documents?

And why did Knoll (Nolan and/or Beals) and/or its lawyers do nothing between December 9, 1963, when they first learned of Prosser's defection, and March 5, 1964, when they filed their motion to suppress—almost three months later? Dworski and Knoll knew on December 9, 1963, that Prosser had offered to testify as a witness for Turiel and deliver damaging documents to him. On December 10, 1963, Beals knew that someone had been in the Woodward Avenue showroom before Beals arrived there about 8:30–9 a.m.

Dworski and Knoll had been fully alerted to Prosser's intentions by the evening of December 9, 1963. They knew on December 10,

1963, that someone had been in the showroom early in the morning. Knoll's lawyers would have us believe that this alarming and critical development was withheld by Knoll's employees and officers from its lawyers for almost three months, and that the first time Imberman (Knoll's lawyer) had any inkling as to what had transpired was on February 28, 1964, when Dworski attempted to authenticate CX 1914A–CX 1959B, and found that the originals were not in the files. If this were the fact, why did Imberman decide not to use Prosser as a witness in hearings in New York on January 8, 1964, and to substitute Jesse Osetek for Prosser?

Turiel and Prosser conversed by telephone on January 13, 1964, and February 19, 1964.

Although Turiel had previously informed his superior at the Federal Trade Commission, Mr. Frank Mayer, that he did not intend to have anything to do with Prosser, Prosser's January 2, 1964, telephone conversation convinced Turiel that he had a professional responsibility to examine the documents and see whether Prosser's characterization of them was accurate. Turiel suggested to Prosser that he send the documents to Turiel at the Federal Trade Commission in New York City. The documents were sent, and were received by Turiel at the Federal Trade Commission's offices in New York City some time on January 6 or January 7, 1964.

On February 24, 1964, Turiel and Brod, as complaint counsel, filed in this proceeding their motion for Knoll to admit the authenticity of some of the documents which had been sent by Prosser. These documents are now in evidence as CX 1914A through CX 1959B. Attached to the request to admit were photostatic copies of the documents. Knoll's lawyers sent these documents to Dworski in Detroit, Michigan. On or about February 27 or 28, 1964, Dworski went to his files to authenticate the documents and found that the documents were missing. Dworski testified that the documents were accessible to Prosser, and "to all people working in the office including him [Prosser] (Tr. 4416). Dworski further testified (Tr. 4406–4408):

Q. Now, did you have occasion to talk to Mr. Prosser on February 28, 1964?
A. Yes, I did.

Q. How do you identify that date?

A. That was the date that we were asked to check these documents, to see if they were missing from our office.

Q. Yes. Did you?
A. Yes, I did.

Q. And what did you find?

A. They found that the documents were not in our file.

Q. Now, did you then have occasion to talk to Mr. Prosser about the documents?

A. That evening I called him to ask him just *what was the reason* that the documents were taken out of my office.

Q. Did you ask him *whether* he had taken the documents?

A. I asked him whether he had taken them and he indicated that he had found them.

Q. Don't tell me that he indicated. Can you remember what he told you?

A. He said, "I found them."

Q. Where did he say he found them?

A. In the trash can.

Q. Those are his precise words? "I found them in the trash can?"

A. As far as I can remember, yes.

Q. Did you ask him *whether* he had sent the documents to anybody?

A. I asked him *why* he had sent them.

Q. To whom?

A. To Washington, to the Federal Trade Commission.

Q. You asked him that, am I right?

A. Yes.

Q. What did he say?

A. Well, he, at that point—he didn't say anything. He just—the conversation ended and that was the end of the telephone conversation.

Q. So that when you asked him whether he had taken the documents, his reply was that he found them in the trash can?

A. That is right.

Q. Did you pursue that with him any further, Mr. Dworski?

A. *I did not pursue with it any further because it didn't seem to be any purpose to it.*

Q. Was there anything else that you said to him about these documents in the telephone conversation?

A. Not that I can remember. (Italic supplied.)

On March 5, 1964, Knoll's lawyers filed, *inter alia,* motions to suppress CX 1914A through CX 1959B as evidence. The motions were accompanied by an affidavit by Jacob Imberman, as follows:

JACOB IMBERMAN, being duly sworn, deposes and says:

I am a member of the firm of Proskauer Rose Goetz & Mendelsohn, attorneys for the respondent Knoll Associates, Inc. and make this affidavit in connection with respondent's objection to request for admissions dated February 20, 1964 and respondent's request for the scheduling of hearings on the objections at the earliest practicable time, as well as respondent's motion for an order extending its time to file any other objections to the request for admissions until its objections on the ground of unlawful search and seizure have been determined.

On February 25, 1964, respondent received a copy of a request for admissions dated February 20, 1964, served by counsel supporting the complaint. Annexed to the request for admissions were 46 documents listed in the request itself.

An examination of these documents disclosed that they had all come from the files of the respondent's showroom in Detroit, Michigan, and a preliminary investigation disclosed, upon information and belief, that they

had been stolen from the files in the showroom by one, Herbert Prosser, a former employee at the showroom.

I was in Detroit, Michigan on February 28, 1964, and as a result of my conversations with various persons in that city, I am convinced that Mr. Prosser stole these documents from the Detroit showroom; that this theft occurred on or about the same date that Mr. Prosser had a telephone conversation with Bernard Turiel, Esq., counsel supporting the complaint; that Mr. Prosser marked various portions of the documents with brackets, arrows or circles, and then sent the documents to Mr. Turiel or someone else at the Federal Trade Commission.

I have personally talked with persons in Detroit who have informed me that Mr. Prosser had admitted to them that he had spoken to Mr. Turiel on the telephone on more than one occasion and that he had stolen the documents from the files in the Detroit showroom and had sent them to someone at the Federal Trade Commission. I have also been informed by Mr. Joseph Dworski who was the agent for the respondent and who operated the Knoll showroom until December 31, 1963 that although Mr. Prosser had access to these documents, *he had no right or authority to take the documents from the files* or to deliver them to anyone at the Federal Trade Commission or indeed any other person.

Based on this information, respondent objects to the request for admissions dated February 20, 1964 on the ground set forth in the attached objections and requests, in accordance with Rule 3.13(b) that a hearing on the objections be set for the earliest practicable time and that respondent be given reasonable notice of this hearing in order that respondent may issue subpoenas to witnesses whose testimony will be required in connection with this proceeding.

Respondent further requests that its time to make any other objections to the request for admissions be extended until the determination of the objections on the ground of unlawful search and seizure, since it has been impossible for the respondent to make any other determination in connection with these documents. (Italic supplied.)

Imberman, who was in Detroit at the time, conferred with Dworski there on *February 28, 1964,* and thereafter *Dworski* had the conversation with Prosser, *supra,* pp. 1752–1753. Why didn't Imberman confront Prosser in person in Detroit on February 28? Why was Dworski (who no longer represented Knoll in the Detroit area) assigned to *telephone* Prosser about the documents? If the documents had been stolen, this was sufficiently critical for Imberman to confront Prosser personally, since Imberman was in Detroit. Affidavits of February 3, 1965, by Imberman and Greenberg depict a close working relationship between Imberman, Greenberg and Prosser. They characterize Prosser as a man who "was at my side constantly almost every day and late in the evening on many days. He was a member of the defense 'TEAM', and I regarded him in all respects as my client. I confided in him, discussed most aspects of our strategy and defense with him, and I accepted his aid and suggestions with respect to the

Detroit area." Strange indeed that Imberman should swear on March 4, 1964, that this same man was a thief, without even taking the trouble to discuss the matter with this "member of the defense 'TEAM' "—"client"!

Equally strange is Imberman's swearing, in the same March 4 affidavit, that Turiel was implicated in the theft of the documents without paying Turiel the professional respect due him as a government servant of first notifying Turiel that he, Turiel, would be charged under oath by Imberman with suborning larceny.

Although a substantial portion of the reopened record deals with occurrences after March 5, 1964, the fact is, and is found to be, that, IF KNOLL'S CONSTITUTIONAL RIGHTS HAD BEEN VIOLATED, SUCH VIOLATION HAD TAKEN PLACE BY MARCH 5, 1964, AND WOULD HAVE TO BE ESTABLISHED PRIMARILY BY EVENTS AND FACTS OCCURRING PRIOR TO THE IMBERMAN AFFIDAVIT OF MARCH 4, 1964.

It is relatively unimportant how many times Turiel talked to Prosser after March 5, 1964, and when and where, and what was said, and who said what. The charges and innuendoes in Imberman's March 4, 1964, affidavit were so serious that it was and is only natural that Turiel and Brod and Prosser should be constantly conferring in order to refute them and to prove them unwarranted and groundless, which they hereby are found to be.

Telephone conversations between Prosser and Turiel and/or Brod occurred on:

January 13, 1964
February 19, 1964
March 2, 5, 7, 9, 11, 19, 23 and 31, 1964
June 8, 1964
July 16, 1964
August 26, 1964
September 9, 1964
December 18, 1964

As far as the record shows, no action was taken by Dworski and/or Knoll against Prosser based upon "theft" of the documents.

There is an inference in the record that Knoll has succeeded in subtly blacklisting Prosser so that he is presently unable to obtain any employment in the furniture industry in which he has spent most of his business career.

Prosser's legal rights against Knoll need not be discussed for purposes of this supplementary ruling.

The record contains testimony that Knoll's lawyers instructed Dworski and Prosser to remove documents damaging to Knoll on its defenses from their files. There is testimony that Knoll's lawyers indicated to Prosser how he should testify. Documents in

Dworski's file were rewritten at the direction of Knoll officials in order to change their contents, and state a reason different from the original reason, for Knoll allowing some customers in the Detroit area a 50% discount, and reducing some 50% discount customers to a 40% discount.

Prosser's uncontradicted testimony in the record is (Tr. 5512):

> Q. Now, I want you to examine your recollection and think about this closely. During the period October, November and December, 1963, did Mr. Turiel and/or Mr. Brod tell you to take anything out of the files of the Dworski showroom?
>
> A. Absolutely not.
>
> Q. Was that your own idea for your own purposes?
>
> A. That is exactly so. I was more interested in my own way of thinking of making these documents available to the Commission. (*Supra*, p. 1747.)

It is undisputed that on December 9, 1963, Prosser, on his own initiative, offered to be a witness for complaint counsel and deliver to them documents damaging to Knoll. They refused the offer. Prosser's offer was known to and had been discussed by Dworski, Beals and Nolan of Knoll the same day it was made. It was also the subject of discussion between Dworski, Beals and Prosser.

If Knoll's lawyers have evidence that Prosser offered to help complaint counsel prior to December 9, 1963, they have failed utterly to proffer one iota of solid evidence to support such assertion.

Prosser never was in the position of and never acted as Bradley did in *Caldwell* v. *United States*, 205 F. 2d 879 (D.C. Cir. 1953) (cited in Knoll's brief). Prosser's *offer* to help the opposition was known to Knoll almost as soon as it was made. Prosser's *reason* for offering to help the opposition was known to Knoll. *Caldwell* was a criminal case.

The special issue in this part of this proceeding deals only with whether CX 1914A through CX 1959B should be part of the hearing record. Inasmuch as CX 1914A through CX 1959B have not been used nor referred to by the hearing examiner in any way in preparing his initial decision, it is relatively unimportant in the over-all picture whether CX 1914A–CX 1959B are part of the record. However, the hearing examiner refuses to strike the exhibits because he does not wish, even by innuendo, to indicate that there is in this record the slightest proof that the documents were "stolen"; that complaint counsel or anyone else at the Federal Trade Commission induced their theft; or that Knoll's constitutional rights have, in any way,

been abridged by the conduct of *anyone* directly employed by or indirectly associated with the Federal Trade Commission.

In *Lebron*, 222 F. 2d 531 (C.A. 2d 1955) (also cited in Knoll's brief), *Caldwell* is cited on page 534 in the court's dicta, but the judgments of conviction were *affirmed* in *Lebron*. Both *Caldwell* and *Lebron* are criminal cases, and are far different in thrust and in basic issues from this proceeding which involves only whether certain government exhibits should be stricken from the record in a Clayton Act civil proceeding.

The record abounds with efforts of complaint counsel to satisfy themselves that there was no cloud on Prosser's right to possession of the documents, and no cloud on Prosser's right to send them to complaint counsel.[5] Prosser's taking of the documents, if wrongful, would surely have evoked a much more vigorous effort by Knoll's lawyers to do something about the theft, than appears in this record to have been made.

There is an inference in this record that Knoll's lawyers did confer with the state's attorney of Wayne County, Michigan, about the alleged "theft." If such conference did occur, Knoll's lawyers should have made it a part of this record. Or did the state's attorney inform Knoll's lawyers that their charges could not be substantiated? Is that why the record was purposely left silent on this matter?

The examiner rejects Knoll's "denial of due process" argument, which was made, *for the first time,* after the reopened record was closed and without prior notice to opposing counsel, or to the hearing examiner. If such argument could have been made, Knoll's lawyers have waived it by intentionally withholding it until it was too late for opposing counsel to deal with it properly. Knoll's lawyers would deny complaint counsel the same due process they advocate, too late.

How do Knoll's lawyers know so positively, as they assert on page 25 of their February 8, 1965, brief, that this litigation "is now completely beyond salvage"? Surely they do not sincerely believe that any fair, honest and impartial adjudicator will be diverted from the main issue by their inartistic, unproven "search and seizure" red herring?

Up until January 7, 1964, when Turiel examined the Prosser documents, Prosser had not aided Turiel and/or Brod in any material way in this proceeding. His expressed sympathy with

[5] These documents appear to be of such a nature that they should have been turned over to Commission counsel before the hearings began. Instead, they were concealed from complaint counsel contrary to outstanding requests from Commission counsel and direct order of the hearing examiner. (See transcript of prehearing conferences of February 4, 1963, and April 8, 1963.)

the purposes of the Robinson-Patman Act the evening of October 9, 1963, could hardly be considered as help.

The Imberman/Greenberg Alice-in-Wonderland fantasy to the contrary notwithstanding, there is not one iota of solid objective evidence of aid by Prosser to complaint counsel until the Prosser documents were examined by them on January 7, 1964. As a practical matter, this was no aid either, because the examiner is ignoring the Prosser documents in writing his initial decision.

Knoll's motion on February 8, 1965, to dismiss this proceeding hereby is denied. Knoll's motion to strike CX 1914A through CX 1959B from the record is denied.

The hearing examiner finds as a matter of fact and of law that none of Knoll's constitutional rights have, in any way, been infringed upon, denied, or jeopardized by any act or event proven in this record.

HUMPHREYS MEDICINE COMPANY, INCORPORATED,
Docket No. 8640

AMERICAN HOME PRODUCTS CORPORATION,
Docket No. 8641

E. C. DeWITT & CO., INC.,
Docket No. 8642

GROVE LABORATORIES, INCORPORATED,
Docket No. 8643

THE MENTHOLATUM COMPANY,
Docket No. 8644

Order, July 7, 1966

Order denying respondent American Home Products Corporation's petition that stipulations in the four other cases be served upon this respondent, and that it be permitted to file a response thereto.

ORDER RULING ON PETITION BY RESPONDENT AMERICAN HOME PRODUCTS CORPORATION

American Home Products Corporation, the respondent in Docket 8641, has filed a petition dated May 19, 1966, for an order (a) requiring that copies of any stipulations or other papers which may be filed in Dockets 8640, 8642, 8643 and 8644 pursuant to the Commission's "Order Ruling on Motions Certified by the Hearing Examiner" issued in said dockets on April 26, 1966 [69 F.T.C. 1179], be served upon counsel for American

Home Products Corporation and (b) granting American Home Products Corporation an opportunity to file a written response thereto and to seek an opportunity to be heard thereon before the hearing examiner, the Commission, or both. Complaint counsel, who is handling each of the within proceedings, has filed an answer opposing the relief requested in the petition.

American Home Products Corporation's principal claim appears to be that the Commission has prejudiced the respondent by permitting respondents in four other cases to file stipulations to be bound in the hearing of *their* cases by the record already introduced in respondent's case. Respondent argues that as a result of this stipulation the Commission decision in its case will be affected by "wholly extraneous and extra-record factors" and will thus prejudice respondent. Respondent based this argument on that portion of the Commission's order which required these other respondents to stipulate that the advertisements in these cases had the same effect on readers as the advertisements in *American Home Products* and that the "effect of the use of respondent's preparation is not significantly different from the use of American Home Products' preparations."

The mere statement of respondent's argument is sufficient to disclose its patent invalidity. We can see no possible basis for its claim that its case will be prejudiced by stipulations entered into by respondents in other cases. The decision in the *American Home Products* case will be based on the record in that case—and on that record alone. The only effect of these stipulations is to eliminate the necessity for introducing separate proof in these other cases and to permit *them* to be decided on the basis of the proof introduced in respondent's case. In no sense can it be said, therefore, that these stipulations interfere with or affect the decision-making process in the *American Home Products* case.

Accordingly, we have concluded that respondent's petition should be denied in its entirety.

It is thus ordered, That the respondent American Home Products Corporation's petition of May 19, 1966 be, and it hereby is, denied.

MISSISSIPPI RIVER FUEL CORPORATION

Docket 8657. Order, July 15, 1966

Order denying respondent's request that material produced in response to subpoenas issued in this case be submitted to an accounting firm for presentation in such form that confidential data be kept secret.

ORDER DENYING PETITION FOR RECONSIDERATION

Respondent, Mississippi River Fuel Corporation, has filed a Petition for Reconsideration of the Commission's Order Entertaining and Denying Appeals from Hearing Examiner's Denial of Motions to Quash or Limit Subpoenas, issued June 8, 1966 [69 F.T.C. 1186]. Respondent requests that the Commission rescind its direction, contained in that order, that material produced in response to the subpoenas issued herein be submitted to an accounting firm which shall compile and present the material to respondent's counsel in such manner that no individual company's confidential arrangements or data will be revealed.

Respondent argues that this requirement will prevent it from developing all the facts relating to the state of competition in the market because the accounting firm will not know whether the replies to the subpoenas "are responsive or not, or whether they are accurate or complete" and "will convert the evidence sought by Respondent into simple, untested, expository statements of whatever the witnesses desire to submit." Respondent's contentions at this stage in the proceeding must remain in the area of hypothesis and conjecture. We do not agree with respondent's contentions and adhere to our decision.

The interposition of an accounting firm between respondent and the subpoenaed parties in no way limits or impairs respondent's ability to develop whatever facts it can from the material produced in response to the subpoenas. Respondent argues that a disinterested accounting firm "would have absolutely no conception of or interest in the issues in this case." Of course, "disinterested," as used in the Commission's order, connoted the absence of an interest in the outcome of this proceeding. The hearing examiner, after consultation with complaint counsel and respondent's counsel, will provide the accounting firm with sufficient information to enable it to perform its function. Nor is there any reason to believe that responses to the subpoenas will be less complete or less candid because the responses are directed to an accounting firm rather than to respondent's counsel. Because of the overlapping nature of the subpoenas, the accounting firm will be as capable as respondent's counsel of detecting incomplete responses. In essence, respondent is seeking the right to rummage at will through the confidential business files of the subpoenaed firms, many of which are now, or may be in the future, its competitors. This it is not entitled to do. In order to avoid any possibility that the data claimed to

be confidential will be improperly used, it is necessary that material submitted in response to the subpoenas be presented to respondent's counsel in such manner that no individual company's confidential arrangements will be revealed.

It is ordered, That respondent's Petition for Reconsideration be, and it hereby is, denied.

Commissioner MacIntyre not participating.

DEAN FOODS COMPANY ET AL.

Docket 8674, Order, July 25, 1966

Order directing hearing examiner to expedite the filing of his initial decision in this case, and if the dismissal of the complaint against Bowfund is in issue, that the briefs of the parties be filed on or before Oct. 11, 1966.

ORDER

On July 18, 1966, the United States Court of Appeals for the Seventh Circuit entered an order in *Federal Trade Commission* v. *Dean Foods Company and Bowman Dairy Company,* No. 15493, enjoining respondents Dean Foods Company and Bowfund Corporation (the latter formerly known as Bowman Dairy Company), for and during the period of four months from July 18, 1966, from making, *inter alia,* any material changes, directly or indirectly, with respect to the capital stock or corporate structure of Bowfund Corporation or with respect to the assets purchased by Dean from Bowman pursuant to their agreement of December 13, 1965, as amended, pending entry by the Commission of its final order in respect to the above-entitled proceeding.

On July 8, 1966, the proceeding for the purpose of receiving evidence in the above-entitled matter was closed by the hearing examiner, and he directed that the respective proposed findings by counsel supporting the complaint and by respondents be submitted to him on or before August 8, 1966. He also dismissed the complaint as to respondent Bowfund Corporation; on July 18, counsel supporting the complaint filed notice of appeal from the dismissal of Bowfund Corporation.

In light of both the present posture of this case and the order of the Court of Appeals, it is essential that the Commission expedite all further proceedings at all levels and enter its final order on or before November 18, 1966, in compliance with the Court's order.

Now therefore it is ordered, That the hearing examiner file his initial decision on or before September 9, 1966, and that service of his initial decision upon the parties be expedited by the Secretary.

It is further ordered, That, in the event either or both sides should file notice of appeal from the initial decision, the following briefing schedule shall govern and shall apply also with respect to the appeal from the hearing examiner's dismissal of the complaint as to Bowfund Corporation: The parties shall submit their respective briefs on or before October 11, and their answering briefs, if any, on or before October 28, 1966, at which date oral argument shall be heard in the matter.

MARQUETTE CEMENT MANUFACTURING COMPANY

Docket 8685. Order, July 27, 1966

Order granting respondent's appeal on the propriety of the Commission conducting an industrywide survey of the ready-mix cement business at the same time as adjudicating this individual case.

ORDER STAYING PROCEEDING AND GRANTING IN PART AND DENYING IN PART REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

The complaint herein, issued May 20, 1966, charged that respondent, a cement manufacturer, violated Section 7 of the Clayton Act, and Section 5 of the Federal Trade Commission Act by its acquisition of a ready-mix concrete firm. Respondent moved to dismiss the complaint, or, in the alternative, to stay all proceedings herein in view of (a) the dismissal by the hearing examiner of similar complaints in two other proceedings involving the same market area involved here, and (b) the conduct by the Commission of industrywide hearings on vertical integration in the cement industry while the present adjudicative proceeding was pending. On July 13, 1966, the hearing examiner denied respondent's motions and ordered it to answer the complaint within twenty days. Respondent requests an interlocutory appeal from the examiner's order.

The hearing examiner's initial decision in the two other cases clearly furnishes no basis for the dismissal of the complaint here. Those cases have yet to be reviewed by the Commission. Nor does the action in those cases by the hearing examiner or their pendency before the Commission justify the delay which would result from a stay of this proceeding, especially since

respondent has not stipulated to be bound by the outcome of those proceedings.

However, respondent also raises questions similar to those raised in *Lehigh Portland Cement Company,* Docket No. 8680, relating to the alleged unfairness resulting from the conduct of legislative-type hearings while adjudicative proceedings are pending. In *Lehigh* we noted that these questions appear to be sufficiently substantial to warrant full consideration by the Commission. We, therefore, permitted an interlocutory appeal in that case and stayed all further proceedings pending further order of the Commission. The same procedure should be followed here. Accordingly,

It is ordered, That:

(1) Respondent's request for an interlocutory appeal is granted insofar as it seeks review of the examiner's order denying its motion to dismiss the proceeding on the basis of alleged unfairness arising from the Commission's conduct of hearings on vertical integration in the cement industry while this adjudicative proceeding was pending; in all other respects, respondent's request for an interlocutory appeal is denied;

(2) Respondent shall have thirty (30) days from the date of this order within which to file a brief in support of its appeal; and upon the filing of such brief by respondent, complaint counsel shall have thirty (30) days within which to file an answering brief. The Commission will thereafter determine whether and when it desires to hear oral arguments and the Secretary will so notify counsel on both sides; and

(3) Pending the Commission's determination of the appeal, respondent's time to answer and all other proceedings before the hearing examiner in this matter are hereby stayed until further order of the Commission.

Commissioner MacIntyre not participating.

AMERICAN CYANAMID COMPANY ET AL.

Docket 7211. Order, August 1, 1966

Order reopening proceeding pursuant to a judgment of the United States Court of Appeals, Sixth Circuit, 363 F. 2d 757 (1966) (8 S. & D. 248), for a rehearing without the participation of Chairman Dixon and remanding case to the Chief Hearing Examiner.

ORDER REOPENING PROCEEDING AND REMANDING CASE TO HEARING EXAMINER

The United States Court of Appeals for the Sixth Circuit having issued its opinion and judgment on June 16, 1966, vacating the order of the Commission and remanding the case for

further proceedings without the participation of Chairman Dixon; and

Chairman Dixon having decided to withdraw from further proceedings in this matter;

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 the Chief Hearing Examiner for assignment to an examiner to begin expeditious hearings, in accordance with the Court's opinion, not later than 60 days from the issuance of this order for the sole and limited purpose of receiving the testimony of Patent Examiner H. J. Lidoff, and of any other witnesses who have heretofore testified, with respect to "the issue as to whether Pfizer and Cyanamid made misrepresentations to the Patent Office and withheld essential information, thereby deceiving Lidoff into granting a patent which otherwise never would have been approved."

It is further ordered, That upon termination of the hearings the examiner shall within 90 days thereafter enter his initial decision confined to the issue hereinabove specified which shall be subject to review by the Commission under Subpart G of Part 3 of the Commission's Rules of Practice.

Chairman Dixon not participating.

INLAND CONTAINER CORPORATION ET AL.

Docket 7993. Order and Opinion, Aug. 2, 1966

Order denying request of a corrugated box manufacturer of Louisville, Ky., not a party to this case, that Commission reopen proceedings to admit additional evidence concerning the present competitive status of the corrugated box manufacturing market in the Louisville, Ky., area.

OPINION OF THE COMMISSION

Petitioner, Independent Boxmakers, Inc., Louisville, Kentucky, a company not a party to the original proceeding in this matter, has requested that the Commission reopen the proceedings for the purpose of holding hearings to "collect current data concerning the productive capacity, sales structure, and competitive status" of the Lousiville corrugated box manufacturing market.[1]

[1] According to the petition, Independent Boxmakers, Inc., is one of eight corrugated box manufacturers located in the Louisville area. Originally organized as a sheet plant, it has subsequently purchased a corrugator and has an estimated capacity of approximately 300 million square feet of corrugated board per year. Its current approximate volume is 120 million square feet per year.

It is the petitioner's position that the Commission's Modified Order of March 1, 1966, [69 F.T.C. 201] [2] is destructive of competition and that it was entered without a full understanding on the part of the Commission of either the past or present competitive realities of this market. Petitioner asks that the Commission, after holding the requested hearing, formulate a different order ". . . effectuating the purposes of the Act [Section 7 of the Clayton Act as amended] and enhancing competition in the Louisville market." Commission counsel have opposed the instant petition. Respondents have not answered.

There is no provision in the Commission's Rules of Practice which permits one who was not a party to the original proceeding to petition for the reopening of that proceeding. However, the Commission may reopen a proceeding *sua sponte* after the decision has become final when it is of the opinion that changed conditions of law or fact, or the public interest so require. Rules of Practice, par. 3.28(b)(1). Presumable the instant petition is a request that the Commission exercise this power. While not conceding that a petitioner who was not a party to the original proceeding has standing to make such a request, the Commission will nevertheless consider whether either of the above prerequisites for reopening a proceeding exists.

The petition sets forth the present productive capacity of each corrugated box manufacturer located in Louisville, the total productive capacity of the Louisville market, and the current demand for corrugated box in this market. On the basis of these figures, petitioner calculates that the demand constitutes only 37 percent of the present productive capacity. The petition then states that 25 percent of the corrugated container requirements of the Louisville market are being supplied by firms located outside Louisville, and alleges that two additional corrugated box manufacturers will soon establish plants in Louisville. The conclusion that the Commission's Modified Order is anticompetitive is predicated upon petitioner's belief that the formation of still another manufacturer, as required by the Commission, must inevitably result in the diversion of business from established manufacturers, such as the petitioner, and may result in the elimination of one or more of these competitors from the market.

The Commission does not think that the facts recited by

[2] The Final Order, issued July 31, 1964 [66 F.T.C. 329], required Inland Container Corporation to divest itself of all stock and assets of General Box Company. The Modified Order, issued March 1, 1966, requires Inland to establish in Louisville a corrugated container manufacturer and to guarantee such concern adequate financing, certain necessary raw materials, and initial customer business.

and Deception as to the Leather Content of Waist Belts applied to their business, (b) that the original investigation was unfair because assertedly there was no opportunity for them for a hearing at the investigational stage, and (c) that the Commission has not taken similar action against competitors; and

The Commission having determined that respondents have made no showing that they have been denied an opportunity for a full and complete hearing in this matter or that there was any unfairness in any action or procedure followed by the Commission either as to the individual action against respondents or as to the Commission's industrywide regulations applying to all members of the industry and that they have not shown, as a basis for their request, that there have been any changed conditions of fact or law or that the public interest requires the reopening and setting aside of the order requested:

It is ordered, That respondents' petition to reopen this proceeding and to set aside the order to cease and desist issued September 16, 1964, be, and it hereby is, denied.

NATIONAL DAIRY PRODUCTS CORPORATION

Docket 7018. Order, Sept. 19, 1966

Order denying respondent's request for reconsideration of the Commission's order of July 28, 1966, page 79 herein, on the grounds that only two of the three participating Commissioners voted to issue the order. Respondent contends that an order of the Commission must be supported by three members.

ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION

Respondent, by petition filed August 31, 1966, has requested the Commission to reconsider its decision issued herein on July 28, 1966, p. 79 herein. Counsel supporting the complaint has filed an answer in opposition.

Three of the five members of the Commission, constituting a quorum for the transaction of business under § 1.7 of the Commission's Rules of Practice, participated in the decision in this matter, with two of the participating Commissioners concurring in the decision, including the opinion, findings and final order.

In support of its petition, respondent relies on the ruling of the court in *Flotill Products, Inc.*,[1] that an order of the Commis-

[1] *Flotill Products, Inc.* v. *Federal Trade Commission*, 358 F. 2d 224 (9th Cir. 1966), *affirmance upheld on rehearing*, (August 15, 1966).

attention which contradict this conclusion. Moreoever, petitioner raised no objections with respect to the original order of the Commission. The petition does not now allege and there is no indication that the effects of the modified order upon petitioner or upon others in the market will be different from those of the original order.

For the aforementioned reasons, therefore, the Commission concludes that the requirements of its Rules of Practice for the reopening of a proceeding have not been satisfied. An appropriate order will be entered.

ORDER DISPOSING OF PETITION TO REOPEN PROCEEDING

The Commission, at the request of Independent Boxmakers, Inc., of Louisville, Kentucky, having considered whether the instant proceeding should be reopened for the purpose of taking additional evidence and modifying the order, and having found, for the reasons stated in the accompanying opinion, that there are no changed conditions of law of fact justifying reopening and that the public interest does not so require, concludes that the conditions of Section 3.28(b)(1) of the Commission's Rules of Practice have not been satisfied and that this matter should not be reopened.

GEORGE FROST COMPANY ET AL.

Docket C–229. Order, Aug. 10, 1966

Order denying respondents' petition to reopen this proceeding and set aside the order of Sept. 16, 1964, 66 F.T.C. 771.

ORDER DENYING PETITION TO REOPEN AND SET ASIDE ORDER TO CEASE AND DESIST

This matter having come on to be heard upon respondents' petition for recision of the order to cease and desist issued September 16, 1964 [66 F.T.C. 771], such being treated as a petition under § 3.28(b)(2) of the Commission's Rules of Practice requesting a reopening of the proceeding for the purpose of setting aside the order, and the brief in opposition thereto filed by complaint counsel; and

It appearing that the grounds for such action are (a) that the respondents were originally informed that they were subject to the rules for the Luggage and Related Products Industry but were subsequently advised that the rule covering the Misbranding

and Deception as to the Leather Content of Waist Belts applied to their business, (b) that the original investigation was unfair because assertedly there was no opportunity for them for a hearing at the investigational stage, and (c) that the Commission has not taken similar action against competitors; and

The Commission having determined that respondents have made no showing that they have been denied an opportunity for a full and complete hearing in this matter or that there was any unfairness in any action or procedure followed by the Commission either as to the individual action against respondents or as to the Commission's industrywide regulations applying to all members of the industry and that they have not shown, as a basis for their request, that there have been any changed conditions of fact or law or that the public interest requires the reopening and setting aside of the order requested:

It is ordered, That respondents' petition to reopen this proceeding and to set aside the order to cease and desist issued September 16, 1964, be, and it hereby is, denied.

NATIONAL DAIRY PRODUCTS CORPORATION

Docket 7018. Order, Sept. 19, 1966

Order denying respondent's request for reconsideration of the Commission's order of July 28, 1966, page 79 herein, on the grounds that only two of the three participating Commissioners voted to issue the order. Respondent contends that an order of the Commission must be supported by three members.

ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION

Respondent, by petition filed August 31, 1966, has requested the Commission to reconsider its decision issued herein on July 28, 1966, p. 79 herein. Counsel supporting the complaint has filed an answer in opposition.

Three of the five members of the Commission, constituting a quorum for the transaction of business under § 1.7 of the Commission's Rules of Practice, participated in the decision in this matter, with two of the participating Commissioners concurring in the decision, including the opinion, findings and final order.

In support of its petition, respondent relies on the ruling of the court in *Flotill Products, Inc.*,[1] that an order of the Commis-

[1] *Flotill Products, Inc.* v. *Federal Trade Commission*, 358 F. 2d 224 (9th Cir. 1966), *affirmance upheld on rehearing*, (August 15, 1966).

sion must be supported by three members in order to constitute an enforceable order. Additionally, respondent contends that since the Commission's decision is not concurred in by three of its members, the Commission has failed to make the findings of fact and give the statement of reasons in support of its decision required by Section 8(b) of the Administrative Procedure Act.

The decision of the court in the *Flotill* case issued several months prior to the Commission's decision in this matter. Notwithstanding that decision, it has been, and is, the position of the Commission that three members constitute a quorum and that a majority of a quorum is sufficient for the transaction of business, including the making of valid findings, the assignment of reasons therefor, and the issuance of a valid order. Moreover, this position was sustained by the court in *Atlantic Refining Co.* v. *Federal Trade Commission,* 344 F. 2d 599 (6th Cir. 1965), prior to the *Flotill* decision and has more recently been upheld by the court of appeals in another circuit in *Emile M. Lapeyre* v. *Federal Trade Commission,* 366 F. 2d 117 (5th Cir. 1966). As the decision of the court in *Flotill* does not stand as the ultimate determination on this issue, the Commission adheres to its position, and respondent's petition is denied.

Commissioner MacIntyre not participating.

TRI-VALLEY PACKING ASSOCIATION

Dockets 7225, 7496. Order, Sept. 23, 1966

Order denying respondent's petition for reconsideration of the decision issued herein on page 223, on the grounds that it was not on notice that it had the burden of proving that its lower prices were available to nonfavored customers.

ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION

Respondent has filed a petition for reconsideration pursuant to § 3.25 of the Commission's Rules of Practice stating as ground therefor that the decision issued herein on July 28, 1966, page 223, raises new questions which it had no opportunity to argue before the Commission. Specifically, respondent contends that it was not apprised prior to the issuance of the Commission's opinion that it had the burden of proving that its lower prices were available to nonfavored customers. Respondent further argues that it was not proper for the Commission to con-

sider whether the proof offered by respondent in support of its meeting competition defense met the basic requirements of the *Staley* decision [1] because that issue had not been raised before it.

The Commission has carefully examined the record in this matter to determine whether respondent's petition relates to new questions raised by the decision or final order and has concluded that it does not. As to the first contention, the Commission did not hold that respondent had the burden of proving the availability of lower prices, but, to the contrary, sustained the hearing examiner's finding that ". . . irrespective of the question of who has the burden, counsel supporting the complaint has introduced clear and convincing evidence disclosing that the granted lower prices to the large chain purchasers located on 'California Street' were not available to the unfavored purchasers." (Initial Decision, p. 238.) Nor is there any basis for respondent's second contention. The hearing examiner interpreted the instructions of the 9th Circuit Court in its remand of this case as requiring a determination of the question whether respondent was engaged in meeting an equally low price of a competitor within the meaning of the proviso to Section 2(b) (Initial Decision, p. 225). In its appeal from the hearing examiner's rejection of its Section 2(b) defense on this issue respondent relied on *Staley* as a decision ". . . wherein the Supreme Court has established standards to test the sufficiency of evidence to establish the defense of meeting competition in good faith." [2]

Inasmuch as respondent's petition does not indicate that the Commission's decision or order raised new questions which respondent had no opportunity to argue,

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

Commissioner Elman dissenting.

THE CROWELL-COLLIER PUBLISHING COMPANY ET AL.

Docket 7751. Order and Opinion, Sept. 30, 1966

Order reopening proceedings and remanding case to hearing examiner for the taking of additional evidence and for him to certify record and findings.

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[1] *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

[2] Opening Brief on Appeal of Respondent Tri-Valley Packing Association, a corporation, p. 48.

DISSENTING OPINION

BY MACINTYRE, *Commissioner:*

I do not agree with the action of the majority providing, as it does, for the remand of this case. The proceeding has been too lengthy to this date. The complaint was issued in January 1960—nearly seven full years ago. The action by the majority insures that a substantial additional period will be added before the case can be terminated.

It seems to me that justice, not only for the respondents but for the public who has an interest in this proceeding, demands a decision as promptly and appropriately as possible. These prolonged proceedings somehow must be brought to an end. Is it justice to the respondents to have to indefinitely operate under the cloud of this litigation? After all this time, do they not have a right to an expeditious disposition of the charges against them? I think they do, and to me it is neither proper nor just to assign ths matter back to a hearing examiner for what will surely be a long, extended proceeding.

Fairness and due process are vital rights and should not be abridged. It is far more fundamental to the achievement of fairness and due process to provide these rights with equitable results to all concerned in substance rather than to pretend to be doing that in form. Excessive legalistic and technical form assertedly provided in the interests of fairness and due process may not enhance the substance of those rights and may well deny the substance of those rights to parties of interest in a proceeding such as this. For example, here the consuming public is vitally concerned and is entitled to an expeditious and appropriate conclusion of this matter. Any denial of the substance of those rights is also a denial of due process.

I suggest that the Commission could fairly determine the narrow issue posed by the majority without the lengthy proceeding here directed. The Commission could grant the respondents an opportunity for a hearing on this narrow issue without the necessity of a remand. Perhaps the issue could be resolved during a hearing of less than one day. The majority, however, will have none of this. Instead, here is a direction for a lengthy proceeding which will consume months of elapsed time.

The Commission at times has been criticized for its asserted inability to move and to get things done and the most scathing of this criticism has come from some of those at the Commission.

Too often one of the members of the Commission and others have complained that the Federal Trade Commission is a fit

article for a museum. Some of this criticism is directed against prolonged proceedings and ineffectiveness. To take part in this action of the majority is to help this criticism. I will not be so obliging.

I dissent.

NOTICE OF REMAND

Whereas, it appears that respondent P. F. Collier & Son Corporation, a wholly owned subsidiary of respondent Crowell-Collier Publishing Company, was dissolved at or about the end of December, 1960, subsequent to the issuance of the complaint herein, and that another wholly owned subsidiary of Crowell-Collier Publishing Company, namely, P. F. Collier, Inc., was organized by Crowell-Collier Publishing Company on or about January 1, 1961; and

Whereas, the Federal Trade Commission on September 30, 1966, issued its order reopening this proceeding and remanding it to the hearing examiner for the purpose, *inter alia*, of determining whether said P. F. Collier, Inc., a corporation with its principal offices located at 640 Fifth Avenue, New York, New York, is in fact the successor to respondent P. F. Collier & Son Corporation, continuing the same business enterprise in a new corporate form and thereby should be subject to an order should one be issued herein:

It is ordered, That a copy of said order and the accompanying Commission opinion be served upon P. F. Collier, Inc.;

It is further ordered, That said corporation be afforded the opportunity to participate in the taking of further evidence in this matter and presenting any evidence or argument which it may desire, in reply to the evidence and argument that may be introduced by counsel supporting the complaint.

ORDER REOPENING PROCEEDING AND REMANDING CASE TO HEARING EXAMINER*

The Commission having determined that this matter should be reopened to the extent set forth in the accompanying opinion [p. 1005 herein] and that determination of certain issues in this matter should be reserved until the hearings on remand have been completed:

It is ordered, That the proceeding be, and it hereby is, reopened for the limited purpose set forth in the accompanying opinion.

It is further ordered, That the matter be, and it hereby is,

*Now known as Crowell Collier and Macmillan, Inc.

remanded for further proceedings in accordance with the accompanying opinion.

It is further ordered, That the hearing examiner, upon completion of the said hearings, shall certify the record with his findings to the Commission for final disposition of the proceeding.

Commissioner MacIntyre dissented and has filed a dissenting opinion. Commissioner Elman also dissents.

MONTGOMERY WARD & CO., INCORPORATED

Docket 8617. Order, Sept. 30, 1966

Order denying respondent's petition for reconsideration of the Commission's decision and order dated July 26, 1966, page 52 herein, on the ground that the Commission failed to consider respondent's argument that the proceeding was not in the public interest.

ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION

Respondent Montgomery Ward & Co., Incorporated, has filed a petition pursuant to Sections 3.25 and 3.27 of the Commission's Rules of Practice for reconsideration of the Commission's decision and order herein dated July 26, 1966, page 52. In support of this petition respondent contends that the Commission in its opinion failed to consider respondent's argument that the proceeding was not in the "public interest" or to take into account certain admissions of fact allegedly made by complaint counsel.

Rule 3.25 requires that any petition filed thereunder "must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." Both issues which respondent now urges were not considered by the Commission were in fact raised by respondent during the hearing and argued at length by respondent in its brief on this appeal (pp. 1–2; 24–31) and in oral argument (Tr. 10–11, 21–22, 26).

Respondent's first argument that the proceeding is not in the public interest is based on its claim that respondent's alleged voluntary compliance with the Commission's Guarantee Guides makes the issuance of an order unnecessary. The authorities are legion that the Commission may in its discretion, as it has in this case, determine that the public interest requires that a cease and desist order must issue to ensure that a practice illegally engaged in in the past will not be resumed in the future by respondent once it has shaken the Commission's "hand from its shoulder." *Sears, Roebuck & Co.* v. *F.T.C.,* 258 F. 307, 312

(7th Cir. 1919); *Spencer Gifts, Inc.* v. *F.T.C.*, 302 F. 2d 267 (3d Cir. 1962); *Clinton Watch Co.* v. *F.T.C.*, 291 F. 2d 838 (7th Cir. 1961); *cert. denied*, 368 U.S. 912 (1962).

Respondent's second contention is that the Commission failed to consider complaint counsel's alleged admission that respondent had a policy that it would honor guarantees as advertised regardless of the terms of the actual guarantees themselves. The Commission's opinion made it clear, however, that the crucial question in the case was not whether such a policy existed but whether the existence of such a policy dissipated the deception inherent in respondent's practices. As we stated:

> Thus, irrespective of what Wards' policy may in fact be in honoring guarantees, Wards' practice here of having advertised a broad guarantee and furnishing the customer with a limited guarantee is deceptive and has the capacity to deceive regardless of whether or not respondent stands ready to perform as advertised (Op., p. 72).

Both of these issues were raised by respondent and considered by the Commission. There is, therefore, no basis for respondent's petition, and it is hereby

Ordered, That respondent's petition be, and it hereby is, denied Commissioner Elman dissenting.

ASSOCIATED MERCHANDISING CORPORATION ET AL

Docket 8651. Order and Opinion, Oct. 13, 1966

Order denying oral argument of complaint counsel and directing the respondents to commence their pretrial submissions as ordered in Prehearing Order No. 1.

OPINION OF THE COMMISSION

The Commission, on March 23, 1966, granted permission to complaint counsel to file an interlocutory appeal from the hearing examiner's order of March 7, 1966, denying their motion to implement Prehearing Order No. 1 by requiring respondents to commence their part of the pretrial to expedite proceedings. Complaint counsel and respondents have filed their respective briefs in support of, and in opposition to, the appeal. Respondents, on April 11, 1966, requested that the Commission hear oral argument in the matter.

Prehearing Order No. 1, issued January 25, 1965, requires complaint counsel, within 45 days of the date of that order, to file with the examiner and to serve on the other parties various disclosures and requests covering their case, including a list

setting forth each illegal price discrimination, allowance, discount, etc., intended to be established at the hearings and the names and addresses of the resources, a list of the documents and exhibits to be introduced, a list of witnesses to be called, requests for admissions, proposed stipulations, requests for production of documents and other items. The prehearing order requires respondents, within 30 days after the completion by complaint counsel of their part of the order, to file with the examiner and serve on complaint counsel their pretrial submission, which is to include, among other things, a list of documents and exhibits they intend to introduce, a list of witnesses, and requests for admissions and for the production of documents. The prehearing order further provides for additional procedures upon the completion of the respective disclosures.

Complaint counsel have completed their portion of the pretrial as required under the examiner's Prehearing Order No. 1, with the exception of their failure to obtain—and to make further submissions, if any, based thereon—certain documents in the respondents' possession, which the hearing examiner, on August 12, 1965, ordered respondents to produce.[1]

Complaint counsel's argument in support of their motion to the examiner, and to the Commissioner on this appeal, is that they have completed their portion of the pretrial to the extent that they are able, excepting only that area covering documents which respondents have in their possession and have not produced, and that therefore there is no reason why respondents should not be directed to commence their pretrial submissions at this time. Respondents' answer to the motion and the substance of their brief on this appeal is that complaint counsel must bear the responsibility for the delay because they assertedly are seeking to continue the investigation. Respondents make other arguments such as that requiring respondents to commence their pretrial submissions would result in a disorganized and ineffective discovery procedure and would deny them a fair hearing and due process.

The hearing examiner, on March 7, 1966, denied complaint counsel's motion to implement Prehearing Order No. 1, giving his reasons in a six-page order and opinion. In the examiner's

[1] The respondents' failure to comply with the hearing examiner's order of August 12, 1965 ordering the production of certain documents, was certified by the examiner to the Commission December 10, 1965. Thereafter, the United States Attorney, pursuant to the Commission's request, moved the United States District Court for the Southern District of New York for a court order directing respondents to comply with the examiner's order. Such motion is now pending in that court for decision [256 F. Supp. 318 (1966), 261 F. Supp. 553 (1966) (8 S. & D. 338, 382)].

view, the scheduling of the pretrial submissions is tied in with his ruling on respondents' earlier motion for a more definite statement. He denied that motion but in so doing stated that he would order complete disclosures by complaint counsel of all of the specific acts and practices relied upon prior to the commencement of the hearings in the matter, with sufficient time granted respondents to prepare their defense. He now feels that to require respondents to make their submissions while complaint counsel have not completed their discovery would result in piecemeal and endless submission and counter-submission. The examiner further states that he has "serious doubts" about whether the action requested would provide respondents with a fair hearing and due process.

So far as pretrial submissions made to date are concerned, complaint counsel state they have furnished respondents with detailed tabulations setting forth all purchases from ten suppliers and showing the names of the unfavored customers, the precise items purchased, the date, the price and the amount of discrimination involved. In addition, they state that respondents have been given descriptions of all documents and exhibits that complaint counsel will rely upon and the opportunity to examine the same and that they have been supplied with a schedule showing the names and addresses of all Government witnesses, with a description as to the transactions about which they will testify. Accordingly, it appears that respondents have been provided with complete discovery, with the exception of whatever further discovery may be involved in connection with the documents not yet produced by them.

There is no reason that we can see why the examiner's objective (expressed in his order of March 7, 1966) of assuring that respondents obtain complete disclosures by complaint counsel of all specific acts and practices relied upon prior to the commencement of the hearings in this matter, with sufficient time granted respondents to prepare their defense thereto, cannot be achieved in this proceeding even though respondents are now required to go ahead with their pretrial procedures. There has never been any question that discovery proceedings can be engaged in at intervals if the circumstances so demand. Prehearing procedures, if they are ever to serve their purpose fully and effectively, must be flexible.[2]

[2] The courts have not adopted a hard and fast rule on the priority of discovery submittals. In *Sturdevant* v. *Sears, Roebuck & Company*, 32 F.R.D. 426, 427 (W.D. Mo. 1963), the court ruled: "Only in unusual cases should the priority rule be enforced to permit one party to complete all discovery before the other party may commence discovery proceedings." See also *Caldwell-Clements, Inc.* v. *McGraw Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y. 1951).

One of respondents' arguments, as indicated, is that to require them to start their pretrial submissions prior to the completion of complaint counsel's pretrial procedures would result in a piecemeal approach and would not expedite the ultimate progress of the proceeding. We do not agree that this would be so. It is quite possible that in the interim period a great deal of respondents' pretrial discovery and submissions can be disposed of. Among the items respondents have indicated they will, or might, ask for on discovery will be the depositions of the ten resources on which complaint counsel has made submittals, depositions of the alleged unfavored customers, and depositions on the 200 resources listed in Appendix A of complaint counsel's submission. Thus, respondents' discovery needs are sufficiently broad so that duplication of effort, if any, will no doubt be relatively small. A great deal can probably be accomplished without necessarily covering areas which will be affected by later possible submissions. We are convinced, moreover, that such duplication as might occur will be a minor matter compared to the delay involved in an indefinite stay of proceedings.

Respondents further insist that to grant the request of complaint counsel would be to deviate from the requirements of the Commission's Rules of Practice and constitute a violation of respondents' due process rights. However, nothing in the Commission's Rules requires a staggered discovery, and it appears that in some instances it would be entirely appropriate to have discovery on a concurrent basis. Respondents cannot be disadvantaged, surprised or hurt in any way by information or data which complaint counsel does not have and at this time cannot show. At such time as this material will be available to complaint counsel, if it does become available, appropriate provision can be made for notice to respondents and for counter-discovery. *Cf. Texas Industries, Inc.*, Docket No. 8656 (order issued October 8, 1965) [68 F.T.C. 1195], where the Commission indicated that, if necessary, additional discovery could be made by respondent therein even after complaint counsel's case had been put in. In the circumstances, respondents' claim that they would be denied due process is unjustified.

There is great public interest in bringing administrative proceedings to an early conclusion on the merits. We believe that the examiner has exceeded his discretion in the circumstances here shown where the effect of his ruling is to indefinitely stay proceedings. This case, while still in its pretrial stages, is stalled on dead center and it is possible that it will be suspended for a lengthy period unless respondents proceed at this time with

their pretrial discovery procedures. If they do so proceed, we do not see, nor has it been shown, that respondents will be harmed in their defense to this proceeding or that their rights under the Commission's Rules or under the law will be in any way abridged. Moreover, we believe that to begin now on respondents' pretrial submissions will materially expedite the disposition of this proceeding. Accordingly, complaint counsel's appeal is granted. We will issue an order herewith, directing the examiner to issue an appropriate direction to the respondents to begin their pretrial discovery.

ORDER DENYING ORAL ARGUMENT AND DIRECTING COMMENCEMENT OF PRETRIAL PROCEDURE

This matter having come on to be heard upon the interlocutory appeal of complaint counsel from the hearing examiner's order of March 7, 1966, denying their motion to implement Prehearing Order No. 1 by requiring respondents to commence their part of the pretrial procedure to expedite proceedings, the respondents' answer in opposition thereto, and upon respondents' request of April 11, 1966, for oral argument on such appeal; and

The Commission, for the reasons stated in the accompanying opinion, having granted complaint counsel's appeal and having further determined that the request for oral argument should be denied:

It is ordered, That the examiner, making such provisions as he deems necessary to assure respondents the opportunity for discovery on subsequent submittals by complaint counsel, if any, resulting from delayed discovery, direct the respondents to commence, as soon as possible, their pretrial submissions and procedures as ordered in Prehearing Order No. 1.

It is further ordered, That respondents' request for oral argument on the interlocutory appeal of complaint counsel be, and it hereby is, denied.

Commissioner Elman, seeing no reason for the Commission to interfere with the hearing examiner's intelligent and responsible handling of prehearing discovery procedures, dissents.

ROYAL CONSTRUCTION COMPANY ET AL.

Docket 8690. Order, Oct. 17, 1966

Order granting respondents' request to hold hearings in Washington, D.C., and Roanoke, Va., but denying its request for access to certain documents.

ORDER GRANTING LEAVE TO HOLD HEARINGS IN MORE THAN ONE PLACE AND DENYING RESPONDENT'S REQUEST FOR ACCESS TO DOCUMENTS

This matter is before the Commission upon two certifications of the hearing examiner. The first is a certification of necessity filed October 4, 1966, submitting to the Commission the respondents' request for hearings to be held in Washington, D.C. in addition to those scheduled for Roanoke, Virginia. This request will be granted.

The second certification, filed October 7, 1966, presents to the Commission respondents' motion for the production and disclosure of documents. Respondents have requested that complaint counsel be ordered to submit for examination and copying "all interviews and responses to questionnaires which were procured in the course of the investigation of the respondents." The hearing examiner, in certifying this motion, states that he interprets the request as embracing only persons other than witnesses scheduled to testify in this proceeding. He additionally points out that to the extent the request may be construed as relating to individuals who will testify in the proceeding the motion has been mooted by complaint counsel's action (1) in turning over to the respondents at the prehearing conference on October 8, 1966, questionnaire responses submitted by such persons and (2) in producing to the examiner, on an *in camera* basis, the interview reports relating to such witnesses, with the understanding that these would be examined by the examiner for a determination as to whether or not they are producible under the Commission's pertinent rulings.

The examiner, having considered the matter, concluded, *inter alia,* that the respondents are simply seeking the right to explore the files of complaint counsel for the purpose of finding out what evidence such files may contain and that they have made no showing that the failure to grant access to the documents and information requested will deprive them of their right to a full and fair hearing or that the granting of the application would be in the public interest. He recommends that their motion be denied.

The request herein for the production of documents is one to be resolved under § 1.134 of the Commission's Rules of Practice relating to the release of confidential information, which rule requires a showing of good cause. This means there must be a showing of real or actual need. *Viviano Macaroni Company,* Docket No. 8666 (order issued March 9, 1966) [69 F.T.C. 1104].

See also *Graber Manufacturing Company, Inc.*, Docket No. 8038 (order issued December 13, 1965) [68 F.T.C. 1235].

Respondents, as we understand their motion, seek access to the documents requested for the purpose of determining whether or not some would be favorable to them. Their main interest appears to be with evidence, if any, as to satisfied customers. However, if misrepresentations in certain instances are proved, the fact that there are satisfied customers in other instances would be entirely irrelevant. *Basic Foods, Inc.* v. *Federal Trade Commission*, 276 F. 2d 718–721 (7th Cir. 1960). Clearly, this is not a sufficient justification and respondents have not otherwise made a showing of good cause as § 1.134 requires. Their request for the production of documents will be denied. Accordingly,

It is ordered, That the request to hold hearings in Roanoke, Virginia and Washington, D.C. be, and it hereby is, granted, subject to the conditions set forth in the certificate of necessity.

It is further ordered, That respondents' request for access to confidential documents in the Commission's files be, and it hereby is, denied.

Commissioner Elman not concurring.

DEVCON CORPORATION ET AL.

Docket C–607. Order and Statements, Oct. 17, 1966

Order denying request of respondents that hearings on proposed modification of cease and desist order of Oct. 11, 1963, 63 F.T.C. 1034, be deferred on the ground that Commission's extension of the effective date of its Guides Against Deceptive Labeling and Advertising of Adhesive Compositions creates uncertainty in this area of the law.

DISSENTING STATEMENT

OCTOBER 17, 1966

By ELMAN, *Commissioner:*

Re: Guides Against Deceptive Labeling and Advertising of Adhesive Compositions

These Guides were prepared without the knowledge or participation of industry members, and were promulgated by the Commission on June 30, 1965. Thereafter, a number of industry members requested the Commission to suspend and amend the Guides, and the Commission extended their effective date to

September 30, 1966. After a private meeting with counsel for certain industry members, the Commission has now decided not to amend the Guides. In view of (1) "the unpleasant legal consequences" which failure to conform with these Guides would entail for industry members, and (2) the assistance which the Commission would thereby receive in formulating useful and effective rules, I would set this matter down for an early public hearing. I would afford all industry members and the public an opportunity to be heard before these Guides—which represent an exercise of the Commission's rule-making function—become effective.

Although a formal adjudicatory-type hearing is not required, all interested persons should be given an opportunity to express their views on a proposed rule before it is finally adopted. Apart from considerations of fairness, their participation in the rule-making process is likely to assist an agency in formulating a practical and sound rule. Rule-making, as the Court of Appeals for the District of Columbia Circuit recently observed, "is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy * * *." (*American Airlines, Inc.* v. *Civil Aeronautics Board,* 359 F. 2d 624, 629.) Rule-making procedures should be designed to secure respect for, and observance of, the rule by those to whom it is directed. We should not deny a hearing to industry members merely because it is not a constitutional or statutory prerequisite. If a public hearing will serve a useful purpose in making a rule more effective, as I believe it would in this instance, it should not matter that a hearing may not be required by law.

Where industry guidance takes the form, as here, of issuing administrative rules, the desirability of a hearing is not lessened by the circumstance that the rules are not "binding" or mandatory in the sense that they have the same legal force and effect as express statutory commands or prohibitions. These Guides certainly have no such legal status. This Commission does not, and has never claimed to, possess authority to promulgate such rules under the Federal Trade Commission Act. Indeed, administrative rules having such "legislative" or "statutory" status are comparatively rare. Most rules issued by federal administrative agencies follow the classic pattern of the Chain Broadcasting Regulations issued by the Federal Communications Commission in 1941, and which were the basis of the leading decisions of the Supreme Court in the field of administrative rule-making, *Columbia Broadcasting System* v. *United States,* 316 U.S. 407; *National Broadcasting Co.* v. *United States,* 319 U.S. 190.

The FCC's Chain Broadcasting Regulations were also "merely advisory" in the sense that they were not self-executing but required subsequnt administrative action to determine their applicability to particular cases. As Mr. Chief Justice Stone stated,

> Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. (*Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 418, 422.)

As the Supreme Court was careful to point out, the FCC "did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 225; *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202–205. The same is true of the rules issued by the Federal Trade Commission. In each case that comes before this Commission where a violation of law is charged, we may not treat violation of a rule as a *per se* violation of law. We must still exercise an ultimate judgment whether the particular acts or practices, as found on the record, constitute a violation of the Federal Trade Commission Act. But this does not mean that the rule is any less valid or effective as a rule. Although a substantive rule issued by the Federal Trade Commission is neither a statutory prohibition nor an adjudicatory injunction or order, it "is addressed to and sets a standard of conduct for all to whom its terms apply," it "operates as such in advance of the imposition of sanctions upon any particular individual," and it should be anticipated that businessmen will "conform their conduct" to the rule "so as to avoid the unpleasant legal consequences which failure to conform entails." The Commission's objective, like that of industry members, should be to achieve compliance with the law without litigation or controversy. That objective is furthered by administrative rule-making. But the advantages of rule-making in achieving fair and effective admin-

istration should not be lost by an agency's failure to make full use of available rule-making procedures. See, generally, Shapiro, *Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 Harv. L. Rev. 921; Fuchs, *Procedure in Administrative Rule-Making,* 52 Harv. L. Rev. 259. The most important of these procedures is the elicitation of the views of the public and all industry members affected by a proposed rule.

Throughout its history this Commission has issued substantive rules defining and particularizing the requirements of the Federal Trade Commission Act as applied to specific trade practices and prescribing standards of conduct for businessmen to whom the rules apply. While such rules are not self-executing and violation of them is not a *per se* violation of law, they are still an exercise of the administrative rule-making function. Whatever their nomenclature—"trade regulation rules," "trade practice rules," or "guides"—they express the Commission's considered determination, based on facts of which it has knowledge, of the substantive requirements of the Act as applied to the practices or conduct involved. As such, these rules or guides may be—and frequently are—relied upon by the Commission and the courts in subsequent adjudication. See, for example, *Prima Products, Inc.* v. *F.T.C.,* 209 F. 2d 405 (2d Cir. 1954); *Northern Feather Works, Inc.* v. *F.T.C.,* 234 F. 2d 335 (3d Cir. 1956); *Buchwalter* v. *F.T.C.,* 235 F. 2d 344 (2d Cir. 1956); *Lazar* v. *F.T.C.,* 240 F. 2d 176 (7th Cir. 1957); *Burton-Dixie Corp.* v. *F.T.C.,* 240 F. 2d 166 (7th Cir. 1957); *Vanity Fair Paper Mills, Inc.* v. *F.T.C.,* 311 F. 2d 480 (2d Cir. 1962); *Helbros Watch Co.* v. *F.T.C.,* 310 F. 2d 868, 869, n. 3 (D.C. Cir. 1962); *Heavenly Creations, Inc.* v. *F.T.C.,* 339 F. 2d 7, 9 (2d Cir. 1964); *Gimbel Bros., Inc.,* 61 F.T.C. 1051, 1072–73; Comment, *Trade Rules and Trade Conferences: The FTC and Business Attack Deceptive Practices, Unfair Competition, and Antitrust Violations,* 62 Yale L. J. 912, 935, 941–43 (1953); Comment, *FTC Revised Guides Against Deceptive Pricing Limit Manufacturer Liability,* 39 N.Y.U. L. Rev. 884 (1964); Statement of Basis and Purpose of Trade Regulation Rule on Labeling of Cigarettes, 29 Fed. Reg. 8325, 8364–73 (1964).

To be sure, the Administrative Procedure Act imposes no mandatory requirement of notice and hearing with respect to "interpretative rules" and "general statements of policy." Sec. 4(a), 5 U.S.C. 1003(a). The scope of these categories is not well-defined, however, and in marginal cases an agency should resolve the doubt in favor of giving the public and industry

members an opportunity to comment on a proposed rule before it is finally adopted.

As their text shows, these Guides express the reasoned judgment of the Commission, based on evidence, as to the legality of certain trade names and representations used generally in the industry. The Guides recite that they were adopted by the Commission to assist manufacturers "in avoiding deceptive advertising and labeling representations concerning their products and in the interest of protecting the public from such deception." Continuing, the Guides state: "Consumers have a right to expect that products are as represented and it appears that claims made for products of this industry have resulted in widespread consumer deception. A Commission investigation of practices in the industry and tests of industry products disclosed that many adhesive compounds were being misrepresented both as to their contents and capabilities. In many instances the descriptive name of a product was itself misleading."

Guide 1, for example, is cast in the same terms as an industry-wide cease and desist order requiring the excision of established trade and brand names. It reads as follows:

> Products which do not, after application, have the same physical and chemical properties of metal, or of a particular represented metal, shall not be represented as metal or as having the intrinsic characteristics of metal, or of the particular metal indicated. Thus, neither the term "metal" nor the terms "iron," "steel," "aluminum" or other names of metal shall be used to designate in brand names or otherwise any product of the kind herein described. While the Guide does not prohibit truthful representations in advertising and labeling of the percentage of content of any metallic substances in such products (e.g., contains 20% powdered aluminum) it does prohibit with respect thereto the use of representations such as, but not limited to, the following:
>
> "Plastic Steel"
> "Dries to steel"
> "Hardens into metal"
> "Steel in paste form"
> "Liquid aluminum"
> "Instant aluminum"
> "Real metallic putty"
> "Fluid Steel"

These requirements and prohibitions of the Guides, and the terms in which they are expressed, cannot be dismissed as "merely advisory." The only differences between these Guides and an order to cease and desist are that (1) the Guides are addressed to industry members at large, while an order would be directed to named parties; (2) the Guides are issued *ex parte* while an order would be based on a record made in a formal

adjudicatory proceeding; and (3) violation of the Guides requires further administrative proceedings before sanctions may be imposed, while violation of an order is immediately subject to judicial penalties.

The Guides expressly put industry members on notice that violations of the Guides will be treated as violations of Section 5 of the Federal Trade Commission Act against which the Commission will proceed:

> The Guides prohibit all the deceptive representations made for products of this industry as disclosed by the investigation and tests conducted and by other available pertinent information. The Commission concludes that the practices proscribed by the Guides are violative of Section 5 of the Federal Trade Commission Act, and that the public interest in preventing their use is specific and substantial.
>
> The Guides are intended to encourage voluntary compliance with the law by those whose practices are subject to the jurisdiction of the Commission. Proceedings to enforce the requirements of law set forth in the Guides may be brought under the Federal Trade Commission Act (15 U.S.C., Secs. 41-58).

In short, the Guides reflect the Commission's considered determination of

(1) questions of fact (the meaning of the representations made to the public, and whether such representations are false and misleading);

(2) questions of law (whether such representations violate Section 5 of the Federal Trade Commission Act);

(3) questions of administrative policy (whether it is in the public interest to bring Section 5 (b) proceedings against persons violating the Guides); and

(4) questions of remedy (whether excision of established trade and brand names is required).

An industry member who fails to conform his conduct to the requirements of these Guides is not merely put on notice that the Commission will proceed against him; he also knows that on each of the above questions, as it may arise in subsequent adjudication, the Commission has already reached a considered determination. Although the Guides are characterized by the Commission as "merely advisory," they are nonetheless substantive rules. Even though—like the FCC's Chain Broadcasting Regulations—they do not inflexibly bind the Commission to their express provisions, they represent "a valid exercise of the rule-making power [which] is addressed to and sets a standard of conduct for all to whom its terms apply." A businessman cannot lightly ignore or disregard such "advice" from a regulatory

agency. Industry members cannot afford to treat the prohibitions contained in these Guides as having no more substantive legal significance or effect than a press release.

The Commission has a choice here between (1) denying a hearing, and treating these Guides as "merely advisory" and having no force or effect whatsoever in subsequent adjudication, or (2) granting a hearing, and treating the Guides as a valid exercise of the rule-making function. The latter course would seem to me to be clearly preferable. It would result in the issuance of Guides more likely to command industry respect and observance and to achieve a greater degree of voluntary compliance with the law. Perhaps it is necessary to downgrade the status of the Guides in order to justify the refusal to hold a hearing. In the long run, however, this seems to me to weaken, rather than strengthen, the Commission's industry guidance program. I think it is too high a price to pay in order to avoid holding a public hearing here. Even if the Guides are nothing more than Commission "advice" to industry members—which they may freely follow or disregard, as they see fit—the advice we give them would probably be wiser and better informed if a hearing were to be held.

STATEMENT

OCTOBER 17, 1966

By REILLY, *Commissioner:*

Re: Guides Against Deceptive Labeling and Advertising of Adhesive Compositions

The dissenting Commissioner's statement advances the argument that these Guides are an exercise of the administrative rule-making function and should not be promulgated without notice and opportunity to be heard being afforded the industry and public. It is my position, and I believe that of the Commission majority, that these Guides are interpretive advice to the industry as to what the Commission considers is industry conduct which might violate Section 5 of the Federal Trade Commission Act; that they have no controlling force whatever in subsequent adjudication; that the Commission has so stated in unequivocal terms both as to these Guides and as to its Guides generally; that they thereby fall within the exemption of Section 2(c) of the Administrative Procedure Act whereby notice and hearing are not required and that to upgrade such interpretive rules to the status of binding substantive rules is to parade a sheep in wolf's clothing.

For years critics both within and without the Commission have accused it of leaving the businessman in the dark as to what is expected of him and then gleefully pouncing when he stumbles into a violation. The Commission has established advisory machinery designed to correct this. It has carefully differentiated these advisory procedures from more formal rule-making activities and has done everything but shout from the rooftops to convey to those affected that the Guides and advisory opinions are purely advisory, do not seek to bind and are not therefore substantive rules within the meaning of the Administrative Procedure Act. Now the Commission is told that despite its assertion to the contrary this creature of its own making is not what it clearly intended it to be.

Over the years the Commission has painstakingly developed a hierarchy of substantive and interpretive rules designed to procure the widest possible compliance with the statutes it administers. They consist, in ascending order of persuasive effect, of press releases, advisory opinions, guides, trade practice rules and trade regulation rules.

In the exercise of its administrative responsibilities and weighing in each case the necessity for economy, speed, the gravity and prevalence of the practices involved and the immediacy of the need for deterrents, or alternatively the sufficiency of advice, the Commission must make a judgment as to which of these devices is appropriate in a given situation. Here it determined that an advisory statement would provide sufficient guidance and it chose the Guides here involved.

That Guides are advisory and nothing more is obvious from the way they have been established and treated by the Commission since the first Guides were issued in 1958.

Initially conceived as communications of Commission policy to the Commission's staff, they have subsequently been communicated to the industry for its enlightenment and assistance. They are *ex parte* in nature although in some instances the Commission has found it helpful to solicit industry participation in their preparation.

Anyone desiring to assay their character, that is, whether they are substantive or interpretive, would be well advised to examine the Commission's treatment of them rather than emphasize the incidental prohibitory form of their expression. Form, in my opinion, should never be elevated above substance.

First, Guides have consistently been treated by the Commission as not requiring public or industry participation because they are interpretive rules. In recent years the Commission has

promulgated without notice and hearing, and without the dissent of anyone presently on the Commission, Guides dealing with debt collection deception, mail-order insurance, deceptive use of the word "mill," advertising of radiation monitoring instruments, advertising of shell homes and the labeling and advertising of shoe content.

On June 30, 1965, the Commission adopted the adhesive composition Guides here involved without notice and hearing and again without dissent.

In the Commission's General Procedures and Rules of Practice, guides, along with advisory opinions, are set forth under Subpart E—Industry Guidance, not under Subpart F—Rules and Rulemaking. Section 1.55 of the Commission's Rules describes guides and their purpose:

> Guides are administrative interpretations of laws administered by the Commission for the use of the Commission's staff and guidance of businessmen in evaluating certain types of practices.

Nowhere does the Commission state or intimate that they are for any purpose other than information and guidance. They have never been accorded weight in the disposition of subsequent proceedings. At most they have been alluded to only to the extent that they were indicative of the Commission's attitude or interpretation of its statutes. Certainly they have never been given substantive effect. *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480, 485 (2d Cir. 1962); *Heavenly Creations, Inc.* v. *Federal Trade Commission*, 339 F. 2d 7, 9 (2d Cir. 1964).

Moreover, the Commission has said in reference to the very Guides here involved—

> Guides are designed to inform. They are persuasive or compulsive only according to the subjective response of industry members. They are not injunctive and are not of themselves an adequate instrument for procuring compliance with the statutes administered by the Commission. *Devcon Corporation, et al.*, Docket No. C-607, Order and Opinion Denying Motion to Suspend, January 19, 1966 [69 F.T.C. 1092, 1093].

The Commission has repeatedly described Guides as administrative interpretations having no force or effect as substantive law. *Arnold Constable Corporation*, 58 F.T.C. 49, 62 (1961); *Gimbel Brothers, Inc.*, 61 F.T.C. 1051, 1073 (1962).

In the statements of purpose in particular guides adopted by the Commission it is repeatedly set forth that they are administrative interpretations designed to inform and assist the businessman and to encourage voluntary compliance.

Such statements are designed to convey, and since 1958 have been apparently successful in conveying, the idea that they have no binding force, with the result that anyone choosing to act counter to the announced Commission interpretation can be held accountable only after formal complaint and hearings conducted pursuant to the requirements of the Administrative Procedure Act.

Moreover, it seems to me it does the Commission a disservice to suggest that in promulgating these Guides it acted in disregard of industry interests and arbitrarily imposed its will on the industry on the basis of inadequate facts which should have been subjected to industry scrutiny and criticism. The fact is these Guides were adopted only after 25 investigations of individual firms in the course of which industry members had ample opportunity to furnish the Commission with whatever data they felt might assist the Commission in addressing itself to industry problems.

Furthermore, the Commission had the benefit of scientific analysis by the Bureau of Standards.

Finally, although there was no formal notice and hearing for industry members prior to adoption of the Guides on June 30, 1965, the Commission, responsive to industry desires, deferred the effective date of these Guides to September 30, 1966, and granted industry representatives speaking for the principal firms, by whom observance of the Guides will be most keenly felt, an opportunity to file written submissions commenting on the Guides. Furthermore, the same industry representatives were granted opportunity to appear personally before the Commission for purposes of commenting on the Guides as adopted.

I fail to see any irregularity in the Commission's handling of this matter.

Commissioners Dixon, MacIntyre and Jones have authorized me to state that they join in this statement.

STATEMENT

OCTOBER 17, 1966

By MACINTYRE, *Commissioner:*

In re: Guides Against Deceptive Labeling and Advertising of Adhesive Compositions

In our effort to avoid confusion regarding this situation we should keep in mind the problem presented. Here counsel for a party requested "An *Advisory Opinion,* pursuant to Rule 1.51 of

the Commission's General Procedures, as to the lawfulness of proposed revised labels." It was indicated that the labels were expected to be attached to adhesive compositions offered for sale. Previously a statement on "Guides" had been distributed by the Commission reflecting the Commission's interpretation of applicable law to deceptive practices in the sale of adhesive compositions. In that connection the Commission has made it clear that it "considers these 'Guides' to be merely advisory."

In response to the request "for an Advisory Opinion, pursuant to Rule 1.51 of the Commission's General Procedures, as to the lawfulness of proposed revised labels," the Commission advised that the labels submitted would appear to be inconsistent with the advice set forth in the Guides and therefore inconsistent with the requirements of the law regarding the use of deceptive acts and practices. The recipient of this advice, of course, is free to disregard it. If in disregard of this advice, deceptive acts and practices should be used and brought to the attention of the Commission, the probabilities are that it would have reason to believe that Section 5 of the Federal Trade Commission Act was violated in that respect and perhaps issue a complaint to that effect. If so, the person charged with any wrongdoing would be provided with an opportunity for a hearing for the purpose of demonstrating that the challenged conduct was not deceptive and was not violative of Section 5 of the Federal Trade Commission Act.

Obviously no provision of the Constitution, of statutory law or rule of fairness in or remotely related to due process requires a hearing at this time on the question of whether the Commission provided faulty advice in its Advisory Opinion or in its Guides. To think otherwise would blur distinguishing requirements applicable to utterances and actions by government agencies and government officials and would promote confusion regarding provisions of law making distinctions in the requirements applicable to one utterance or action when compared with other utterances or actions.

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580
OFFICE OF THE SECRETARY

October 17, 1966

Robert L. Wald, Esquire,
Wm. Warfield Ross, Esquire,
Wald, Harkrader & Rockefeller,
1225 Nineteenth Street, N.W.,
Washington, D.C. 20036.

Re: Guides Against Deceptive Labeling and Advertising of Adhesive Compositions.

Dear Sirs:

The Commission has received and duly considered your letter of June 8, 1966, concerning the Guides Against Deceptive Labeling and Advertising of Adhesive Compositions, the accompanying scientific and engineering data relating to metal-filled resin compounds, and your request on behalf of the Devcon Corporation, Magic American Chemical Corp., Marson Corp., Ross Chemical & Manufacturing Company, and Woodhill Chemical Sales Corp. for an advisory opinion as to the propriety of two proposed labels for adhesive products.

You are advised that the subject Guides reflect the Commission's interpretation of applicable legal requirements and no change in such Guides is deemed to be warranted by the material you submitted.

The Commission is of the opinion that the labels submitted are inconsistent with applicable provisions of the Guides. You are hereby further informed that although these guides are cast in the language of express prohibitions, the Commission considers these guides to be merely advisory.

By direction of the Commission. Commissioner Elman dissented and his dissenting statement is attached. Commissioner Reilly has filed the attached statement, joined in by Commissioners Dixon, MacIntyre and Jones. Commissioner MacIntyre's separate statement is attached.

/s/Joseph W. Shea
Joseph W. Shea,
Secretary.

Enclosures.

ORDER RULING ON HEARING EXAMINER'S CERTIFICATION

By order of April 7, 1966, the Commission directed that this matter be assigned to a hearing examiner for purposes of re-

ceiving evidence on the question whether the Commission's cease and desist order of October 11, 1963 [63 F.T.C. 1034], should not be modified in accordance with the Commission's show cause order dated October 25, 1965, so that the proscription of the order is directed against misrepresentation of the applied properties of the products in question rather than the metallic content thereof, and

The hearing examiner on May 20, 1966, having pursuant to § 3.6(a) of the Commission's Rules certified to the Commission respondents' motion to defer hearings filed May 6, 1966, and

The grounds for said motion being that the Commission having extended the effective date of the Guides Against Deceptive Labeling and Advertising of Adhesive Compositions to September 30, 1966, and the Guides having an important bearing on the factual issues in this case, and the fact that the Commission extended the effective date of the Guides suggests a possibility that the Guides may be rescinded or modified with a consequent effect upon the issues raised in the hearings herein, and

The Commission now having determined that the effective date of said Guides will not be further altered and neither rescission nor modification is contemplated.

It is ordered, That the motion of respondents to defer hearings filed May 6, 1966, and certified by the hearing examiner on May 20, 1966, be, and it hereby is, denied.

Commissioner Elman dissented and has filed a dissenting statement. Commissioner Reilly has filed the attached statement, joined in by Commissioners Dixon, MacIntyre and Jones. Commissioner MacIntyre has filed the attached separate statement.

MISSISSIPPI RIVER FUEL CORPORATION

Docket 8657. Order, Oct. 21, 1966

Order staying further proceedings before hearing examiner until further order and granting each counsel time to submit briefs on the question of the alleged unfairness of conducting legislative-type hearings while adjudicative proceedings are pending.

ORDER PROVIDING FOR CONSIDERATION AND DETERMINATION OF RESPONDENT'S MOTION TO VACATE THE COMPLAINT, ETC.

In this proceeding, in which complaint issued on January 22, 1965, respondent filed a motion before the hearing examiner on October 11, 1966, "to vacate complaint or postpone hearing pending further direction of the Commission." On October 12, 1966,

the examiner certified such motion to the Commission under Section 3.6(a) of the Commission's Rules of Practice. Respondent's motion presents questions similar to those raised in *Lehigh Portland Cement Company,* Docket No. 8680, and *Marquette Cement Manufacturing Company,* Docket No. 8685, relating to alleged unfairness resulting from the conduct of legislative-type hearings while adjudicative proceedings are pending. The Commission believes that the same procedure should be followed here as in those cases. Accordingly,

It is ordered, That:

(1) Respondent shall have 30 days from the date of this order in which to file a brief in support of its motion; and upon the filing of such brief by respondent, complaint counsel shall have 30 days in which to file an answering brief. The commission will thereafter determine whether, and when, it desires to hear oral arguments, and the Secretary will so notify counsel on both sides; and

(2) Pending the Commission's determination of the instant motion, all other proceedings before the hearing examiner in this matter are hereby stayed until further order of the Commission.

Commissioner MacIntyre not participating.

BEST & CO., INC.

Docket 8669. Certification, Oct. 21, 1966

Finding by hearing examiner that the record fails to establish that any complaint counsel did anything to prevent respondent from gaining access to information in the files of Majestic Specialties, Inc.; recommended that complaint counsel not be barred from the case.

CERTIFICATION TO COMMISSION, WITH FINDINGS AND RECOMMENDATIONS ON INTERLOCUTORY MATTER

This matter is before the hearing examiner pursuant to the Commission's Order of June 23, 1966 [69 F.T.C. 1193], remanding to proceeding for further action by the examiner in accordance with the opinion accompanying said order. Such remand resulted from an application by respondent for permission to file an interlocutory appeal from an order of the examiner denying a motion by respondent to suspend and bar complaint counsel from further participation in this proceeding. While the Commission denied respondent's request, it directed the examiner to make specific findings on certain of the issues raised, and to certify the matter to the Commission with his recommendation for disposition.

The ground of respondent's motion to suspend complaint coun-

sel was that their conduct in communicating with a certain witness "was calculated to prevent respondent from obtaining information material to its defense and to circumvent" the examiner's prehearing order. In his order of May 10, 1966, the examiner denied the motion to suspend for the reasons that, (a) there had been no failure by complaint counsel to comply with the examiner's prehearing order, and (b) there was no prejudice to respondent from complaint counsel's alleged communication with the witness. While accepting the examiner's finding that no harm had resulted to respondent from the action of complaint counsel, the Commission directed that the examiner make specific findings "on the issue of whether complaint counsel made misstatements to the witness in question and concealed from it material facts with the intent of preventing respondent from gaining access to information to which it is entitled."

Following the remand of this matter, the examiner concluded that it would be desirable to call before him, as witnesses, all persons having knowledge of the facts relevant to respondent's charge against complaint counsel.* In accordance with the Commission's direction that there be no interruption of the hearings for the reception of evidence in the main proceeding, scheduled to begin on June 29, 1966, the calling of witnesses in this ancillary matter was delayed until July 27 and August 1, 1966. The parties were granted until August 27, 1966, to file memoranda in support of their respective positions. No memorandum was filed by either party.

The charge of respondent concerning the alleged impropriety by complaint counsel in contacting a witness involves one of respondent's suppliers, Majestic Specialties, Inc. The contention that complaint counsel prejudiced the witness against respondent arises out of alleged conversations by complaint counsel with counsel for the witness, rather than with the witness directly. The charge of prejudicial conduct by complaint counsel is based on the following statements allegedly made by them to counsel for the witness:

1. That as a result of a motion or application by respondent, complaint counsel were being compelled to turn over to respondent certain tables (identified as Tables I and III), which otherwise would not have been turned over.

2. That the receipt of such tables would be inimical to the witness' interests.

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*Such witnesses included one of complaint counsel, one of respondent's counsel, and two of the attorneys representing the witness.

3. That complaint counsel did not intend to introduce the tables in evidence.

4. That complaint counsel did not intend to call representatives of Majestic as witnesses, but that respondent did.

Respondent further contends that complaint counsel concealed from counsel for the witness the following facts:

1. That the names of officials of Majestic appeared on a list of prospective witnesses furnished to respondent by complaint counsel pursuant to the examiner's prehearing order.

2. That complaint counsel had been willing to turn over the tables in question if respondent had agreed to stipulate to their accuracy.

3. That no motion or application had been made by respondent for the production of the tables, but same were directed to be turned over by the examiner's prehearing order, with counsel for respondent agreeing to maintain the confidentiality thereof.

The basis of respondent's contention that it was prejudiced by the conduct of complaint counsel is that as a result thereof the witness was unwilling to cooperate with respondent in verifying the correctness of another table (Table II), which had also been turned over to its attorneys by complaint counsel, and that respondent was prevented thereby from obtaining information material to its defense.

Before making specific findings on the remanded issue, brief reference should be made to the tables which form the background of the present controversy. During the investigational phase of this proceeding, complaint counsel obtained evidence from various of respondent's manufacturer-suppliers purporting to reflect sales made by these suppliers, and advertising allowances paid by them, to respondent and certain of its allegedly disfavored competitors. This evidence was compiled by complaint counsel into a series of summary tables, showing total sales and allowances on an annual basis (for the years 1962 and 1963), by each of the designated suppliers, to respondent and various of its alleged competitors. Each of these tables of sales and allowances by the various suppliers was designated as Table I. Complaint counsel also obtained from respondent Best detailed evidence purporting to show the individual payments of advertising allowances to it in 1962 and 1963. This evidence was summarized by complaint counsel in a series of tables purporting to show, for each of the named manufacturers, the date and amount of each payment, the style number of the merchandise advertised and the

publication in which the advertisement appeared. Each of these tables, summarizing the individual advertising payments to Best, was designated as Table II. In addition to this evidence, complaint counsel had also obtained from the suppliers upwards of 15,000 invoices purporting to show the sales of merchandise, bearing identical style numbers, to Best and certain of its alleged competitors. The data in these invoices were summarized, by individual suppliers, in a series of tables, each designated as Table III.

In the examiner's order scheduling the initial prehearing conference, the parties were required to exchange with one another copies of proposed documentary evidence, names of witnesses and narrative summaries of the expected testimony of witnesses. Complaint counsel indicated at the initial conference that they proposed to offer the summary tables, I, II and III, as well as the underlying documents on which the tables were based. The examiner endeavored to explore with the parties the possibility of entering into a stipulation as to the correctness of the summary tables. Counsel for respondent indicated that they were willing to enter into such a stipulation with respect to the Table II's, after verifying the information against basic records. The Table II's were, accordingly, turned over to respondent's counsel for checking. Counsel for respondent were unwilling to enter into a similar stipulation with respect to Tables I and III, unless complaint counsel would agree to limit the number of such tables to manufacturers who were to be called to testify, and agree to respondent's taking the depositions of these manufacturers. While complaint counsel were willing to agree to limit the number of Tables I and III, they would not agree to the taking of depositions by respondent.

At a prehearing conference held April 7, 1966, counsel for respondent, while not agreeing that Tables I and III could be received as evidence, agreed that in view of the voluminous nature of the underlying records, they would accept copies of Tables I and III as compliance with the examiner's earlier prehearing order for supplying opposing counsel with copies of proposed documentary evidence. Since complaint counsel indicated that they preferred to supply copies of the tables rather than the voluminous underlying records, they were directed to turn over copies of Tables I and III by April 20, 1966. Based on the representation of complaint counsel that such records contained confidential information, counsel for respondent agreed not to disclose them to anyone except to the extent that they might have to consult their client as to the correctness of certain of the information. At the same prehearing conference counsel for re-

spondent indicated that they had been unable to verify, from respondent's own records, the accuracy of certain of the style numbers appearing in the Table II's, and that they were endeavoring to do so from the records of some of their suppliers. The examiner directed that this effort be completed by April 15, 1966. Counsel for respondent further indicated that they intended to move for the taking of the depositions of the Commission's supplier witnesses. The examiner directed that such motion be filed not later than April 20, 1966.

Following the prehearing conference of April 7, Ronald D. Schwartz, the member of complaint counsel's staff who was in charge of the portion of the case pertaining to Majestic Specialties and its records, concluded that he was obliged to notify Majectic's counsel of the fact that he had been directed to turn over copies of Tables I and III to counsel for respondent. The tables had been prepared from documents supplied by Majestic and, at a meeting held in the office of Majestic's attorneys in December 1965, Schwartz had supplied copies of the tables to the attorneys and had promised them that he would notify them if it became necessary to reveal the contents thereof to third persons. On April 8, 1966, Schwartz telephoned Andrew J. Kilcarr of the Washington, D.C. office of the law firm representing Majestic, and notified him that he was being obliged to turn over Tables I and III to respondent's counsel by April 20, 1966, pursuant to the examiner's prehearing order. Kilcarr expressed concern about the revealing of what he regarded as confidential information, and asked Schwartz to hold up the turnover until the last date possible so that he could discuss with his firm's New York office what action should be taken.

By coincidence, at the time Schwartz called Kilcarr, the latter was talking on the telephone with Erwin Klineman, a Majestic official. Klineman advised Kilcarr that he had been contacted by respondent for the purpose of checking the style numbers listed in the Table II pertaining to Majestic. Since Majestic had been previously instructed by its attorneys not to talk to anyone about the case without consulting them, Klineman declined to permit an inspection of Majectic's records by respondent at that time, but advised the latter that he would have his attorneys communicate with respondent's attorneys regarding the matter. Kilcarr informed Klineman that he would have Sanford Litvack of his law firm's New York offce communicate with respondent's attorneys regarding the verification of style numbers.

On April 11, 1966, Kilcarr telephoned Litvack and informed him of his conversations with both Schwartz and Klineman. The at-

torneys were concerned about the turning over of the tables, particularly Table I, because they were fearful that if other customers learned of the information, Majestic might be subject to a treble damage suit. It was decided that since Litvack was in New York, he would telephone respondent's attorneys regarding the checking of style numbers, and discuss ways and means for protecting their client from the turnover order.

In the meantime, respondent had informed its attorneys of the conversation with Majestic and of the latter's advice that its attorneys would contact respondent's attorneys. After waiting several days for a call from Majestic's attorney, one of respondent's attorneys, Ronald J. Offenkrantz, placed a call to the Washington office of Majestic's attorneys and spoke to Andrew Kilcarr. The latter informed Offenkrantz that Litvack of the law firm's New York office was handling the matter and that the latter would be in touch with him.

Not having heard from Litvack, Offenkrantz telephoned the former on April 13. He asked Litvack if he could arrange to have certain style numbers checked against Majestic's records. Litvack informed Offenkrantz he had learned that complaint counsel were being directed to turn over to respondent confidential records pertaining to Majestic, and that he was disturbed about the matter. Offenkrantz informed him that respondent's attorneys had agreed to maintain the confidentiality of the records and not reveal their contents to anyone, except to the extent it might be necessary for counsel to reveal the contents to his client for the purpose of checking the accuracy of the information. During the course of the conversation Offenkrantz informed Litvack that Majestic records would eventually be introduced as evidence through officials of Majestic, who were on the witness list supplied to respondent by complaint counsel. Litvack expressed surprise at learning officials of Majestic would be called to testify, having gotten the impression from a meeting with Schwartz some months earlier that it might not be necessary to call Majestic officials if certain stipulations could be worked out. Offenkrantz offered to send Litvack the portion of the prehearing transcript related to preserving the confidentiality of Tables I and III, and copies of the narrative statements of the proposed Majestic witnesses which had been supplied by complaint counsel. Litvack informed Offenkrantz that he could not give him any definite word on when the style numbers could be checked since the official in charge, Erwin Klineman, had left for Europe the previous day. However, he undertook to see what other arrangements could be made.

The following day, April 14, Litvack was in Washington, D.C., attending a meeting of the Antitrust Section of the American Bar Association. He took advantage of the occasion to discuss with Kilcarr the matter of the turning over of the tables to respondent's attorneys. A meeting was arranged later in the day with Schwartz of Commission's trial staff. Majestic's attorneys sought to find out whether it was true that representatives of Majestic would be called to testify, and were informed that they would be. Upon inquiring when it was likely that the Majestic witnesses would be called to testify, Schwartz stated that respondent was filing a motion to take the depositions of supplier witnesses, including Majestic, and that this might delay the start of hearings. Discussion was also had about the request from Best's attorneys that Majestic permit them to verify the correctness of the style numbers of merchandise sold to Best, on which advertising allowances had been paid by Majestic. Schwartz explained that this information appeared in the Table II's, copies of which had been turned over to respondent's counsel several months earlier, and he urged that Majestic cooperate in this effort. He stated that the failure to complete verification of the tables might result in a delay of the hearings.

Later in the day on April 14, Litvack called Offenkrantz in New York. He told him he had verified, through complaint counsel, the fact that Majestic officials were to be called as witnesses. However, he stated he was still concerned about protecting the confidentiality of the tables which were to be turned over to respondent's counsel. He expressed doubt about the sufficiency of the commitment by respondent's counsel to maintain the confidentiality of the tables, and stated he was considering filing a motion for a protective order. With regard to verification of the style numbers in the Table II's, he stated he had not yet been able to discuss this matter with his client, and told Offendrantz he would call him about it in a few days.

On April 14, respondent's counsel sent Litvack a letter, purporting to summarize their conversations of the previous day and that day. In this letter (which is attached to respondent's motion to suspend complaint counsel), respondent's counsel stated that "our efforts to verify information furnished by the Commission [viz, Table II] have been thwarted and delayed by your apprehension as a result of communication with you from Complaint Counsel." To this letter Litvack replied the following day, taking issue with the statement that the reason for the delay in the verification of style numbers was a communication from complaint counsel. Litvack's letter (which is also attached to

the motion to suspend) states that the reason for the delay was that "although you have had the data since January 7, 1966, you did not make any request to Majestic to aid in verifying the style numbers until April 8, 1966. Further, you did not actually communicate with us as counsel for Majestic until April 13. At that time, Mr. Klineman had already left for Europe."

Several days later Litvack called Offenkrantz and told him that in view of the fact that respondent was about to file a motion to take Majestic's deposition, he could see no reason for verifying the style numbers at that time since it would, in effect, require the appearance of Majestic officials on two separate occasions. He suggested to Offenkrantz that the matter of verification of style numbers should be held in abeyance until a ruling had been made on the application for depositions. Thereafter, on April 21, 1966, counsel for Majestic moved for a protective order with respect to Tables I and III, the examiner having in the meantime, at their request, directed that the turnover of the tables be delayed pending the filing of such motion. By order dated April 26, 1966, the examiner modified his Prehearing Order No. 2, by directing that counsel for respondent not reveal, to anyone, the contents of Table I pertaining to Majestic, without prior approval of the examiner. Thereafter, copies of Tables I and III were turned over to counsel for respondent by complaint counsel.

CONCLUSIONS

There is no dispute as to the fact that Ronald D. Schwartz, of complaint counsel's staff, communicated with a representative of the law firm representing Majestic Specialties, Inc., a prospective witness, and informed him that he was turning over copies of Tables I and III to counsel for respondent pursuant to the examiner's prehearing order. However, as the Commission held in the opinion remanding this matter:

> Merely contacting a witness to inform him that data he furnished to the Commission will be turned over to a respondent * * * without more is, of course, a neutral act not warranting charges of impropriety.

The issue presented on this remand is whether Schwartz went beyond this mere "neutral act," and "made misstatements to the witness in question and concealed from it material facts with the intent of preventing respondent from gaining access to information to which it is entitled." This, in effect, involves a resolution of two questions, viz, (a) whether Schwartz made any of the statements or concealed any of the facts set forth in respondent's motion and (b), if so, whether any of these involved

"material facts" and were made or concealed "with the intent of preventing respondent from gaining access to information to which it is entitled."

The statements attributed to Schwartz which, in the opinion of the examiner, were most clearly calculated to discourage the witness from cooperating with respondent are those that (a) the turning over of the tables (I and III) to respondent's counsel "would be inimical to Majestic's interests," and (b) this would not have been necessary "except for a motion or application by respondent which was granted by the Hearing Examiner" (Respondent's Motion, p. 10). Such statements by Schwartz were allegedly revealed by the witness' counsel, Litvack, in a telephone conversation with respondent's counsel, Offenkrantz, on April 13 or 14, 1966. However, according to Schwartz' testimony and that of the two attorneys for the witness to whom he talked, Kilcarr and Litvack, Schwartz never made any such statements. The first conversation which Schwartz had regarding the turning over of the tables was on April 8 and was with Kilcarr only. Schwartz, in essence, stated that he was being required to turn over the tables pursuant to the examiner's prehearing order, and said nothing as to how said order had come about or what effect it would have on the witness (Tr. 3059–3064, 3082, 3088–3091, 3098–3100). When Schwartz met with Kilcarr and Litvack in Washington on April 14, the discussion related primarily to whether and when Majestic officials would be called to testify, and as to the desirability of cooperating in the verification of the other table (Table II) which respondent was seeking to check from Majestic's records (Tr. 2612, 2618, 2621, 2628–2629, 3065–3069, 3071, 3080–3082, 3096, 3098–3099).

Respondent's contention regarding the making of the prejudicial statements by Schwartz rests on the vicarious admission allegedly made by Litvack in a telephone conversation with Offenkrantz. Respondent made no claim, in its motion, that Litvack had identified Schwartz specifically, as the author of the statements, but rather that Litvack referred to such statements as having emanated from a "source in Washington." Respondent apparently assumed that Schwartz was Litvack's Washington "source" because in the second telephone conversation between Offenkrantz and Litvack on April 14, the latter mentioned that he had met with Commission counsel that day. However, it is clear from Offenkrantz' own testimony concerning the matters which he discussed with Litvack in their two conversations that the prejudicial statements which Litvack allegedly identified as having emanated from a Washington source, if made at all, were made

in the first conversation between Offenkrantz and Litvack on April 13 (Tr. 3111–3118). Since Litvack had not yet talked to Schwartz about the matter, it is clear that Litvack's Washington source when he talked to Offenkrantz on April 13 would have had to be Kilcarr, rather than Schwartz. In view of the fact that Litvack had no apparent hesitancy, on the occasion of his second conversation with Offenkrantz on April 14, in revealing that he had spoken to complaint counsel, it is difficult to believe that he would have been unwilling to identify Commission counsel as his source when he first spoke to Offenkrantz, if such were the fact.

In any event, irrespective of who was Litvack's Washington source, or whether the subject was discussed between Litvack and Offenkrantz in their first or second telephone conversation, the examiner is satisfied that neither Schwartz, nor any other Commission attorney, told Kilcarr or Litvack that the turning over of the tables would be inimical or prejudicial to Majestic's interests. The credible testimony of both Litvack and Kilcarr corroborates that of Schwartz, that he never made any such statement to them (Tr. 2610, 3098–3099, 3082). According to Litvack's testimony, to the extent that he referred to the prejudicial consequences of the turnover of records in his conversation with Offenkrantz, he was expressing his own opinion, and was not reporting any statement made by his informant (Tr. 2610). Offenkrantz conceded in his own testimony that, after hearing Litvack testify, he was "not sure" whether, what Litvack told him concerning the prejudicial consequences of the turnover, was expressed as his (Litvack's) own opinion or that of his informant (Tr. 3114). It is significant that in the letter written by respondent's counsel to Litvack on April 14, 1966, purporting to summarize their discussions, there is no reference to the fact that the statement concerning the prejudicial effect of the turnover had emanated from Litvack's informant, but rather that, "*you* [Litvack] were apprehensive as to the prejudice that might result to your client" from the turnover of the tables (emphasis supplied). The reason for this apprehension was, as Offenkrantz' own testimony indicates he was informed by Litvack, the possibility that if the information became known to disfavored retailers Majestic might become the subject of treble damage actions (Tr. 3112). Considering the fact that Schwartz was not dealing with a layman, but with counsel experienced in antitrust matters, it is contrary to the probabilities inherent in the situation, to say nothing of the credible testimony now in the record, to believe that Schwartz would have had the poor taste to advise

such counsel what would be the consequences, to their client, of the turnover of the tables.

With respect to the second of the prejudicial statements allegedly made by Schwartz, viz, that the tables would not have been turned over except for a motion or application by respondent, the record likewise fails to establish that he made any such statement. According to Schwartz' testimony, he had no occasion to discuss with Kilcarr the circumstances which led to the examiner's prehearing order for the turnover of the records (Tr. 3063). Kilcarr had no recollection of Schwartz saying anything to him as to why the examiner had ordered the records turned over (Tr. 3100). Respondent's charge, in this respect, is apparently based on a statement inadvertently made by Litvack in his initial discussion with Offenkrantz on April 13 (prior to Litvack's talking with Schwartz). Since Litvack had been informed by Kilcarr that the tables were to be turned over pursuant to a prehearing order of the examiner, he assumed that a motion therefor had been made by respondent and, in his conversation with Offenkrantz, he used the expression: "I understand a motion was made." When Offenkrantz informed him there had been no motion, Litvack replied: "That is my word. I must have used the wrong word" (Tr. 2607). While stating that he had gotten the impression that Litvack's reference to a motion having been made was based on information received from his source, Offenkrantz conceded in his testimony that "I guess I am really reading his mind" (Tr. 3112). In the opinion of the examiner, Litvack's statement cannot be attributed to anything which Schwartz said to Kilcarr or to him and cannot be considered the basis for any finding that Schwartz made any misstatement of fact regarding the reason for the examiner's turnover order.

Unlike the two statements discussed above, the third and fourth misstatements attributed to Schwartz by respondent were not, in themselves, calculated to prejudice the witness against cooperating with respondent. These are the statements allegedly made by Schwartz that (a) complaint counsel did not intend to offer the tables (I and III) in evidence, and (b) they did not intend to call officials of Majestic to testify, but that respondent did intend to do so. The only basis on which such statements could be considered to have prejudicial overtones is that they were made in the context of the other two statements, *i.e.*, that at the time such statements were made Schwartz informed counsel for the witness that he was being compelled to turn over the tables because of a motion by respondent, and that the turnover of the tables would be prejudicial to the witness' interests. How-

ever, as has been found above, the record fails to establish that Schwartz made the latter statements.

Aside from whether the third and fourth statements attributed to Schwartz are prejudicial or not, the record fails to support respondent's position concerning the making of these statements. According to Offenkrantz' testimony, the statement by Litvack (attributed to his Washington "source"), that complaint counsel did not intend to call Majestic officials was witnesses, was made on the occasion of their first telephone conversation on April 13 (Tr. 3111, 3113). However, as previously found, Litvack had not yet talked to Schwartz about the turning over of the tables and other matters incident thereto. Litvack's testimony indicates that he did state, in his initial conversation with Offenrantz, that he understood complaint counsel did not intend to call any witnesses from Majestic. However, this statement was based on talks which he had had with Schwartz some months earlier, and not any discussion of the matter following the examiner's turnover order. As previously found, Schwartz had conferred with Majestic's attorneys some months earlier regarding the material which Majestic had turned over to him. At that time he had expressed the hope that, if some stipulation could be worked out with respondent for offering the material in evidence, it might not be necessary to call any witnesses from Majestic (Tr. 2610–2614, 3055–3059, 3084–3088). However, when he talked to Kilcarr on April 8 to advise him of the order to turn over the tables, Schwartz made no reference to the subject of whether Majestic officials would or would not be called to testify (Tr. 3062–3063, 3093). At his meeting with both Kilcarr and Litvack on April 14, when the latter sought to verify the information received from Offenkrantz, that Majestic officials would be called, Schwartz did truthfully inform the witness' attorneys that this was the fact (Tr. 2618, 3066, 3096). It is clear, therefore, that Schwartz did not advise counsel for the witness in any conversation following the examiner's turnover order that Majestic officials would not be called to testify.

As part of the same charge, respondent contends that Schwartz not merely informed Majestic's counsel that he did not intend to call any witnesses from the company, but that respondent intended to do so. Litvack acknowledged that, in the same conversation in which he told Offenkrantz he understood the Commission did not intend to call any witnesses from Majestic, he also stated he understood respondent might do so. This statement was based on the discussions with Schwartz previously alluded to, which had taken place some months prior

to the examiner's turnover order. While Schwartz had stated at that time that if agreement could be reached on Majestic's records being received in evidence, it would be unnecessary to call any witnesses from the company, he also indicated that respondent might object to this procedure and that this would necessitate the calling of Majestic witnesses (Tr. 2611). The only reference made by Schwartz to the possibility of respondent's calling Majestic witnesses, after the examiner's turnover order, was in the meeting with Litvack and Kilcarr on April 14. In connection with a discussion of when the case would be reached for trial, Schwartz mentioned that there might be some delay due to respondent's impending motion to take the depositions of a number of suppliers, including that of Majestic. The statement by Schwartz that respondent intended to take Majestic's deposition was truthful. A date for the filing of such a motion had been fixed at the prehearing conference of April 7, and such motion was filed soon after Schwartz' conversation with Litvack and Kilcarr.

The record likewise fails to support respondent's position concerning the last of the alleged misstatements attributed to Schwartz, viz, that he did not intend to offer Tables I and III in evidence. Aside from the fact that there is some question as to whether Schwartz made any such statement to Litvack, which the latter relayed to Offenkrantz (Tr. 2611–2612), the statement, if made, was a truthful one. At the time he talked to Kilcarr, and later to both Kilcarr and Litvack, it was not Schwartz' intent to offer the tables in evidence. He had earlier, during the prehearing conferences, indicated a desire to offer the tables as a summary of the voluminous underlying data. However, since he and counsel for respondent could not agree on a stipulation for the offering of the tables, complaint counsel concluded that he had no alternative except to offer the underlying documents without the tables. Kilcarr's testimony indicates that in the meeting on April 14, Schwartz did inform him and Litvack that the tables themselves would not be offered in evidence, in view of the breakdown of negotiations with counsel for respondent (Tr. 3099–3100). To the extent that Schwartz made the statement attributed to him by respondent, it was truthful and nonprejudicial at the time, and in the context in which, he made it.

The remaining charges of respondent involve the alleged concealment of facts, rather than the affirmative misstatement of facts, by Schwartz. The first of the facts allegedly concealed by Schwartz in his conversations with Majestic's attorneys is the

fact that two of Majestic's officials appeared on complaint counsel's list of witnesses, and that narrative statements of the testimony of such witnesses had been supplied to respondent pursuant to the examiner's prehearing order. Such fact was, admittedly, not revealed to Kilcarr on the first occasion when Schwartz spoke to him about the turning over of the tables. However, the failure to reveal this fact was not, in the opinion of the examiner, the product of any intent on Schwartz' part to prejudice the witness against respondent or to prevent respondent from gaining access to information to which it was entitled. Schwartz telephoned Kilcarr on April 8 for the sole purpose of informing him, in accordance with what he regarded as an earlier commitment to do so, that the examiner had ordered him to turn over to counsel for respondent certain information obtained from Majestic. There was no obligation on Schwartz' part to give Kilcarr an extended account of other developments in the case. The only basis on which the claimed concealment could be deemed to have been perpetrated with an untoward motive would be if it occurred in connection with respondent's concomitant charge, that Schwartz falsely stated to Majestic's attorneys that he did not intend to call any of the company's officials to testify. However, as above found, no such statement was made by Schwartz at or after the time he advised the attorneys about the examiner's turnover order.

The second of the facts allegedly concealed from the witness' counsel is the fact that complaint counsel would have been willing to turn over the tables (I and III) if counsel for respondent had agreed to stipulate to their accuracy. This fact was, admittedly, not disclosed to counsel for the witness. However, it is the opinion of the examiner that the failure to reveal this fact could not possibly have been prejudicial, unless it occurred in the context of the basic misstatements charged by respondent, viz, that Schwartz stated he was being compelled to turn over the tables as a result of respondent's motion, and that this would be harmful to Majestic's interests. As previously found, the record fails to establish that these misstatements were made. The only other basis on which the failure to reveal the fact under discussion could be deemed prejudicial is that it tends to prove Schwartz was not in good faith in informing respondent of the turnover order, since he had been willing earlier to turn over the tables voluntarily. However, the examiner does not consider the two actions inconsistent. It does not follow that if it had been possible to stipulate to the accuracy of the tables, Schwartz would not have sought to protect

the confidentiality of the information before turning it over, or would not have felt obliged to inform Majestic prior to the turnover. It may be noted, in this connection, that counsel for Majestic were aware that ultimately the data turned over to the Commission would be offered in evidence, but they felt that arrangements could be made, at an appropriate time, to protect its confidentiality (Tr. 2614–2615). It is the conclusion of the examiner that Schwartz' failure to reveal his earlier willingness to turn over the tables was not the result of any intent to prevent respondent from obtaining needed information or of prejudicing the witness against it.

The final charge of omission is that Schwartz failed to reveal that no motion had been made by respondent for the turnover of the tables, and that respondent's counsel had agreed to treat the tables in confidence. This charge is, in part, a duplication of the charge that Schwartz falsely stated that the tables would not have been turned over "except for a motion or application by respondent." As heretofore found, the record fails to establish that Schwartz made any such statement. Not having suggested in any way that respondent was responsible for the examiner's order, Schwartz was not, in the opinion of the examiner, under any obligation to affirmatively reveal that respondent had not moved or applied for the turnover order. His failure to do so cannot, under the circumstances, be deemed to have been done with the intent of prejudicing the witness against respondent or of preventing it from obtaining necessary information.

With regard to the claim that Schwartz should have revealed that respondent had agreed to treat the tables in confidence, it is the opinion of the examiner that he was under no obligation, when he initially contacted Kilcarr, to discuss with him the terms of the examiner's prehearing order, including the provision for the confidential treatment of the records. However, it was Schwartz' testimony that he did, in fact, advise counsel for the witness of this provision (Tr. 3073). Whether Schwartz did or did not do this at the time of his initial contact with the witness' attorneys, it is clear that when he met with both attorneys on the second occasion, they were well aware of the fact that there was a restrictive provision in the order. However, it was their view that this provision did not sufficiently protect their client, since it permitted disclosure of the information to respondent by its counsel, under stated circumstances (Tr. 3117). Accordingly, they moved soon thereafter for a more restrictive protective order. It is the opinion of the examiner that, to the

extent Schwartz may have failed to promptly disclose respondent's counsel's undertaking to maintain the confidentiality of the tables, it was not with any intent to prejudice the witness against respondent, or to prevent it from cooperating with respondent.

In the foregoing discussion the examiner has not considered, directly, the question of what prejudice could have resulted to respondent from Schwartz' communication with Majestic's counsel. It is basic to respondent's motion that the statements and acts of concealment by Schwartz were prejudicial to it. The only prejudice which is specifically referred to by it is that, as a result of Schwartz' conduct, "our efforts to verify information furnished by the Commission have been thwarted," *i.e.*, the checking of the correctness of the style numbers in the Table II pertaining to Majestic (letter of April 14 to counsel for Majestic). While there is some suggestion in the motion that respondent may have been prevented from obtaining other information necessary to its defense, there is no indication of what other information respondent sought and was unable to obtain as a result of the communication from Schwartz.

Insofar as the verification of the style numbers in the Table II's is concerned, the prejudice, if there was any, was experienced principally by complaint counsel since, as a result of respondent's inability to verify the style numbers, complaint counsel was precluded from offering the Majestic tables in evidence with style numbers. Since complaint counsel was a major beneficiary of respondent's effort to verify the style numbers, it is difficult for the examiner to believe that Schwartz would have undertaken to state or conceal facts from Majestic's counsel for the purpose of prejudicing the latter against cooperating with respondent's counsel. The credible testimony establishes that he not merely did nothing to prevent cooperation, but that he actively urged that the witness cooperate in the verification of style numbers (Tr. 2621, 3082, 3099).

The examiner is satisfied that the delay in the verification of the tables was not the result of anything which Schwartz said or failed to say in communicating with the witness' attorneys. The initial delay occurred because, as indicated in the letter of the witness' attorney dated April 15, counsel for respondent had waited to communicate with the witness until the eve of the departure for Europe of the official familiar with the matter. The later decision by counsel for Majestic to hold up the verification was due to the immenent filing of respondent's

motion for depositions and the desire of counsel to avoid a duplication of appearances by his client.

According to the testimony of Majestic's attorney, there was no connection between anything that Schwartz said, and the decision to hold up verification of the tables. The two were completely unrelated (Tr. 2626). Respondent's counsel was principally concerned with verifying the tables, so that he could comply with the examiner's order that this effort be completed by April 15, 1966. However, counsel for the witness were primarily concerned with protecting their client from a possible treble damage suit, and so advised respondent's counsel at the time (Tr. 3112). The verification of the tables was a matter of small moment to them. The examiner is satisfied that there was no causal connection between the delay in the verification of the tables, and anything which Schwartz said or failed to say to counsel for the witness.

It is the conclusion and finding of the examiner that the record fails to establish that Ronald D. Schwartz, or any other member of complaint counsel's staff, made any misstatements or concealed any facts of the nature set forth in respondent's motion, or any similar statements or material facts, with the intent of preventing respondent from gaining access to information to which it was entitled in the files of Majestic Specialties, Inc.; and further, that the record fails to establish that the communication by complaint counsel with counsel for Majestic prevented respondent from obtaining information which it sought and to which it was entitled.

RECOMMENDATION

It is recommended that the Commission take no further action in this matter and consider it closed, insofar as the issues raised by respondent's motion to suspend or bar complaint counsel from further participation in this proceeding.

The hearing examiner's consideration of this matter having been completed, it is hereby certified back to the Commission for consideration and appropriate action by it.

THE SEEBURG CORPORATION

Docket 8682. Order and Opinion, Oct. 25, 1966

Order denying respondent's request for the production of certain Commission documents and for the opportunity to present briefs and oral argument thereon.

OPINION OF THE COMMISSION

This matter is before the Commission on the hearing examiner's certification of respondent's motion for production of Commission documents pursuant to § 3.11 of the Commission's Rules, with a recommendation that it be denied. The motion was certified to the Commission on the ground that the request should be treated as an application for confidential information from the Commmission's files under § 1.134 of the Rules. It should be noted at the outset that respondent has apparently had full disclosure of complaint counsel's case, both with respect to the witnesses to be utilized, the documents to be introduced, the underlying data supporting such exhibits, and the theory of the case. There is evidently no suggestion that complaint counsel will, in his presentation of the case, rely on the data included in the specifications of respondent's motion for production now under consideration.

In issue before the Commission, according to the examiner's certification, are the following documents specified in respondent's motion for production:

3. Any documents showing the amount and manner of sales of bottle and can vending machines to the following listed classes of bottlers, including, but not limited to, any special policies, problems, and selling or other techniques applicable to such classes of bottlers:

(a) Bottlers of Coca-Cola, whether independent or owned by The Coca-Cola Company;

(b) Bottlers of Pepsi-Cola, whether independent or owned by Pepsi-Cola Co., Inc.;

(c) Bottlers of Royal Crown Cola, whether independent or owned by the Royal Crown Cola Company;

(d) Bottlers of Seven-Up, whether independent or owned by Seven-Up syrup manufacturers;

(e) Bottlers of Dr. Pepper, whether independent or owned by the Dr. Pepper Company;

(f) Bottlers of Canada Dry, whether independent or owned by the Canada Dry Corporation;

(g) Bottlers of other soft drinks, whether independent or owned by soft drink syrup manufacturers.

4. Any documents which are, or which mention, refer, relate to, or show correspondence, reports of meetings, meetings, negotiations, engineering tests, or other contacts between any manufacturer of vending machines and any manufacturer of soft drink syrup in connection with the approval or acceptance of the vending machine manufacturer's products for sale to bottlers of soft drinks.

5. Any documents obtained from any manufacturer of soft drink syrup, including, but not limited to, the firms listed in specifications 3(a)–(f), which are, or which mention, refer, relate to, or show:

(a) Laboratory or engineering procedures used by any such manufacturer in the testing or acceptance of bottle or can vending machines;

(b) Laboratory, engineering or other reports (including summaries thereof) on the testing or acceptance of bottle or can vending machines by such manufacturers;

(c) Negotiations, meetings, correspondence, or any other contacts between such soft drink syrup manufacturer and any manufacturer of bottle or can vending machines with respect to the testing or acceptance of said vending machine manufacturer's machines by said soft drink syrup manufacturer;

(d) Modification and/or resubmission of vending machines by bottle or can vending machines manufacturers to overcome engineering or technical problems or objections raised by soft drink syrup manufacturers;

(e) Technical problems encountered in actual operation of bottle or can vending machines;

(f) Lists of bottle or can vending machines approved or accepted by any manufacturer of soft drink syrup for sale or recommendation for sale to its owned, controlled, or contract bottlers;

(g) Purchase volume of bottle or can vending machines, including particular types and models thereof, by soft drink syrup manufacturers and/or soft drink bottlers, from particular suppliers;

(h) Any special promotional incentives, offered by soft drink syrup manufacturers in connection with the purchase of bottle or can vending machine equipment by soft drink bottlers.

6. Any documents obtained from any bottler of soft drinks, whether independent or company owned, or from any association of soft drink bottlers, which are, or which mention, refer, relate to, or show:

(a) Purchase volume of bottle or can vending machines, including particular types and models thereof, from particular suppliers;

(b) Identity of suppliers of bottle or can vending machines;

(c) Technical problems encountered in the actual operation of bottle or can vending machines;

(d) Incentive programs, whether in cooperation with a manufacturer of bottle or can vending machines or a manufacturer of soft drink syrup, in connection with the purchase of bottle or can vending machines;

(e) Any meetings, correspondence, conversations, or other contacts between a bottler and any manufacturer of soft drink syrup pertaining to or concerning purchase by the bottler of bottle or can vending machines not approved or accepted by said soft drink syrup manufacturer.

8. Any memoranda or documents in the Commission's files relating to the Commission proceeding denominated *In the Matter of The Vendo Co.*, FTC Dkt. 6646 (Sept. 5, 1957) [54 F.T.C. 253], which will show the reasons or basis for the Commission's approval of the settlement which permitted Vendo, alleged to have been the nation's largest manufacturer of soft drink vending machines, to retain ownership of Vendorlator Mfg. Co., one of Vendo's major competitors in this market, where the combined sales of the merged company were alleged to have accounted for over 50 percent of the domestic bottle vending machine market.

Respondent asserts, with respect to specifications 3–6 and 8, that it requires this information in order to elicit evidence

in support of its theory of the case as to the relevant market in this Section 7 proceeding and to prepare for the cross-examination of complaint counsel's witnesses. To make its defensive showing respondent asserts that it desires to demonstrate "the separate nature of the Coca-Cola and other bottler markets." According to the examiner, respondent intends to establish that there was no substantial actual or potential competition between Seeburg and Cavalier, the acquired concern, at the time of the acquisition.

The examiner states that apart from the contention that the acquired concern was not competing in the alleged relevant market in which Seeburg did business, the purpose of the discovery in question under these specifications is obscure since the nature of the relevant market, functionally, which respondent proposes to establish, is not disclosed. The examiner finds that respondent has not made the prerequisite showing of good cause necessary under § 1.134. The examiner further holds that an application for such disclosure should be supported by a specific indication of relevancy and materiality as to each and every class of document, supplemented by an explanation of how such documents would fit into respondent's pattern of defense, including "the functional" market structure which respondent believes the evidence may establish.

The examiner, in view of his proximity to the proceeding, is in a more favorable position than the Commission to judge in the particular instance the proper scope of discovery proceedings.[1] As a result, the Commission will, of necessity, give considerable weight to his analysis of applications for production of confidential documents from the Commission's files under Rule 1.134. A showing of generalized relevance or possible helpfulness is not enough. A showing of good cause under § 1.134 requires a demonstration of "real or actual need." *Viviano Macaroni Company*, Docket No. 8666, Order Ruling on Question Certified (March 9, 1966) [69 F.T.C. 1104, 1106]. We agree with the examiner that on the facts presented the showing of need requisite to the production under the rule has not been made. In this connection, we note further the examiner's statement that the respondent has made no attempt, through the deposition procedures available to it, to document the necessity of securing the data demanded from the Commission's files.

Much of the data which respondent desires to secure from the Commission's files is obviously confidential, both in the case

[1] *Cf. Topps Chewing Gum, Inc.*, Docket No. 8463, opinion and order disposing of motions, July 2, 1963 [63 F.T.C. 2196].

of customers of the vending machine manufacturing industry and competitors of Seeburg, since it relates to sensitive topics such as the marketing strategies, as well as the technical, marketing and purchasing experiences and plans of such customers and competitors. Sensitive information of this nature should not be released by the Commission from its confidential files without compelling need. Disclosing information from the Commission's confidential files under a lesser standard would necessarily engender resistance on the part of companies and individuals cooperating in Commission industry investigations. It would be likely to seriously retard voluntary compliance with the Commission's efforts to obtain the data which it needs in industry inquiries. Obviously, the cooperation which the Commission has received in the past from business depends in large part on the confidence of industry that confidential data submitted to this Agency will not be released in an adjudicative proceeding unless specific and concrete need therefor has been shown.

The Commission, at this time, is not fully informed as to the measures respondent has taken or intends to take to secure the information requested in specifications 3–6 directly from the third parties involved under the procedures set forth in §§ 3.10 and 3.17 of the Rules. At this time no determination can be made that such data is unavailable to respondent under these procedures. Wherever sensitive data relating to customers or competitors of the nature involved in this request is concerned, respondent should utilize the procedures made available by the Commission's Rules to secure the data directly from the source rather than from the Commission's confidential files. Under these procedures, the third parties from whom information is sought are, of course, entitled to state their views on the competitive implications of disclosing the information requested and on the proper measures for preserving the confidentiality of the data produced pursuant to subpoena where such measures are appropriate.[2] In this connnection, it appears from the hearing examiner's certification that certain of the data sought in specifications 3–6 has already been obtained by respondent. Certainly due process requires no more than that respondent be able to secure evidence to present its defense. Respondent, of course, does not have an unqualified right to demand confidential

[2] If a party responding to respondent's subpoena states that it would prefer to have the Commission release documents already in this Agency's files which it previously furnished in order to save itself the trouble of responding to Seeburg's subpoena, then such data may be released to respondent.

data from the Commission's files at any particular time or stage in a proceeding. See *The Sperry and Hutchinson Company* v. *Federal Trade Commission,* CCH Trade Reg. Rep ¶ 71,800 (S.D.N.Y. 1966).[3]

We turn now, specifically, to specification 8 of Seeburg's motion for production, which seeks any memoranda or documents in the Commission's files showing the reasons or basis for the Commission's approval of the settlement in *The Vendo Co.,* Docket No. 6646, which permitted Vendo to retain ownership of the Vendorlator Mfg. Co. Respondent requests these files on the ground that the documentation sought may contain material necessary to adequately cross-examine complaint counsel's witnesses from the Vendo Company "as to the realities of competition in the industry, illustrated by Vendo's attempt to diversify by acquiring Vendorlator." In addition, Seeburg asserts "the requested documents may also support respondent's defensive showing as to the separate nature of the Coca-Cola and trade bottler markets." On both counts respondent's showing of need is so conjectural that it necessarily fails to meet the prerequisites for release of confidential information under § 1.134 of the Rules.[4]

Insofar as the demand encompasses internal memoranda of the Commission in an attempt to probe its mental processes in deciding to accept the consent settlement in *Vendo,* these are clearly not a proper subject of discovery.[5] The fact that intra-agency memoranda of this kind come within the exemption of § 3(e)(5) of the Freedom of Information Act has already been considered in connection with respondent's motion to vacate. That discussion also applies to this issue as well.

Respondent contends that the procedures for application to the Commission under § 1.134 of the Rules for the release of confidential information from the Commission's files are inapplicable here, on the ground that the examiner has the power to order the production of the documents in question under § 3.11 without reference to the Commission. Seeburg relies on the clause in § 1.133(a) exempting from the procedures for the

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[3] *Cf. American Brake Shoe Company* v. *Schrup,* 1965 Trade Cases ¶71,575 (D. Del. 1965).

[4] The consent order in question was issued more than nine years ago, on September 5, 1957. See *The Vendo Company,* 54 F.T.C. 253 (1957).

[5] *Graber Manufacturing Company, Inc.,* Docket No. 8038, Order Ruling on Questions Certified by the Examiner and Respondents' Appeal From Hearing Examiner's Ruling, December 13, 1965 [68 F.T.C. 1235]; *R. H. Macy & Co., Inc.,* Docket No. 8650, Order Ruling on Questions Certified and Denying Motion To Strike Certification, September 30, 1965 [68 F.T.C. 1179]. *Cf. Modern Marketing Service, Inc.,* Docket No. 3783, Order Ruling on Question Certified, January 7, 1966 [69 F.T.C. 1077]. See also *Coro, Inc.* v. *Federal Trade Commission,* 338 F. 2d 149 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965).

release of confidential information under § 1.134 those documents whose "use may become necessary in connection with adjudicative proceedings." The fact is that the Commission has already ruled on the scope of the exception in § 1.133 on which respondent relies. In *Viviano Macaroni Company,* Docket No. 8666, Order Ruling on Question Certified (March 9, 1966) [69 F.T.C. 1104, 1105], the Commission stated:

> * * * The exception in pertinent part relates to material and information which may be necessary for use in connection with an adjudicative proceeding and this, in general, includes that which complaint counsel must use in the presentation of his case and other vital documents such as Jencks type statements. * * * It is not a general authorization for pretrial discovery bypassing the Commission's requirements in § 1.134 governing the release of confidential data. * * *[6]

There is no question here, as respondent states, of § 3.11 not meaning what it says if this construction of the Rules is followed. Obviously, on their face §§ 1.133, 1.134 and 3.11 are expressly related by the terms of § 1.133. The rules must be read together and the construction given § 1.133 is a reasonable one, doing no violence to the provisions of § 3.11. Respondent's argument that this construction of the Rules requires it to resort to procedures not published in the Federal Register and therefore violates Section 3(a) of the Administrative Procedure Act is without merit.

Seeburg further asserts that Sections 6(a), 7(a), and 12 compel the production of the documents which it seeks pursuant to § 3.11 of the Commission's Rules. Otherwise, respondent argues, its right under Section 6(a) to be represented and advised by counsel would be reduced to an empty formality if complaint counsel, in an adjudicative proceeding, were accorded a preferred position in their discovery and pretrail preparation by the Commission's interpretation of § 3.11. With respect to Section 7(a)'s direction that adjudicative proceedings be conducted in an impartial manner, respondent similarly argues that this provision would be frustrated if it is not granted the pretrial discovery which it seeks. Respondent, in addition, relies on Section 12's guarantee that all requirements or privileges relating to evidence and procedures shall apply equally to agencies and persons.

Contentions similar to those advanced by Seeburg were passed on by the District Court for the Southern District of New York, in *The Sperry and Hutchinson Co.* v. *Federal Trade Commission,*

[6] See also *Inter-State Builders, Inc.*, Docket No. 8624, Order and Opinion Directing Remand, April 22, 1966 [69 F.T.C. 1152].

supra, when the court considered claims that the Commission's denial of motions under § 3.11 of the Rules for discovery contravened statutory rights guaranteeing access to material evidence under Sections 7(c) and 12 of the Administrative Procedure Act.[7] The court ruled:

> I cannot agree. Section 7(c) provides simply that "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." These rights certainly do not extend to an unlimited privilege to examine all the Commission's files, which in essence is what Sperry seeks. As previously pointed out, there has been no showing here that Sperry will be denied any rights to present its defense and this court is in no position to find that Sperry is likely to be deprived of essential material at what will undoubtedly be a lengthy hearing yet to be commenced.
>
> Section 12 adds little to Sperry's argument. This provision states that "*except as otherwise required by law,* all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons." (Emphasis added.) By no means can it be said that the Commission has plainly flouted this open-ended legislative direction. CCH Trade Reg. Rep. ¶ 71,800, *supra,* at 82,703.

That holding is applicable here. Seeburg, as we have noted already, is not foreclosed from seeking the evidence which it seeks pursuant either to § 3.10 or § 3.17 or even to again seek this data from the Commission's files if it can meet the standard of necessity outlined in this and previous decisions. The court, in *Sperry and Hutchinson,* clearly held that a respondent does not have the right, as we noted above, to confidential data from the Commission's files at any particular time or stage in the Commission's proceeding as long as there is a reasonable opportunity at future stages of the proceeding to adduce the evidence it needs.

Significantly, the district court characterized the requirement of Section 12 that all requirements or privileges relating to evidence or procedures shall apply equally to agencies and persons as an "open-ended legislative direction." In short, while it has the duty of insuring that Seeburg has the opportunity to secure and present its evidence, the Commission can make provision that this is done in a manner consistent to the greatest extent possible with the protection of confidential sensitive business data in the Commission's files. As the court stated:

> Such "equal" rights of access to evidence as Sperry may have under this provision are by no means unqualified. As the statute indicates these

[7] Although respondent here relies on Sections 6(a) and 7(a), as well as 12, of the Administrative Procedure Act, its contentions are not materially different from those ruled upon by the court.

rights are plainly subject to the protections against disclosure of confidential information required by the Commission's rules. . . .

Moreoever, even assuming there is a statutory right of "equal" access to evidence, it could scarcely be said to require such access at any particular time or at any particular stage in the proceeding. Nor would it include access to any evidence which is not shown to be necessary to the defense. There is no showing here that access to any such material will necessarily be denied in this adjudicative proceeding. CCH Trade Reg. Rep. ¶ 71,800, *supra*, at 82,703.

Finally, the Commission does not construe § 1.133 "as a blanket of secrecy for all documents in [complaint] counsel's possession." The fact of the matter is that § 1.133 and § 1.134 do not constitute an impenetrable barrier to the Commission's confidential files, but merely require, as we have stated here and in other cases, that documents in the confidential category should not be released without a showing of necessity on the part of a respondent engaged in putting on his defense. This is by no means an insuperable barrier. The Freedom of Information Act of 1966 does not indicate that the Commission should abandon the standard of necessity in the case of discovery proceedings involving application for confidential documents from the Commission's files. In fact, the provisions of the Act indicate to the contrary. The Act does not concern itself with discovery procedures applicable to adjudicative proceedings. It does concern itself with enlarging the access of the public and in clarifying the right of the public to documents in administrative files. However, Section 3(e) of the Act provides expressly that documents in the categories enumerated therein shall be exempt from the provisions of the Act. In this connection, Section 3(e)(4) exempts from the provisions of the Act trade secrets and commercial or financial information obtained from any persons and privileged or confidential,[8] while Section 3(e)(7) exempts investigatory files compiled for law enforcement purposes except to the extent available by law to a private party.[9] Certainly, while these exemptions do not exclude documents in this cate-

[8] "Exemption No. 4 is for 'trade secrets and commercial or financial information obtained from any person and privileged or confidential.' This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. * * *" S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

[9] "7. Investigatory files compiled for law enforcement purposes except to the extent available by law to a private party: This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

gory from discovery proceedings when a proper request is made, they clearly indicate that it was not the intent of Congress to change with this legislation the standards whereunder discovery would be required with respect to such documents. In short, in the case of discovery proceedings relating to confidential information from the Commission's files coming within the exemptions of Section 3(e) of the Act, the test is still one of a showing of necessity, which has not been met in this instance.

Since the Commission is adequately informed of the issues raised by respondent's motion for production, the request for the opportunity to present briefs and oral argument will be denied. The motion for production is denied for the reasons set forth above.

Commissioner Elman concurred in the result.

ORDER RULING ON HEARING EXAMINER'S CERTIFICATION

Upon consideration of respondent's motion for production of documents certified by the examiner and its request that briefs and oral argument be scheduled on this motion, the Commission, for the reasons stated in the accompanying opinion, has determined that the motion for production of documents and the request for the scheduling of briefs and oral argument should be denied. Accordingly,

It is ordered, That respondent's motion for the production of documents be, and it hereby is, denied.

It is further ordered, That the request for the scheduling of briefs and oral argument on respondent's motion for the production of documents be, and it hereby is, denied.

Commissioner Elman concurring in the result.

THE SEEBURG CORPORATION

Docket 8682. Order and Opinion, Oct. 25, 1966

Order denying respondent's motion to vacate complaint and to file briefs and present oral argument on the issue of whether the Commission's consent order procedure violates the Administrative Procedure Act.

OPINION OF THE COMMISSION

This matter is before the Commission on respondent's motion to vacate the complaint, certified by the hearing examiner with a recommendation that it be denied.[1] In essence, respondent's

[1] Respondent, in a separate motion to the Commission, opposed by complaint counsel, requests leave to file a brief and present oral argument in support of its motion to vacate the complaint. Seeburg subsequently requested the Commission to consolidate the motion to vacate the complaint with the examiner's certification of respondent's motion for the production of certain documents from the Commission's files for briefing and oral argument.

motion to vacate alleges, in support of its request, that the Commission's consent order procedure preceding issuance of complaint violates the Administrative Procedure Act, the Freedom of Information Act of 1966, and administrative due process. Specifically, Seeburg attacks the Commission's consent order procedures as deficient on three grounds. It first alleges that the Commission's Rules of Practice delineating the consent order procedure, by omitting vital elements of the Commission's actual operations which are either unauthorized or unlawful, violate the notice requirement of Section 3(a) of the Administrative Procedure Act, as well as the Freedom of Information Act. Secondly, respondent alleges that it has been denied administrative due process on the ground that it was not apprised of, and had no opportunity to meet, the *ex parte* representations of the staff to the Commission in the course of the consent order procedure prior to the issuance of complaint. As a result, respondent argues, it was denied a fair hearing and effective representation by counsel. Thirdly, respondent argues the invalidity of the Commission's consent order procedure is confirmed by the Freedom of Information Act of 1966.

Respondent's motion to vacate the complaint presents two threshhold questions: First, do the Commission's Rules comply with the notice requirement of Section 3(a) of the Administrative Procedure Act and, secondly, are the Commission's consent order procedures, prior to the issuance of complaint, "adjudication," as that term is defined by that statute? Or, are consent settlement procedures, at this stage of the proceeding, as the Rules contemplate, simply an exercise of this Agency's administrative function where *ex parte* contact with the staff is appropriate and even desirable?

We first turn to the question of whether the Commission's Rules of Practice comply with the notice requirements of Section 3(a) of the Administrative Procedure Act. Respondent's contentions on the question of whether it had an adequate hearing and whether the consent order procedures permit improper commingling of the prosecutorial and adjudicative functions will be considered in connection with the issue of whether precomplaint consent settlement procedures are properly administrative or adjudicative functions.

Respondent contends that Section 3 of the Administrative Procedure Act has been violated by the failure of the Commission's Rules to authorize the participation or to define the role of the Bureau of Restraint of Trade in the consent order procedure. In this connection, Seeburg contends:

. . . the Commission's present Rules specifically pinpoint exclusive responsibility for consent negotiations with the Division of Consent Orders, which has no connection with investigation or litigation, as contrasted with staff counsel assigned to the Bureau of Restraint of Trade, who are inherently adversary advocates predisposed against a proposed respondent whose conduct they have investigated with an eye toward litigation.

Respondent's reliance on Section 3(a) of the Administrative Procedure Act, whose text is set forth in the margin,[2] is misplaced. A reading of §§ 2.1–2.4 of the Commission's Rules and its Statement of Organization makes it clear that they adequately delineate the consent order procedure actually followed and authorized the participation of the Bureau of Restraint of Trade in that process.

In this connection, the Statement of Organization sets forth the functions of the Division of Consent Orders as follows:

Division of Consent Orders.—This office *supervises* the preparation and execution of agreements submitted to the Commission for the settlement of cases by the entry of consent orders. (Emphasis supplied.)

The term "supervise" to describe the duties of the Division of Consent Orders is utilized for a purpose, namely, to inform respondent and all others to whom the consent order procedure applies that it is the duty of the staff members of this Division to oversee the preparation of agreements looking toward consent settlement by respondent and employees on the Commission's staff outside the Consent Order Division. The fact that the Statement of Organization does not specifically name the Bureau of Restraint of Trade, as such, is immaterial. Obviously, the Rules contemplate, in any case, that a proposed respondent desiring to settle a proceeding shall negotiate under the consent settlement procedure with those staff members primarily responsible for the case (in this case, attorneys belonging to the Bureau of Restraint of Trade), under the supervision of the Division of Consent Orders. Read together, §§ 2.1–2.4 of the Rules and the Statement of Organization clearly authorize, in the consent settlement process, participation by the Bureau of Re-

[2] "(a) *Rules.*—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

straint of Trade or other staff personnel engaged in the investigation or prosecution of the case.

In short, it is clear that the Rules and the Statement of Organization put respondents on notice that personnel from the Division of Consent Orders are not alone involved in the precomplaint consent order procedure. The Rules also make it clear that the final authority for deciding on whether proffered consent agreements should be accepted rests with the Commission itself. Accordingly, the Rules comply with the requirements of Section 3(a) that procedural rules shall describe the organization of the agency as well as the general course and methods by which functions are channeled and where final authority rests with respect to particular functions—in this case, the consent order procedure. Section 3(a) does not require that an agency's procedures be set forth in every detail but merely that they be "realistically informative to the public" [3] so that it can intelligently take advantage of the formal and informal procedures of an agency, which are available.

That it was the legislative intent to set up a standard of realistic information rather than to require the recitation of all the details attendant upon an agency's procedures is evident from the legislative history. In that connection, the Senate Judiciary Committee print of June 1945, commenting on agency objections to the proposed notice requirement under the APA, specifically stated that if such objections were grounded on the difficulty of stating the procedures in detail, the answer to such objections was that the contemplated provision required only a statement of the general course and method of agency procedure.[4]

Furthermore, even if it were conceded, for the sake of argument, that Part II of the Commission Rules and the Statement of Organization do not sufficiently apprise respondent of the particulars of the Bureau of Restraint of Trade's role in the consent settlement procedure, it is clear on the facts of this record that respondent, as soon as it initiated the settlement procedure, had actual notice of the Bureau's role in the precomplaint settlement proceedings. As respondent itself states in the memorandum in support of its motion to vacate, of July 15, 1966:

> All negotiations with representatives of the Commission were held at the offices of the Chief of the Division of Mergers of the Bureau of Restraint of Trade. Attending the negotiations were the Chief of the Division, Division staff counsel, a member of the Division of Consent Orders, as well

[3] See Attorney General's Manual on the Administrative Procedure Act (1947), p. 21.
[4] S. Doc. No. 248, 79th Cong., 2d Sess. 16 (1946).

as counsel for the respondent. These discussions explored not only respondent's position, but also alluded to the recommendations ultimately to be made to the Commission by the staff.[5]

In short, it is apparent from respondent's own statements that it clearly knew from the inception of the consent settlement proceedings that it would be dealing and negotiating with personnel of the Bureau of Restraint of Trade and that personnel of that Bureau would make recommendations to the Commission with respect to the consent settlement proceedings. Furthermore, respondent knew, from §§ 3.2 and 3.3 of the Commission's Rules of Practice, that an adjudicative proceeding in this Agency commences only with the issuance and service of a complaint by the Commission. Accordingly, respondent was put on notice by the express wording of the Rules that the precomplaint settlement procedures are considered by the Commission to be in the stage *preceding* the adjudicative phase of the proceeding and therefore one in which *ex parte* contact with the staff is proper. In short, from the beginning of the procedure, Seeburg knew (1) that the Bureau of Restraint of Trade was to participate in the proceeding, (2) that the staff would offer comments on respondent's proposals to the Commission, and (3) that under the Commission's Rules the precomplaint settlement procedures were *ex parte,* nonadjudicative proceedings. Knowing all this, respondent nevertheless elected to proceed and only when the case was not settled to its liking did Seeburg choose to attack the Commission's consent settlement procedures under Part II of the Rules as conflicting with the Administrative Procedure Act and the requirements of administrative due process. Accordingly, respondent's challenge to the Rules in this instance must clearly fail in any case, since it had actual notice of the very facts which it claims were inadequately published. See *United States* v. *Aarons,* 310 F. 2d 341, 347–8 (2d Cir. 1962). In that case the court explained that the sanction in Section 3(a) for nonpublication does not apply where actual knowledge exists. Construing the Congressional intention on this point the court cited a memorandum of the Department of Justice put into the record on the floor of the House during the consideration of this law. This interpretation of the section is pertinent here.

Section 3(a) provides that there shall be publication in the Federal Register of the rules of the various agencies of the Government. The last sentence of section 3(a) states: no persons shall in any manner be

[5] Furthermore, the Commission's "A" and "B" letters, respectively, notifying respondent of the intent to issue complaint and replying to respondent's answer indicating an interest in the consent settlement procedure, routinely identify counsel responsible for the trial of the case. (See Appendices A and B.)

required to resort to organization or procedure not so published. But this does not mean that a person who has actual notice is not required to resort to agency organization or procedures if it has not been published in the Federal Register. If a person has actual notice of a rule, he is bound by it. The only purpose of the requirement for publication in the Federal Register is to make sure that persons may find the necessary rules as to organization and procedure if they seek them. It goes without saying that actual notice is the best of all notices. At most, the Federal Register gives constructive notice. See 44 U.S.C. sec. 307." (Foot note omitted.) 310 F. 2d at 348.[6]

Furthermore, the challenge to the Commission's complaint in reliance on the notice provision of Section 3(a) of the Administrative Procedure Act is clearly inappropriate under any circumstances. The only penalty in the statute for the failure to make notification pursuant to its provisions is to excuse compliance by outsiders with the requisite procedure. *First National Bank of Smithfield* v. *Saxon*, 352 F. 2d 267, 273 (4th Cir. 1965). See also *Kessler* v. *F.C.C.*, 326 F. 2d, *supra* note 6, at 690. Obviously, the penalty provisions in Section 3 (a) give respondent no standing to sue for dismissal of the complaint on the grounds relied upon in this instance.

The resolution of respondent's contention that the Commission's consent order procedures are contrary to the Administrative Procedure Act and constitute a denial of administrative due process because they deny Seeburg a hearing and effective representation of counsel depends primarily on the validity of its assertion that consent order procedures are "adjudication" within the meaning of that term as it is used in the Administrative Procedure Act. Essentially, respondent argues in this connection that the consent settlement procedures come within the definition of "adjudication" as "agency process for the formulation of an order" set forth in Section 2(d) of the Administrative Procedure Act. The same section of the statute defines an order as "the whole or any part of the final disposition . . . of any agency proceeding in any matter other than rule making." In addition, respondent relies on the fact that Section 5(b) of the Administrative Procedure Act, which provides for informal settlement of cases otherwise to be decided on a hearing and record, is included in that section of the statute dealing with "Adjudication."

The short answer is that the Commission has already considered and rejected essentially the same contentions in *William H. Rorer, Inc.*, Docket No. 8599. The Commission, in its interlocutory order of March 5, 1964 [64 F.T.C. 1446, 1447], in that case, ruling on almost the identical argument, stated:

[6] See also *Kessler* v. *F.C.C.*, 326 F. 2d 673, 690 (D.C. Cir. 1963).

. . . Nothing in the Administrative Procedure Act or in the basic principles of fair procedure precludes the Commission from creating and following a procedure for settling disputes without recourse to adjudication. Consent negotiations are not a stage in adjudication but a means of establishing whether adjudication can be avoided altogether. Like investigations, consent negotiations are distinct from the adjudicative process and hence not governed by the standards which control adjudicative procedure.[7]

The definition of "adjudication" set forth in Section 2(d) of the APA, on which respondent relies, simply does not apply to consent settlement negotiations prior to the issuance of complaint. The consent order procedure, which follows the notification to respondent that this agency contemplates a proposed adjudicative proceeding, is not a final disposition in any sense. If the proposed respondent elects to do nothing upon such notification or if negotiations are unsuccessful, no disposition of any kind is, or can be, made. In such an eventuality, the complaint is issued and served; only then can final disposition be made after trial or upon default. In no case is there an order or final disposition made until after the issuance and service of the complaint and after full opportunity for hearing. Accordingly, since there is no final disposition prior to the issuance and service of complaint, there is no adjudication within the meaning of the Administrative Procedure Act. If a final disposition does result from consent order negotiations, it does so only upon respondent's consent. In such cases, the consent agreements customarily contain language wherein proposed respondent waives any further procedural steps and consents to the issuance of complaint and final order without further notice. Without such waiver and consent there can be no final disposition of any proceeding pursuant to the consent order procedures.

The Commission's position on this question is in accordance with the terms of Section 5(b) of the Administrative Procedure Act, which provides for settlement of disputes by consent. This section provides:

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, ...

* * * * * * *

(b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the

[7] On May 13, 1964, the United States District Court for the District of Columbia, in Civil Action No. 644-64, *William H. Rorer, Inc.* v. *Federal Trade Commission*, dismissed Rorer's motion for preliminary injunction and summary judgment, which involved this issue, among others.

proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

In short, Section 5(b) provides that administrative agencies shall afford opportunities for informal settlement and that the hearing procedures specified by the Act in cases where consent settlement procedures have begun, apply only to the extent that the cases are not settled in this manner. Accordingly, the statute sanctions informal procedures for settling cases in order to avoid the complexities of adjudication.

This construction of the plain meaning of the statute is supported by a reading of the legislative history. In this connection, the House Report on the bill expressly states, with respect to Section 5(b), that where settlements do not dispose of the whole case, Sections 7 and 8, as well as Section 5(c), apply.[8] Significantly, in the light of respondent's arguments implying that the Commission's *ex parte* contact with the staff was improper in this instance, Section 5(c) provides for the separation of functions in adjudicative hearings. Accordingly, the conclusion is inescapable, both from the text of the Act, the statutory scheme and the legislative history, that consent settlement procedures under Section 5(b)(1) of the Administrative Procedure Act are properly *ex parte*. There is no right to a hearing except to the extent that the matter cannot be settled by the informal settlement procedures provided by the agency.[9]

In effect, respondent, in its motion, concedes that the requirements for hearings spelled out in Sections 5(c), 7 and 8 of the Administrative Procedure Act do not apply to consent settlement procedures. Nevertheless, respondent claims it has been denied due process because it did not get a hearing, although it does not spell out with any degree of precision the ground rules under which such a hearing should be conducted.[10] In this con-

[8] H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946); S. Doc. 248, *supra* note 4, at 262.

[9] The fact that the Congress did not intend to require trial-like proceedings under the settlement procedures authorized by Section 5(b)(1) of the Administrative Procedure Act is made clear by the Senate Judiciary Committee print of June 1945 on the legislative history of the Administrative Procedure Act, which states in pertinent part:

". . . The statutory recognition of such informal methods should both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. It should be noted that the precise nature of informal procedures is left to development by the agencies themselves." S. Doc. 248, *supra* note 4, at 24.

[10] In this connection, respondent states:

"And while the detailed hearing requirements in Sections 7 and 8 of the Administrative Procedure Act may be inappropriate to the Commission's consent order practice, the essentials of due process presupposing fair and impartial procedures are still required for such 'adjudication,' where substantial rights of proposed respondents are vitally affected. . . ." (Memorandum in support of motion, p. 17.) In connection with its contention that *ex parte* comments by the staff on settlement proposals are improper, respondent does not apparently rely directly on Section 5(c). (*Id.* at 19.)

nection, respondent is obviously not entitled to intra-agency comment on its settlement proposals on the ground that this is necessary to afford it a fair hearing since neither the Commission's Rules nor the Administrative Procedure Act, with which those Rules must comply, require a hearing in precomplaint settlement procedures.

A related question in this connection is: Is respondent entitled, as it claims, to intra-agency memoranda to the Commission commenting on the consent negotiations prior to complaint, on the ground that withholding such documents would deprive it of effective representation of counsel? Respondent, of course, has the right to be represented by counsel. It is obvious, however, that the degree to which counsel may participate in representing a client before the Commission will, of course, vary with the nature of the proceeding. The real issue involved here is whether the Commission may informally consult with its staff as to whether a complaint should issue once consent settlement procedures have begun. Respondent's counsel should not be permitted to inject himself into that procedure under the guise of rebutting staff representations with respect to the settlement proceedings. The requirements of Section 6(a) providing for representation by counsel in administrative proceedings do not go that far. Nor does Section 6(a) of the Administrative Procedure Act go so far as to permit respondent to, in effect, secure, by way of discovery, internal communications bearing on the question of whether complaint should issue, irrespective of whether the proceeding is in the adjudicative stage or not. The net effect of respondent's argument is that administrative due process requires that the informal settlement procedures should be converted into a preliminary trial on the Commission's decision to issue complaint. Neither the Administrative Procedure Act nor any other legislation warrants such a procedure. Respondent's rights will be fully protected in the adjudicative stage of this proceeding, which is subject to all the safeguards provided by the Administrative Procedure Act. Furthermore, the Commission's decision on whether to issue complaint is within its discretion. Preservation of the integrity of the administrative process precludes an inquiry into this Agency's mental processes leading up to that decision.[11]

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[11] *Graber Manufacturing Company, Inc.* (Order Ruling on Questions Certified by the Examiner and Respondents' Appeal From Hearing Examiner's Ruling, December 13, 1965 [68 F.T.C. 1235, 1247]), Docket No. 8038; *R. H. Macy & Co., Inc.* (Order Ruling on Questions Certified and Denying Motion to Strike Certification, September 30, 1965 [68 F.T.C. 1179, 1195]), Docket No. 8650. *Cf. Modern Marketing Service, Inc.* (Order Ruling on Question Certified, January 7, 1966 [69 F.T.C. 1077, 1083]), Docket No. 3783.

Finally, respondent contends that the Commission's consent order procedures violate the letter and spirit of the Freedom of Information Act of 1966. Although that statute does not, as a technical matter, come into effect until July of 1967, respondent's arguments thereunder will be considered since the Commission desires to bring its procedures into line with the requirements of this Act as quickly as possible. Respondent, under this statute, also asserts that the rules relating to the Commission's consent order procedures do not adequately give notice of the nature of the staff participation in the consent settlement procedures, that they fail to establish criteria for opportunity to make oral presentations to the Commission,[12] and that they fail to give notice that the Commission may rely on *ex parte* representations by the staff. As stated above, it is the Commission's view that the consent order rules satisfy the notice requirements of Section 3(a) of the Administrative Procedure Act now in effect. It is further our view that the provisions of Section 3(a), as amended by the Freedom of Information Act, are not markedly different from the requirements of the statute prior to its amendment. As the Senate Report on the bill [13] states, this subsection has fewer changes from existing law than any other, primarily because there have been few complaints about omission from the Federal Register of necessary official material and that the complaints that have been received have been more directed to allegations that there has been too much publication rather than too little. According to the Senate Report, a number of minor changes have been made in the section to make it "more clear that the purpose of inclusion of material in the Federal Register is to guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests." Accordingly, under the Freedom of Information Act, as before, the standard by which procedural rules must be judged is whether they are realistically informative to the public of the administrative procedures available. The Commission's consent order rules for the reasons heretofore stated meet that test.

Seeburg also apparently relies on the Freedom of Information Act as support for its contention that it is entitled to intra-agency memoranda commenting on its settlement proposals to

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[12] Oral presentation to the Commission in the course of consent procedures has only been granted under unusual circumstances when in the Commission's belief such presentation served the public interest. If the consent settlement proceedings are to remain the flexible, informal procedures they are intended to be, the decision on whether to grant permission for such presentation must remain within the Commission's discretion.

[13] S. Rep. No. 813, 89th Cong., 1st Sess. 6 (1965).

the Commission. These, however, are internal communications relating to an administrative matter and clearly are within the exemptions set forth under Section (e) of the Act, which states in pertinent part:

> (e) Exemptions.—The provisions of this section shall not be applicable to matters that are . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency . . . .

As already noted, the Commission's precomplaint consent order procedures are properly *ex parte* and not in the category of adjudication. The Freedom of Information Act, of course, has no bearing whatsoever on the issue of whether the Commission's precomplaint consent order procedures are properly *ex parte* or not. The only question remaining is whether the staff memoranda commenting on respondent's consent settlement offers are properly within Exemption No. 5 to the provisions of the Act. We hold that the documents in question come squarely within the scope of this exemption. The Act does not enlarge the discovery rights of a private party engaged in litigation with the Commission to secure documents of this nature which have hitherto never been considered as subject to discovery in this Agency's proceedings.

The fact that Congress did not intend to enlarge discovery rights to encompass internal agency memoranda bearing on the question of whether the agency should issue complaint is supported by those passages in the House and Senate reports commenting on Exemption No. 5 of the Act. In this connection, the Senate Report states:

> Exemption No. 5 relates to "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation. (S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).)

The House Report makes it equally clear that the Act was not intended to enlarge a litigant's discovery rights to documents of this nature. It, too, recognizes the merit in the objection of agency witnesses that a complete exchange of opinions

within agencies would be impossible if all internal communications were made public, and that "advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.'" The report concludes its consideration of this point with the following significant interpretation of this exemption, which is pertinent here:

> . . . This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material "which would not be available by law to a private party in litigation with the agency." Thus, any internal memorandums which would *routinely* be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). (Emphasis supplied.)

As the Assistant Attorney General of the Department of Justice's Office of Legal Counsel stated: "If an internal report, proposal, analysis, or recommendation is to be worth reading, it must be a free expression and not confined to matters 'cleared for publication.' This is as true in Government as it is in any other organization." [14] That reasoning is applicable in full measure to the documents which respondent claims should have been produced in the course of the precomplaint settlement procedures.

The final matter remaining for decision is the question of whether respondent should be granted leave to file briefs and present oral argument in support of its motion to vacate complaint and whether that certification should be consolidated with the certification of Seeburg's motion for production of documents for the scheduling of briefs and oral argument. The Commission has carefully examined the pleadings filed before the hearing examiner in connection with respondent's motion to vacate as well as respondent's subsequent request directly addressed to it, and complaint counsel's answer in opposition thereto. As a result of such review, the Commission is of the opinion that on the basis of the pleadings now in this record it has sufficient information on the respective positions of both respondent and complaint counsel on the issues raised by the motion to vacate the complaint, and that this matter should be decided without further delay. The Commission, therefore, has determined that

[14] Statement of Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Department of Justice; Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1666, 88th Cong., 1st Sess. 203 (1963).

respondent's motion to vacate the complaint, its request for leave to file briefs and present oral argument, and the request that the two certifications of respondent's motions be consolidated for briefs and oral argument should be denied. An order to this effect will issue.

Commissioner Elman concurred in the result.

APPENDIX A
FEDERAL TRADE COMMISSION
WASHINGTON, D. C.

OFFICE OF THE SECRETARY

Re:
File No.

You are hereby notified that the Commission has determined to institute a formal proceeding in the above captioned matter. A copy of the complaint which the Commission intends to issue, together with a proposed form of order, is enclosed.

As provided in the Commission's Rules, Part 2—Consent Order Procedure, you may, within ten days after the service of this notice, notify the Secretary as to whether or not you are interested in having the proceeding disposed of by the entry of a consent order. If your reply is in the negative, or if no reply is filed within the time provided, the complaint will be issued and served forthwith and thereafter adjudicated in regular course. If your reply is in the affirmative, the files will be referred to the Division of Consent Orders for further handling in accordance with established procedure. After the complaint has been issued, the consent order procedure provided for by Part 2 of the rules will not be available.

Counsel for the Commission in this matter is

By direction of the Commission.

/s/Joseph W. Shea
Joseph W. Shea,
Secretary

Enclosures:

Copy of complaint the Commission intends to issue and proposed form of order.
Copy of Statute.
Rules of Practice.
Notice of Appearance. (2)

APPENDIX B
FEDERAL TRADE COMMISSION
WASHINGTON 25, D.C.

OFFICE OF THE SECRETARY

Re:
File No.

The proposed respondent(s) having filed reply on indicating interest in having this matter disposed of by the entry of a consent order, the files herein have been referred to the Division of Consent Orders.

The Commission's Rules governing consent order procedure provide for the submission to the Commission of an agreement containing a consent order within thirty days after the filing of such a reply.

Counsel for the Commission will communicate with you with respect to securing the agreement.

Very truly yours,
/s/Joseph W. Shea
Joseph W. Shea,
Secretary.

ORDER RULING ON HEARING EXAMINER'S CERTIFICATION

Upon consideration of respondent's motion to vacate the complaint certified by the examiner, its request that the motion to vacate be scheduled for briefs and oral argument, and its request that the motions to vacate the complaint and for production be consolidated for briefing and oral argument, the Commission has determined, for the reasons stated in the accompanying opinion, that this motion and the requests for the scheduling of briefs and oral argument be denied. Accordingly,

It is ordered, That respondent's motion to vacate the complaint be, and it hereby is, denied.

It is further ordered, That the requests for the scheduling of briefs and oral argument be, and they hereby are, denied.

Commissioner Elman concurring in the result.

GLADSTONE-ARCUNI, INC.

Docket 8664. Order, Nov. 17, 1966

Order denying respondent's appeal from the hearing examiner's refusal to hear an additional witness after the closing of the record on the ground that the order in Docket No. 8629, p. 638 herein, required additional evidence.

ORDER DENYING PERMISSION TO FILE INTERLOCUTORY APPEAL

The respondent in this proceeding seeks to appeal from the hearing examiner's order denying its motion for an additional hearing and it has filed with the Commission a document which it designates as an appeal. Complaint counsel has filed a reply thereto. Under Section 3.20 of the Commission's Rules of Practice, an interlocutory appeal, except as provided in sections not here relevant, may be filed only after permission is first obtained from the Commission. Since respondent has not obtained and received such permission, it may not properly appeal to the Commission from the examiner's order. Nevertheless, in the circumstances the Commission will construe the document filed as a request for permission to file an interlocutory appeal under Section 3.20 of its Rules and will make its determination in accordance with the requirements of such section. This provides that permission to file an interlocutory appeal will not be granted except in extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest.

On October 5, 1966, subsequent to the closing of the record for the taking of further evidence except in accordance with the examiner's order of September 29, 1966, authorizing the parties to present motions for additional hearings, respondent moved for an additional hearing of one day, to be held in New York City. Respondent, as a ground for its request, asserted that the Commission's decision in the recently decided case of *Rabiner & Jontow, Inc.*, Docket No. 8629 (order issued September 19, 1966) [p. 638 herein] required the submission of additional evidence. The examiner denied such motion, stating as his reason that respondent failed to state (a) the nature of the evidence to be adduced and why such evidence was not offered at the previous defense hearings; (b) the names of the additional witnesses to be called and a list of the additional exhibits to be offered, as required by previous orders of the examiner; and (c) the manner, if any, in which the *Rabiner & Jontow* opinion imposed a burden of proof upon respondent different from its burden at the time of the hearing.

Respondent, in seeking to appeal to the Commission, makes no claim that the examiner erred in any way in the proper exercise of his discretion nor does the respondent attempt to explain or satisfy the deficiencies in its presentation to the examiner. Respondent states only that the additional expert witness to be called, who is not identified, will testify "regarding the manner of granting allowances in apparel trades and the ability

of a competitor to make a determination of the nature and extent of such allowance, ..." Respondent's justification for its request appears to be contained in the following sentence:

> Respondent deems that the Rabiner & Jontow decision, which was received after the conclusion of the last hearing of this proceeding on September 27, 1966, would be additional evidence that would aid the Commission in learning more about the practices in the apparel trades in order to make a determination of the question whether or not this respondent was meeting competition in good faith.

We fail to see that it is necessary to hold a further hearing merely to bring to the Commission's attention to practices in the apparel trade which may be shown in *Rabiner & Jontow, supra.* The Commission, of course, is cognizant of such decision, and respondent is free to argue as to its relevance, if any, to the instant proceeding.

The hearing examiner has broad discretion in connection with the conduct of the hearings. No showing whatsoever has been made here that he was unreasonable or arbitrary in denying the request for an additional hearing or that he in any way abused his discretion in this regard. No showing has been made of extraordinary circumstances where an immediate decision by the Commission is clearly necessary to prevent detriment to the public interest. In the circumstances, respondent's request will be denied. Accordingly,

It is ordered, That the request herein presented as an appeal and treated as a request for permission to file an interlocutory appeal be, and it hereby is, denied.

Commissioner Elman not concurring.

GENERAL TRANSMISSIONS CORPORATION OF WASHINGTON ET AL.

Docket 8713. Order, Dec. 1, 1966

Order denying respondents' request for suspension of proceeding until complaints are issued against its competitors who are engaged in the same practices with which respondent is charged.

ORDER RULING ON MOTION FOR SUSPENSION OF PROCEEDINGS

CERTIFIED BY THE EXAMINER

The examiner has certified, with the recommendation that it be denied, respondents' motion for suspension of further proceedings in this matter until complaints are issued against certain of its competitors or, in the alternative, for dismissal

of the complaint and in lieu thereof institution of a trade practice conference proceeding. In support of these requests, respondents, in essence, contend the business practices of respondents are the same as those used by their competitors, including the dominant firm in the industry.

In his affidavit attached to respondents' motion, one of the individual respondents, William J. Greene, states that the advertisements of General Transmissions are no different from its competitors since the representations therein are essentially the same. The affidavit further alleges, in effects that the performance of General Transmissions' competitors in connection with the advertising claims under consideration in this proceeding was the same as that of respondents. According to the affidavit, the instances which it cites are only illustrative of the fact that the practices challenged in the complaint "are common, ordinary, market-wide practices used by all competitors in the metropolitan Washington, D. C. area." The affidavit concludes with the assertion that competition in the Washington market is severe. As a result, respondents claim that to require General Transmissions to discontinue the practices alleged illegal while its competitors are not similarly restricted would seriously injure them and may force them out of business before the Commission takes action in the case of its rivals.

Subsequent to the examiner's certification, respondents filed a request for leave to present oral argument and to file a brief in support of their motion.

The Commission has determined that the motion should be denied. A determination of the truth of falsity of the advertising claims under consideration here, whether made by respondents or their competitors, cannot be made on the basis of the advertisements alone. The actual performance of the advertiser is necessarily a crucial consideration. As a result, the Commission is not in a position to pass on the veracity of the advertising claims cited in the motion to suspend solely on the basis of respondents' charges. Under these circumstances, the public interest will not permit a suspension of this proceeding where the Commission has stated in the complaint that there is reason to believe that the law has been violated. If it is respondents' position that Commission proceedings against their competitors will result in orders to cease and desist, that assumption is premature and does not justify suspension of this proceeding. See *Clinton Watch Company* v. *Federal Trade Commission*, 291 F. 2d 838 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962). Nor is there any evidentiary basis for the inference that respondents

will be forced out of business by bringing this case to an expeditious conclusion.

Respondents' alternative request, that the Commission institute a trade practice conference proceeding in lieu of the complaint in this case, will also be denied. The Commission will consider whether an industrywide proceeding or other actions are justified in the light of the representations made by respondents. However, even if a general industrywide inquiry were instituted, this would not justify "declaring a moratorium on all enforcement activities" as to past transactions. See *Permanente Cement Company,* Docket No. 7939 (1964) [65 F.T.C. 410]; *Texas Industries, Inc.,* Docket No. 8656, and *Mississippi River Fuel Corporation,* Docket No. 8657 (Order Denying Motions To Suspend Complaints, April 14, 1965) [67 F.T.C. 1363].

Finally, respondents have made no showing that the public interest would be served by further delaying this proceeding in order to grant respondents an opportunity to present oral argument and file a brief in support of their motion. The Commission, on the basis of the examiner's certification and the pleadings already on file, has sufficient information to dispose of the issues raised by respondents' requests. Accordingly,

It is ordered, That respondents' request for suspension of these proceedings be, and it hereby is, denied.

It is further ordered, That respondents' request for institution of a trade practice conference proceeding in lieu of the complaint in this case be, and it hereby is, denied.

It is further ordered, That respondents' request for opportunity to present oral argument and to file a brief in support of their motion to suspend be, and it hereby is, denied.

STATESMAN LIFE INSURANCE COMPANY

Docket 8686. Order and Opinion, Dec. 7, 1966

Order denying respondent's request for an intra-agency document which allegedly dismisses a complaint based on facts similar to those in the instant case.

DISSENTING OPINION

By ELMAN, *Commissioner:*

While I am not in favor of opening all of the Commission's files to every member of the public who expresses a desire to examine them, I do not agree that this document should be withheld from respondent. The Commission has formally charged

respondent with violating the law, and we should not, without overriding reason, withhold any document from respondent which could assist in its defense. *Jencks* v. *United States,* 353 U.S. 657, 668–71; *Brady* v. *Maryland,* 373 U.S. 83, 86–88; *United States* v. *Andolschek,* 142 F. 2d 503, 506 (2d Cir. 1944). Respondent asserts—and the Commission apparently does not deny—that the subject-matter of the requested document is related to issues raised in the instant proceeding by way of defense. This constitutes "good cause" under our Rules of Practice. In discovery proceedings it is not necessary for respondent to show that the document will be introduced in evidence, but only that it may aid in preparing its defense. (*Associated Merchandising Corp.,* Dkt. 8651, Order of Sept. 23, 1965, p. 5 [68 F.T.C. 1175, 1178].) Respondent obviously cannot determine the document's usefulness until after it is inspected; and only respondent is competent to determine, after examining the document, what use if any should be made of it.

Like the other members of the Commission, I have not examined the requested document. I have no idea whether it does or does not contain anything that may be helpful to respondent's defense. I do not know—and I do not understand that the other Commissioners know—whether the "public interest considerations" involved in the prior closing were the same as or different from those involved here. Nor do I have any basis for determining whether the Commission's action in the prior matter would or would not "compel," or even justify, closing or dismissing this case. One cannot know any of these things unless he examines the document. We have not done so ourselves; the hearing examiner has not done so; and the majority does not propose to let respondent do so. Perhaps after seeing the document, respondent would have no further use for it. But that is something for respondent, not the Commission or the hearing examiner, to decide. Why should respondent have to take our word for it that this document could not conceivably aid in its defense? And how can we give respondent such word without examining the document?

One thing is clear: As a result of the Commission's ruling today, the requested document will never get into the record of this case. It will continue to gather dust in the Commission's archives, resting undisturbed. Respondent will never know whether it contains matter that would have been helpful in making its defense. And neither will the members of the Commission. Yet it is said, without any examination of the document, that it would have no relevance to any issue in this

case. How can one say this with assurance? This is a Section 5 case, which is now before a hearing examiner and in which no evidence has yet been taken. Other than the bare pleadings, the Commission has no record before it. Section 5 proceedings like this one, when they ultimately come before the Commission for final decision, generally present issues of discretion and law as well as fact: What representations were made by respondent? What impressions did they convey to the public? Were they false or deceptive in any material respect? Is there need for an order—or will the public interest be better served by some other disposition of the matter? If an order is to be entered, how far should we go in "fencing in" respondent? Has respondent shown an attitude of intransigent defiance of the law, or has it cooperated with the Commission in good faith? Did it rely upon, or did it disregard, informal advice of the Commission's staff in the advertising claims it made? These questions, and others, may be involved in a case like this. Particularly in regard to the fashioning of an appropriate remedy, the Commission—like a court of equity—takes a broad range of factors into consideration. How can one say with certitude, at the present early stage of the proceeding, that this document—which, I repeat, none of us has seen—could not possibly be of any help to respondent in preparing its defense here? Even if it were only the basis of a plea for mercy, I think respondent should not be denied the opportunity to make whatever use it can of the document in its defense.

If the Freedom of Information Act of 1966 means anything, it means that Congress wants a government agency to have some reason for withholding a relevant document from a respondent in an adjudicative proceeding, other than the mere fact that it is contained within the agency's "confidential" files. Respondent's interest in examining this document is obviously serious and substantial, and not based on idle curiosity. Its motion should not be denied without good reason. So far as appears, making this document available to respondent would in no way impair administrative efficiency. Nor would it involve any unwarranted disclosure of the Commission's "mental processes in arriving at a disposition of a matter before it"—even if we assume, as the majority apparently does, that the "mental processes" of an agency are something that it should not be required to disclose to the public. I would suppose, however, that, so far as practicable, an agency should take every opportunity to satisfy the public that its actions rest on a reasoned and reasonable basis. While it may not be feasible at present for the

Commission to publish an "opinion" or "decision" in every closing matter, this should not mean that the grounds on which we acted should forever, and in all circumstances, remain secret. Wherever appropriate, as in this instance, the lid of secrecy should be lifted—and I do not see how anybody would be harmed thereby. If anything, it should tend to make agency actions more responsible.

CONCURRING STATEMENT OF COMMISSIONERS JONES AND REILLY

The dissent seems to be arguing that the respondent's motion should be granted because the Commission has not shown good cause why the requested document should *not* be produced. We do not agree that any such burden is on the Commission in a discovery request of a respondent. The Commission's rules explicitly require that it is the respondent which must show good cause for the release of memoranda and documents in the Commission files. To establish such good cause respondent must demonstrate at the very least that the document will be relevant to its defense before any issue can arise as to whether confidentiality is a proper ground for its nonproduction. We have not reached this latter issue in this case.

While the dissenting Commissioner makes respondent's request here sound like an isolated instance, the majority of the Commission is aware of the problems that will arise if a respondent can show good cause to obtain a document by merely asserting it is necessary for his defense. It is ludicrous to suggest that the mere assertion that a document is needed in a defense is good cause.

The sole basis set forth by respondent in its motion for the production of the requested internal staff communication to the Commission is that it sets forth reasons why an investigation against its predecessor, based on what respondent claims were identical advertisements, should be closed and that this "memorandum is obviously relevant to Stateman's position that this advertising is not deceptive and that this proceeding is lacking in public interest" (Respondent's Motion, pp. 4–5). The issue before us in the instant proceeding relates solely to the question of whether respondent's advertising claims are or are not deceptive. Any attempt to determine why the Commission closed a prior proceeding would be to put the Commission's internal administrative decisions on trial rather than respondent's alleged practices and would have no relevance to any issue in this case. No such inversion of the administrative process is required either by any law presently in effect or by the Freedom of Infor-

mation Act of 1966. For this reason we concur in the majority's order that the motion for the production of this document should be denied.

ORDER DENYING PRODUCTION OF DOCUMENT

This matter is before the Commission upon the hearing examiner's certification of respondent's motion of October 21, 1966, requesting the production of a confidential document in the Commission's files.

The specific document requested is identified as "the Commission's closing memorandum in F.T.C. File No. 642 3244, Cosmopolitan Mutual Life Insurance Company." [1] As grounds for the request respondent refers to the following circumstances: It asserts that respondent herein, Statesman Life Insurance Company, is a successor of the Cosmopolitan Mutual Life Insurance Company; that before the latter became inactive on December 31, 1964, it (Cosmopolitan) received a letter from the Bureau of Deceptive Practices requesting certain information in connection with the investigation in File No. 642 3244; that the advertising materials supplied to the Commission were identical with those now set forth in the instant complaint except for the name of the insurer appearing on the letter; and that the Commission advised Cosmopolitan that the matter was closed because the information developed was not considered sufficient to justify further action. Respondent's argument is that the memorandum referred to is relevant to its position that the challenged advertising is not deceptive and that this proceeding is lacking in public interest.

Under the Commission's Rules respondent must show good cause for the document requested.[2] In an effort to show good cause, respondent has asserted that it is believed the document requested would show reasons why the Commission decided not to proceed in the Cosmopolitan Mutual Life Insurance Company matter and that such reasons would be relevant to the defense

[1] Respondent states that it "understands that in all docketed investigational files which are closed a report and recommendation of closing is made by the [Commission's] staff." Of course, it does not necessarily follow from the fact that a file is closed that the staff so recommended.

[2] Respondent has made its request pursuant to § 3.11 of the Commission's Rules of Practice and § 1.133(a) of the Commission's General Procedures. However, a request for production of confidential documents in the files of the Commission made during the course of a hearing is considered as a request pursuant to § 1.134 of the Commission's General Procedures relating to the release of confidential information. *R. H. Macy & Co., Inc.*, Docket No. 8650 (order issued September 30, 1965) [68 F.T.C. 1179]; *The Sperry and Hutchinson Company*, Docket No. 8671 (order issued April 15, 1966) [69 F.T.C. 1112]. See also the discussion in *Viviano Macaroni Company*, Docket No. 8666 (order issued March 9, 1966) [69 F.T.C. 1104], and *The Seeburg Corporation*, Docket No. 8682 (order issued October 25, 1966, denying request for production of documents) [p. 1809 herein].

the respondent wishes to make in this case. Although respondent has alleged that there are great similarities in its advertising and the advertising of Cosmopolitan Mutual Life Insurance Company, it does not follow that the Commission's decision to close the file in the Cosmopolitan matter would compel the Commission to close or dismiss this case. The parties are different, the circumstances are different and the public interest considerations which perhaps influenced the decision to close the earlier file were not the same as those underlying the Commission's consideration of this case to this date.[3] We conclude that respondent has failed to sustain its burden of showing "good cause" as required by the Commission's Rules.

The Commission is also of the view that intra-agency memoranda of the type requested, at least to the extent that such would consist of the Agency's mental processes in arriving at a disposition of a matter before it, are not the proper subject of discovery. *United States* v. *Morgan,* 313 U.S. 409, 422 (1941); *North American Air Lines* v. *Civil Aeronautics Board,* 240 F. 2d 867, 874 (D.C. Cir. 1956), *cert. denied,* 353 U.S. 941; *Coro, Inc.* v. *Federal Trade Commission,* 338 F. 2d 149, 152–153 (1st Cir. 1964); *Graber Manufacturing Company, Inc.,* Docket No. 8038 (order issued December 13, 1965, slip opin., p. 7) [68 F.T.C. 1235, 1240]; *Inter-State Builders, Inc.,* Docket No. 8624 (order issued April 22, 1966) [69 F.T.C. 1152]; *R. H. Macy & Co., Inc.,* Docket No. 8650 (order issued September 30, 1965) [68 F.T.C. 1179]; *The Sperry and Hutchinson Company,* Docket No. 8671 (order issued April 15, 1966) [69 F.T.C. 1112]; and *The Seeburg Corporation,* Docket No. 8682 (order issued October 25, 1966, denying request for production of documents) [p. 1809 herein]. Nor do we believe, as respondent seems to suggest, that this is contrary to the policy reflected in the Freedom of Information Act of 1966 (Public Law 89–487, 80 Stat. 250 (1966)), an amendment to the Administrative Procedure Act. See discussion in *The Seeburg Corporation,* Docket No. 8682 (order issued October 25, 1966, denying a motion to vacate complaint, slip opin., pp. 11–14) [pp. 1827–1830 herein]. Accordingly,

It is ordered, That respondent's motion for the production of

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[3] Respondent makes no claim that the Commission acted arbitrarily in issuing the complaint in this proceeding while closing the file in the prior matter. The earlier matter was closed, according to the letter transmitted to the Cosmopolitan Mutual Life Insurance Company, on the basis that the information developed in the investigation was not considered sufficient to justify any further action. The Commission, of course, is vested with discretion as to whether or not it will issue a complaint or dispose of a matter by some other administrative action. *R. H. Macy & Co., Inc.,* Docket No. 8650 (order issued September 30, 1965, slip opin., p. 5) [68 F.T.C. 1179, 1182], and cases there cited.

a document certified herein by the hearing examiner be, and it hereby is, denied.

Commissioner Elman dissenting.

MERCURY LIFE AND HEALTH COMPANY ET AL.

Docket 8704. Order, Dec. 9, 1966

Order denying respondents' motions to extend time for filing consent order and for the postponement of the hearings, and returning the motion to dismiss to the hearing examiner.

ORDER RULING ON MOTIONS CERTIFIED BY THE HEARING EXAMINER

This matter is before the Commission upon the certification by the hearing examiner of respondents' "Motion to Dismiss," "Motion to Extend Time for Filing Consent Order," and "Motion to Postpone Hearing," which motions were filed November 10, 1966. These will be treated *seriatum* below.

In their motion to dismiss, respondents assert that respondent Mercury Life and Health Company is a nonprofit corporation and that it is thus not within the ambit of the Federal Trade Commission Act. Complaint counsel, in his answer to such motion, requests that the motion be denied for the reasons (a) that Mercury Life and Health Company is a "corporation" under the definition in Section 4 of the Federal Trade Commission Act because it is organized to carry on business for the profit of its members and (b) that it is not a genuine nonprofit corporation because its operations return revenues to Leonard Hyatt, president and chairman of the board, under the terms of a management contract between Mr. Hyatt and Mercury Life and Health Company. The hearing examiner, as to this motion, recommends that in the event the motion to extend time for filing consent order is denied, the ruling be held in abeyance until all the evidence is received.

An issue raised in an adjudicative matter as to whether or not a company is a corporation within the meaning of Section 4 of the Federal Trade Commission Act is one which can only be resolved upon the basis of the facts of record. Moreover, since this is here a highly contested issue, it appears to us that a determination probably should not be made except on the basis of the whole record after it has been closed for the reception of evidence. The examiner has discretion to so defer

the decision.[1] While we concur in the examiner's recommendation in the matter, we do not believe it is necessary for the Commission to rule directly on respondents' motion. Therefore, as to the motion to dismiss, the matter is returned to the examiner for his determination.

Respondents' next motion certified by the examiner is a motion to extend time for filing a consent order. In this motion, respondents assert that because of alleged illness of individual respondent Leonard Hyatt, it was impossible for any of the respondents or their attorneys to avail themselves of the consent order procedure set forth in Part 2 of the Commission's Rules. Complaint counsel, in his answer to this motion, while pointing out that respondents did not give notice of Mr. Hyatt's illness until October 13, 1966, and did not indicate a desire to enter a consent negotiation until October 19, 1966, states that it appears the public interest would be best served by granting the motion. The hearing examiner recommends that the motion to extend time for filing a consent order be granted.

This matter is now before the hearing examiner for adjudication in accordance with the Commission's Rules of Practice for Adjudicative Proceedings. It would be inappropriate for the Commission, at this time, to extend the time for the filing of a consent order and so in effect to return the matter to its pre-complaint posture. The Commission may consider whether or not it will waive § 2.4(d) of its Rules if and when faced with that proposition. Thus, the motion, so far as it is merely a request to extend time for the filing of a consent order, will be denied.

In the third and final motion certified by the examiner, the respondents move to postpone the hearing on the basis that Leonard Hyatt, the individual respondent, is recovering from a severe and disabling heart condition; that it is medically impossible for him to appear and participate in any type of legal proceeding at this time without endangering his health and life; and that respondents assertedly find it impossible to take part in the proceeding until Mr. Hyatt has sufficiently recovered from his illness to advise and assist the attorneys representing the respondents and to testify at the hearings. Complaint counsel opposes such motion and the hearing examiner recommends that it be denied.

[1] Relevant to this is a provision in § 3.6(e) of the Commission's Rules of Practice, which states that when a motion to dismiss is made at the close of the evidence offered in support of a complaint based upon an alleged failure to establish a *prima facie* case, the examiner may, if he so elects, defer ruling thereon until the close of the case for the reception of the evidence.

The same motion was made to the hearing examiner in the course of the hearings held on October 19, 1966. At that time the examiner carefully considered this issue and expressed his concern, among other things, that there is no indication at what time Mr. Hyatt will be available to participate in the case. He denied the motion but stated that it was with the understanding that he would subsequently entertain a motion to strike any and all of the evidence if it appears to be prejudicing or endangering any of respondents' rights. We believe he has made a sound determination in the matter, making adequate provision for the protection of the rights of respondents. Thus, we will accept his recommendation thereon and deny the request for postponement. Accordingly,

It is ordered, That respondents' motion to extend time for filing a consent order be, and it hereby is, denied.

It is further ordered, That respondents' motion for postponement of hearings be, and it hereby is, denied.

It is further ordered, That as to the motion to dismiss this matter be returned to the hearing examiner for his appropriate determination thereon.

DEVCON CORPORATION ET AL.

Docket C–607. Order and Opinion, Dec. 16, 1966

Order denying respondents' request to file an interlocutory appeal and returning the case to hearing examiner for the receipt of additional evidence on the question of the metallic content of respondent's products.

OPINION OF THE COMMISSION

By REILLY, *Commissioner:*

The Commission on October 11, 1963 [63 F.T.C. 1034], issued its consent order herein requiring in relevant part that respondents cease and desist from:

1. (a) Using the words "steel" or "aluminum" or any other word or words denominating metallic substances in brand names to designate, describe or refer to a product that consists principally of non-metallic ingredients: *Provided, however,* That if a product contains a metallic substance in some form, the percentage thereof may be stated.

On October 25, 1965, the Commission issued its order to show cause why the October 11, 1963, cease and desist order should not be modified so that the thrust of the order provision is to

the metallic properties of the products rather than to their metallic content and thus in relevant part should read as follows:

1. (a) Using the words "steel" or "aluminum" or any other word or words denominating metallic substances in brand names to designate, describe or refer to a product which, after application, does not have the same physical and chemical properties of metal and of any particular metal represented: *Provided, however,* That nothing herein contained shall prohibit truthful representations in advertising and labeling of the percentage of content of any metallic substances in such products.

Thereafter, respondents in their answer filed February 21, 1966, requested a full evidentiary hearing on the issues raised by the Commission's order to show cause, and on April 7, 1966, the Commission issued an order directing hearings ". . . for the purpose of receiving evidence in support of and in opposition to the question whether the public interest requires that the Commission's order to cease and desist of October 11, 1963 [63 F.T.C. 1034], be altered, modified or set aside in accordance with the Commission's order to show cause dated October 25, 1965."

Evidentiary hearings in response to this order of the Commission have been held and the record has been closed by the hearing examiner.

On November 23, 1966, respondents filed with the Commission a Request for Permission to File Interlocutory Appeal, pursuant to § 3.20 of the Commission's Rules of Practice, averring in substance that the hearing examiner has erroneously confined the scope of the hearing to a consideration of the single issue whether the products involved herein after application have the same physical properties of metal or of a particular metal. It is respondents' contention that the hearing examiner should have permitted the introduction of evidence on the question of public interest, deception and whether a suitable remedy other than excision of trade names should be provided.

Complaint counsel has opposed respondents' request on a number of procedural and substantive grounds.

In the opinion of the Commission the hearing examiner's interpretation of the Commission's order directing hearings was unduly restrictive.

In directing a hearing to determine ". . . whether the public interest requires that the Commission's order of October 11, 1963, be altered, modified or set aside in accordance with the Commission's order to show cause" the Commission implicitly charged the hearing examiner to resolve the central issue, namely, whether after application the products have the same physical and chemi-

cal properties of metal, and any subsidiary issues pertinent thereto.

Specifically, although the Commission is charged in the first instance with responsibility for determining public interest, it is wholly appropriate to entertain any evidence proffered by respondents on the point suggesting that there is none. *Moretrench Corporation* v. *Federal Trade Commission,* 127 F. 2d 792 (1942).

Similarly, on the question of deception, while it is not necessary that actual deception be proved, rather that the records show capacity and tendency to deceive, *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission,* 143 F. 2d 676 (1944); *Goodman* v. *Federal Trade Commission,* 244 F. 2d 584 (1957), nevertheless, respondents should not for that reason be prevented from submitting probative evidence tending to negate capacity to deceive. Finally, the possibility that this proceeding may result in the excision of valuable trade names, brands or designations makes it vitally important that respondents have an opportunity to submit whatever evidence they have which they feel demonstrates that excision is not reasonably necessary to cure whatever deception may inhere in the trade names. *Federal Trade Commission* v. *Royal Milling,* 288 U.S. 212 (1933); *Jacob Siegel* v. *Federal Trade Commission,* 327 U.S. 608 (1946).

This matter is before the Commission on an application under Rule 3.20 for permission to file an interlocutory appeal. As noted above, the record for reception of evidence has been closed. However, in the interest of efficiency and speed, there seems little reason to insist upon the formal requirement of entertaining an interlocutory appeal since the issue involved is clear from the application.

Accordingly, an appropriate order directing the hearing examiner to reopen and receive evidence will issue.

ORDER DIRECTING FURTHER HEARING AND DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

The Commission on April 7, 1966, having issued its order directing hearings on the issues raised by its order to show cause of October 25, 1965, in this matter, and

The hearing examiner in the course of said hearings having ruled that the only relevant issue was whether the products in question after application have the same properties as does metal or particular metals, and

The respondents on November 23, 1966, having filed a Request

for Permission to File Interlocutory Appeal from said ruling, averring that other relevant issues which should have been considered by the hearing examiner are: (1) whether the proceeding is in the public interest, (2) whether the trade names in question are in fact deceptive and (3) whether a remedy other than excision might not be adequate in curing any deception which might be present, and

The Commission being of the opinion that the public interest will be best served by ruling now on the issues raised in the Request for Permission to File Interlocutory Appeal and that therefore interlocutory appeal is unnecessary,

It is ordered, That respondents' Request for Permission to File Interlocutory Appeal be, and it hereby is, denied.

It is further ordered, That the hearing examiner be, and he hereby is, directed to reopen the record of these proceedings for receipt of evidence on issues outlined herein and in the accompanying opinion.

THE CARL MFG. CO. ET AL.

Docket 8689. Order and Opinion, Dec. 23, 1966

Order granting respondents' request for extension of time to Jan. 9, 1967, in which to file an appeal brief.

DISSENTING OPINION

By ELMAN, *Commissioner:*

The complaint in this case, issued by the Commission on June 27, 1966 [71 F.T.C. 1156], alleged that the respondent corporation misled the public by calling itself a manufacturer when actually it manufactured none of the merchandise it sells. At the hearing, however, complaint counsel—in direct contradiction to the information given the Commission when it decided to issue the complaint—conceded that respondent does in fact manufacture many of the products it sells. Complaint counsel thereupon moved to amend the complaint to conform to the evidence, and the hearing examiner granted the motion. As amended by the hearing examiner, the complaint alleged deception of the public in that "all" of the merchandise sold by the respondent company is not manufactured by it. The hearing examiner found that the evidence supported the allegations of the amended complaint, and his initial decision, filed November 1, 1966, contains an order prohibiting respondent from using the word "manu-

facturer" or any similar word as part of its trade name unless it also discloses that respondent is a distributor and assembler of many of the products it sells.

On November 15, 1966, the corporate and individual respondents filed a notice of appeal. On December 12, 1966, their counsel sent the Commission a letter in which respondents offer to withdraw their appeal, allowing the initial decision of the hearing examiner to become the final order of the Commission, if they are allowed a period of one year to bring themselves into full compliance with the order. Their counsel states that "it would take my client that length of time to comply with the order, because of the fact that a new catalog will have to be compiled, printed, and distributed. My client will definitely comply with the order, but in view of the above, needs the necessary time to do so."

This request seems to me to be entirely reasonable. In many cases the Commission has granted similar requests in order to avoid unnecessary financial hardship. I see no reason to put respondents to the burden and expense of an appeal in order to have their request considered. If respondents do no more than pursue their statutory right of appeal, more than a year will elapse before any final order could be entered in this case. We would serve the public interest, and not merely respondents', by accepting their offer and entering a final order immediately, with compliance to be fully completed by December 1967. It seems most unlikely that the course pursued by the Commission will produce the same result.

ORDER GRANTING EXTENSION OF TIME TO FILE APPEAL BRIEF

This matter is before the Commission upon the receipt of a letter from respondents' counsel, filed December 13, 1966, herein treated as a motion, requesting the Commission to delay the effective date of the Commission's decision in this matter for a period of one year, with the understanding that in such a case respondents will withdraw their appeal.

Respondents were served with the initial decision on November 9, 1966, on which date the service of the initial decision was completed, and on November 15, 1966, respondents filed their notice of intention to appeal. Under § 3.22 of the Commission's Rules of Practice, respondents' appeal brief was due to be filed December 9, 1966, thirty days after completion of the service of the initial decision. Therefore, respondents are already in default because they have failed to file their brief within

the time prescribed by the Commission's Rules. Section 3.21(a) of the Commission's Rules provides, however, that the failure of an appellant to file a brief within the prescribed time shall extend for ten days the period within which the Commission may by order stay the effective date of the initial decision or place the case on its own docket for review and so the initial decision has not yet become the decision of the Commission.

Respondents' counsel professes a degree of unfamiliarity with the Commission's Rules of Practice and in the circumstances it appears that the failure to timely file their appeal brief may have been unintentional. The Commission, therefore, at this time will not hold respondents to be in default for failure to file their appeal brief. Rather, we will treat respondents' proposal as in part a request for an extension of time for the filing of their appeal brief, and we will grant such extension so as to preserve for them this opportunity. Also, in the event the Commission should decide to issue a cease and desist order herein, it will then determine whether or not to require compliance or the filing of reports of compliance therewith for a period of one year from the date of this order instead of the usual period of sixty (60) days from the date of the issuance of the cease and desist order. Accordingly,

It is ordered, That respondents be, and they hereby are, granted an extension of time within which to file their appeal brief to and including January 9, 1967.

Commissioner Elman dissented and has filed a statement.

GENERAL TRANSMISSIONS CORPORATION OF WASHINGTON ET AL.

Docket 8713. Order, Dec. 28, 1966

Order denying respondents' request that it be allowed to take depositions and serve subpoenas duces tecum upon certain of its competitors.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission on respondents' request for permission to file an interlocutory appeal from the hearing examiner's order of December 6, 1966, denying respondents' application for orders to take oral depositions of competitors, accompanied by subpoenas *duces tecum*. In support of their request, respondents cite the Commission's order of December 1, 1966 [p. 1833 herein], denying their motion for suspension of pro-

ceedings or, in the alternative, for dismissal of the complaint and in lieu thereof the institution of a trade practice conference proceeding. In that motion respondents contended that their competitors were engaging in the same practices which are the subject of the complaint in this proceeding. Respondents claim that should they be forced to discontinue certain practices while their competitors are not similarly restricted, they would be severely injured and might be forced out of business before the Commission takes action in the case of their rivals.

The Commission, by its order of December 1, denied the motion for suspension, noting that it was not able to pass on the practices of General Transmissions' competitors on the basis of respondents' charges alone. It held that the conclusion that proceedings against respondents' competitors would result in cease and desist orders was premature. The Commission further held there is no evidentiary basis for the inference that respondents would be forced out of business by bringing this case to an expeditious conclusion. For the foregoing reasons, respondents' motion to suspend the proceeding was denied.

On December 5, 1966, respondents filed before the hearing examiner an application to take depositions from, and for subpoenas *duces tecum* against, certain of their competitors. In support of this application respondents argued that the evidence to be obtained through these procedures was relevant since it would show that the practices of respondents' competitors are the same as those of respondents. In addition, respondents argued that the evidence they seek by the deposition procedure is the evidence which the Commission, in its order of December 1, stated is required to pass on respondents' motion to suspend.

The examiner, on December 6, 1966, denied respondents' applications for depositions and subpoenas on the ground that the application did not meet with all the requirements of § 3.10 of the Rules. The examiner found that the specifications on respondents' applications for subpoenas *duces tecum* appear to be unduly burdensome in scope and of doubtful relevance since the purpose of this proceeding is not to investigate the acts and practices of respondents' competitors. The examiner further stated that his ruling was not to be understood as precluding the respondents from applying, under § 3.17 of the Rules, for appropriate subpoenas directed to witnesses whom the respondents intend to present during the further course of the proceeding. The request for permission to file an interlocutory appeal from the ruling complained of will be denied. There is no indi-

cation here that the examiner abused his discretion in making the ruling complained of.

Respondents rely upon the Commission's order of December 1, 1966, as an invitation for them to produce direct evidence as to the practices of their competitors. They have misconstrued the Commission's order. If anything, the language relied upon indicates that the Commission intends to rely upon its own investigation of the matters alleged by respondents. The Commission's order of December 1 made it clear that it would take respondents' allegations under consideration and take whatever action is appropriate. This it intends to do.

Respondents, in their motion to suspend filed November 16, 1966, did not apparently allege that the practices cited by their competitors were a defense against the charge of deceptive advertising; rather, the gist of their motion to suspend seemed to be simply that competitors were engaging in the same practices and General Transmissions would be under a disadvantage if it were put under order and similar restrictions were not taken against its rivals. The Commission therefore construed that motion as a request that in the exercise of its discretion it employ different measures to enforce the law in this industry. Such a request, of course, does not constitute a defense against the charges in the complaint that General Transmissions has misrepresented its services in the advertisements under consideration. In the request for permission to file the interlocutory appeal, respondents, however, now characterize the contention that the practices of their competitors are identical to those of General Transmissions as their "defenses". An unfair trade practice does not cease to be so because competitors engage in identical practices. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 493–94 (1922). The widespread prevalence of an unfair trade practice neither constitutes a legal defense on the merits to the allegations of a complaint nor provides any reason for the Commission to withhold remedial or corrective action. As previously indicated, the extent to which the allegedly illegal practices are also followed by competitors will be considered by the Commission in exercising its discretionary powers to fashion appropriate relief. We are unable to find, therefore, that the examiner erred in holding that at this stage of the proceeding the data respondents seek in the course of the depositions and related subpoenas *duces tecum* is of doubtful relevance to the proceeding. On questions of this nature the examiner has broad discretion and his rulings on such issues will not be reviewed in the absence of unusual circumstances. See *American Brake Shoe*

Co., Docket No. 8622, Order Denying Appeal from Denial of Applications for Depositions and Subpoenas (September 1, 1965) [68 F.T.C. 1169]. Furthermore, respondents' rights have been preserved, as heretofore noted, in view of the examiner's willingness to consider applications for subpoenas under § 3.17 of the Commission's Rules in the further course of the proceeding. The Commission is unable, in this instance, to find the existence of the extraordinary circumstances requiring an immediate Commission decision in order to prevent detriment to the public interest contemplated by § 3.20 of the Commission's Rules of Practice. Accordingly,

It is ordered, That respondents' request for permission to file an interlocutory appeal from the hearing examiner's order of December 6, 1966, be, and it hereby is, denied.

NED R. BASKIN DOING BUSINESS AS HOLLYWOOD FILM STUDIOS

Docket 4902. Order, Dec. 30, 1966

Order vacating Commissions order of Oct. 28, 1966, p. 1131 herein, and remanding the case to the hearing examiner for receiving additional evidence on the question of whether the public interest requires the modification of the original cease and desist order.

ORDER GRANTING REQUEST FOR RECONSIDERATION, VACATING ORDER REOPENING PROCEEDING, AND DIRECTING HEARING

The Commission, on September 14, 1966, served upon respondent its order to show cause why this proceeding should not be reopened and the order therein modified by adding certain specified paragraphs. On October 28, 1966 [p. 1131 herein], the Commission issued its order reopening the proceeding and modifying the order to cease and desist in the respects so indicated, it then appearing that respondent had not responded to the show cause order within the period provided in the Commission's Rules. Subsequently, disclosure was made that respondent did, in fact, file a timely response to the Commission's order to show cause and that through clerical error such response was not brought to the Commission's attention prior to the issuance of the order of October 28, 1966. Complaint counsel, on December 7, 1966, filed an answer to respondent's response to the Commission's show cause order.

In the circumstances, the Commission will treat respondent's

notice of November 9, 1966, advising the Commission of the filing of his response to the show cause order, as a request for reconsideration of the Commission's order of October 28, 1966, reopening and modifying the order to cease and desist. Such a request will be, and hereby is, granted, and the response filed September 22, 1966 and complaint counsel's answer filed December 8, 1966 will be included in the Commission's reconsideration of the show cause order.

Respondent, in his response, includes samples of his advertising, *i.e.*, a business reply card, a form letter, and a magazine advertisement. His main argument seems to be that his advertising is not deceptive because he does supply an enlargement free of charge as represented, and because the patron can discern from the advertisements that the purchase of a color enlargement, for which there is a charge, is optional.

Complaint counsel bases his argument for the modification of the order on the contention that respondent's advertising has been, and continues to be, misleading in that it fails to reveal that the free offer is a black and white enlargement—not a colored enlargement—and that the purpose of the advertisement is to try to induce the purchase of the coloring services of the respondent.

Under § 3.28(b)(3) of the Commission's Rules of Practice, if an order to show cause is opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause and answer thereto, or it may serve upon the parties a notice of hearing setting forth the date on which the cause will be heard. In such a case the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. When the pleadings raise substantial factual issues, the Commission, under the Rules, will direct such hearings as it deems appropriate.

The first question here is whether this matter can be decided on the initial briefs. We do not believe it can. Complaint counsel, in his answer, has raised certain issues of fact which he has not clearly demonstrated are supported by the record. For instance, he makes such statements as the following: "Since the inception of the Commission's consideration of Mr. Baskin's advertisements the same basic deception remains" and "Our experience in evaluating numerous consumer complaints against respondent over the years indicates that they are based on the reader's misunderstanding of what is being offered in the advertisements and on the belief that patrons will receive color photographic en-

largements free." He elsewhere refers to a "constant volume of consumer complaints received over the years" and consumer letters which in "virtually every instance are concerned with complaints of being deceived about the nature of the offer made in respondent's advertisements"; and to a quoted Compliance Staff statement advising Mr. Baskin as to the likely deceptive nature of his advertising. There are no citations to the record given for these various assertions and, consequently, there is uncertainty as to the extent such are based on evidence in the record in this proceeding.

Complaint counsel, moreover, at one place in his brief, asserts that many of respondent's customers have expressed dissatisfaction over the caliber of respondent's coloring services and that this has been admitted, though the relevance of this, in light of the show cause order, is not explained, nor is it clear where this admission appears.

In the circumstances, it is believed that the Commission's order of October 28, 1966, reopening the proceeding and modifying the order to cease and desist should be vacated and set aside. It is further believed because of the substantial factual issues raised that this matter, in accordance with § 3.28(b)(3) of the Commission's Rules of Practice, should be referred to a hearing examiner for a hearing to receive evidence in support of, and in opposition to, the show cause order. Accordingly,

It is ordered, That the Commission's order of October 28, 1966 [p. 1131 herein], reopening the proceeding and modifying the order to cease and desist be, and it hereby is, vacated and set aside.

It is further ordered, That this matter be, and it hereby is, referred to a hearing examiner for the purpose of receiving evidence in support of, and in opposition to, the question of whether or not the public interest requires that the Commission reopen this proceeding and modify the order to cease and desist contained therein to read the same as the order to cease and desist set forth in the Commission's show cause order issued September 9, 1966.

It is further ordered, That the proceeding be conducted pursuant to the Commission's Rules of Practice For Adjudicative Proceedings insofar as those Rules are applicable; and

It is further ordered, That the hearing examiner, upon the conclusion of the hearings, certify the record, together with a report of his findings, conclusions and recommendations with respect thereto, to the Commission for final disposition.

ADVISORY OPINION DIGESTS*

No. 69. Foreign origin; razor blade dispensers.

The Commission recently rendered an advisory opinion advising an American manufacturer of razor blades that it would not be necessary to disclose the country of origin of imported plastic razor blade dispensers and end clips into which were packed domestically manufactured blades, nor was there any objection to labeling the completed package as made in this country. The Commission was of the view that such a description would be taken as applying to the blades and that the purchaser would have no real concern with the origin of the dispenser which is designed to be thrown away after the blades are used.

The facts were that after the dispenser cases and end clips were received in this country, a spring and the blades would be inserted, a pusher slide added and the end clip put in place. The spring, slide or pusher and the blades would be manufactured in the United States. (File No. 663 7052, released July 6, 1966.)

No. 70. Bargain offers based upon purchase of other merchandise.

The Commission announced today it had rendered an advisory opinion disapproving a retailer's proposal to offer a free sewing machine with the purchase of a cabinet.

Under the terms of the proposed plan, the retailer intends to place one sewing machine on display in various locations, such as bowling alleys, supermarkets, shopping centers, etc. A nearby sign will invite one to fill out a registration card and deposit same in a box. Each month one name will be drawn from the box in each location where the machine is on display and the winner will receive a free sewing machine with cabinet. In addition, 50 names will be drawn from each box and these persons will be sent a letter informing them they can obtain a free sewing machine head simply by purchasing the cabinet. According to

*In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are currently published in the Federal Register.

the letter to be sent to the 50 winners, the cabinets range in price "from $39.95."

In its opinion, the Commission concluded as follows:

> * * * that part of your plan which provides for prospective customers to win a free sewing machine with cabinet is unobjectionable. However, the Commission is of the opinion that that part of the proposed plan which offers to 50 persons a "free" sewing machine head for the price of the cabinet involves the sale of merchandise by means of a lottery or by means of a chance or gaining device and therefore would be illegal as an unfair trade practice under Section 5 of the Federal Trade Commission Act. As a result, the Commission cannot give its approval to this aspect of your proposed plan in its present form.

Commenting upon other features of the proposed plan, the Commission said:

> When a seller offers to supply one article "free" or "at no extra cost" in conjunction with the purchase of another article, he is thereby representing to prospective customers that the article which is to be purchased is being sold at no more than the price at which it is usually sold in substantial quantities. Accordingly, if you should eliminate that aspect of your proposed plan appealing to the public's gambling instinct, then the price of the cabinets which the consumer is to purchase in order to obtain a "free" sewing-machine head must meet this standard.
>
> Finally, the Commission's opinion concluded, there must be a bona fide effort to sell the merchandise offered and a plan of this nature may not be used simply as a means to obtain leads which will be used to sell more expensive cabinets and/or sewing machines.

Commissioner Elman, dissenting: The Commission holds that "that part of [the] plan which provides for prospective customers to win a free sewing machine with cabinet is unobjectionable." This holding—in which I concur—seems to me to be inconsistent with the Commission's other holding that "that part of the proposed paln which offers to 50 persons a 'free' sewing machine head for the price of the cabinet involves the sale of merchandise by means of a lottery or by means of a chance or gaming device and therefore would be illegal as an unfair trade practice under Section 5 of the Federal Trade Commission Act." There is no essential difference between the first-prize part of the plan, which gives prospective customers the opportunity to win a free sewing machine *and* cabinet, and the second-prize part, which gives prospective customers the opportunity to win a free sewing machine *if* they buy a cabinet. The only difference I can see is in the value of the prize.

A lottery embraces three elements: chance, prize, and consideration. *F.T.C.* v. *R. F. Keppel & Bro.*, 291 U.S. 304: *J. C. Mar-*

tin Corp. v. *F.T.C.*, 242 F. 2d 530 (7th Cir. 1957). If one of these is absent, it is not a lottery. The plan here does not contain the element of consideration. Anyone may enter and become eligible for the drawing by merely fillng out a registration card. No payment or purchase is necessary.

The requirement that the 50 second-prize winners must purchase a cabinet in order to obtain a free sewing machine does not make this plan a lottery. The Supreme Court has defined a lottery as "a device whereby the amount of the return * * * [the entrants] receive from the expenditure of money is made to depend upon chance." *F.T.C.* v. *R. F. Keppel & Bro., supra* at 313. In the plan here the second prize is simply the opportunity to buy a sewing machine and cabinet for the price of the cabinet alone. A winner is not obligated to buy the cabinet. If he chooses to buy the cabinet, at the time he pays for it there is no longer any element of chance or the receipt of a prize which depends on chance. He knows exactly what he will get for his money, *viz.*, a cabinet plus a free sewing machine; his expenditure of money is for making a purchase, and not for receiving a prize depending on chance. (File No. 663 7050, released July 6, 1966.)

No. 71. Products composed of ground leather may not be described as "leather" without proper qualifications.

In an advisory opinion recently issued by the Commission, it said that a product composed of ground leather may not be described as "leather" without proper qualification.

The product in question involved a manicure case, the outer portion of which was composed of 85%–90% ground leather combined with latex rubber. In its opinion the Commission said, "the use of the word 'leather,' without qualification, means top grain leather." "Since the manicure case is composed of ground leather," the Commission added, "it would be improper to describe it as leather without proper qualification." The Commission opinion then pointed out several ways in which this could be done, such as:

Ground leather (or shredded leather or pulverized leather)
Composed of ground leather
Contains ground leather

The Commission's opinion further pointed out that, if the requesting party decided not to disclose the ground leather com-

position of the case, it would be necessary to disclose that the outer portion is not leather by such language as:

Not leather
Imitation leather
Simulated leather

"The reason for this," the Commission added, "is that the outer portion of the case has the appearance of leather and in order to remove the potential deception inherent in its appearance, it is necessary to disclose the fact that the material is not leather." (File No. 663 7057, released July 20, 1966.)

No. 72. Franchise agreement.

A distributor of electronic equipment requested the Commission to render an advisory opinion with respect to the legality of a proposed franchise agreement with its dealers. A Schedule of Fair Trade Prices was to be attached to and made a part of the agreement and the dealer must agree that he will not advertise, offer for sale or sell any products at less than the fair trade prices, nor make any refunds, discounts, allowances or concessions which will have the effect of decreasing those prices, nor offer any of the fair traded items in combination with other merchandise at a single, combination or joint price. The agreement further provided that this provision should be applicable only in those states where agreements of this character are lawful.

The Commission advised that in view of the McGuire Act amendment to Section 5 of the Federal Trade Commission Act it could see no objection to inclusion of the provision in the agreement. However, the Commission added, the responsibility rests squarely upon the seller exacting such agreements from his dealers to see that they are not given effect outside those areas where permitted by state law, for them no exemption would exist to protect the agreements from established antitrust rules applying to resale price maintenance.

Even though the contract provides that this provision shall be applicable only in those states where such agreements are lawful, it would appear that to some extent the burden is placed upon the dealer to ascertain whether or not the agreement is lawful in his own state before he can know whether or not he is obligated to honor it. If this has the effect of creating a situation whereby the Schedule is generally adhered to in states where fair trade is not legal, the presence of the provision in

the franchise agreement could raise a serious inference of an unlawful resale price maintenance program in those states.

The Commission further advised that such pitfalls can be avoided in the franchise agreements with dealers in nonfair trade states by specifically eliminating therefrom provisions relating to the maintenance of fair trade prices. If the distributor desires to circulate price schedules to dealers in nonfair trade states, it would be more appropriate to circulate them under the heading "Suggested Prices" rather than "Fair Trade Prices." In the alternative, the danger of involving dealers in illegal resale price maintenance could be avoided by expressly noting on the franchise agreement those states wherein the provisions relating to maintenance of fair trade prices cannot be given effect.

Additionally, the Commission noted the provision that the distributor will establish, with the aid of the latest marketing information, a reasonable yearly sales volume objective of $\$\_\_\_\_\_$ and this volume will be a consideration in yearly franchise renewal. The Commission advised that it could see no objection to the establishment of such quotas so long as they are reasonable. However, the distributor was advised that much of the legality of any franchise system depends upon the manner in which the agreements are implemented and enforced, for if apparently reasonable reservations of rights by the distributor are in practice administered in an unreasonable manner, so as to unfairly encroach upon the freedom of the licensees, an agreement which is legal on its face can become illegal in effect. (File No. 663 7053, released July 20, 1966.)

Note.—The Commission revoked the Advisory Opinion reported in this digest as of August 2, 1967. This action was based upon the belief that the Opinion was being abused by the party to whom it was issued, not because of any concern over accuracy of the advice contained therein.

No. 73. Rejection of description "golden" for nongold thimble.

The Federal Trade Commission has rendered an advisory opinion objecting to both the description "golden" for a nongold thimble, and the accompanying explanatory phrase "electroplated with real gold."

"Since the thimble in question is not composed throughout of 24 karat gold, unqualified use of the word 'golden' would be improper," the FTC's advisory opinion stated.

Further advising that "the phrase, 'electroplated with real gold,' would constitute neither adequate qualification of the word

'golden,' nor a proper representation standing alone," the Commission pointed out that the gold flashing on the thimbles is between three and seven millionths of an inch thick and that "a coating of gold of less than 7/1,000,000 of an inch in thickness is too thin and insubstantial to warrant the description 'gold electroplate.'" (File No. 653 7004, released July 22, 1966.)

No. 74. Conditional approval given 3-party promotional plan.

The Federal Trade Commission has given conditional approval to a promotional concern's plan to provide a music service to supermarkets which would include "spot" advertisements paid for by their suppliers.

The requesting party would set up a background music network specializing in supermarkets. It would own the equipment and install same without charge to the store operator. About every 2 1/2 minutes a "spot" advertisement paid for by advertiser-suppliers to the store would be made over the network, for each of which, each participating store outlet would receive a small commission.

In addition, the requesting party will offer an in-store promotion service to advertiser-suppliers so that they may provide proportionally equal treatment for nonparticipating stores, who will receive either in-store advertising materials or cash payments based on a designated formula.

Most of the advertisements would feature products sold in the stores. In some stores, announcements regarding house brands could be made by means of separate circuits. Advertisers would pay for the service on a per spot-per store basis. The contracts between the parties are to contain a clause to the effect that suppliers agree not to discriminate between participating and nonparticipating customers.

In the advisory opinion the Commission said that "implementation of the plan probably would not result in violation of Commission administered statutes. This approval is being given conditionally and is contingent on the plan when in operation actually providing on a realistic basis for promotional assistance to all competitors entitled to it under Sections 2 (d) and (e) of the Robinson-Patman Amendment to the Clayton Act." (File No. 653 7027, released July 22, 1966.)

Modified July 11, 1968, 69 F.T.C. 1211.

No. 75. Publisher's display allowance plan given conditional approval.

A magazine publisher has received conditional approval from the Federal Trade Commission of its promotional assistance program proposed for the New York City area.

The Commission said its understanding is that the program would operate substantially as follows:

Each *competing* retail magazine seller in or out of the area would be notified of the program by first class mail by the publisher and afforded the opportunity to choose either of two plans for each publication of the publisher he sells.

Under Plan 1, the dealer would be given a rebate of 10% of the cover price for each copy of a magazine sold, provided he maintained *two* displays (full cover exposed, flat stack or vertical display) of the publication through its "on sale" period in (1) the maximum traffic area of his newsstand and (2) on the main or auxiliary racks. Under Plan 2, the dealer would be given a rebate of 5% on the same basis as under Plan 1 for maintaining *one* display in the maximum traffic area. "Maximum traffic area" means: where the retailer sells most of his magazines—where the largest display of magazines is located.

In the event of a sell-out of an issue, the dealer would agree to reorder immediately. Both the publisher and its distributor would spot check on dealer compliance. A dealer would submit quarterly reports together with statements of performance to the publisher to claim his rebate.

The Commission's advice was that "implementation of the Program as described probably would not result in violation of laws administered by the Commission provided (1) the program is offered to eligible new entrants into magazine retailing when they receive their initial shipment of magazines and (2) the notice to dealers is changed to include a definition of 'maximum traffic area' conforming to the meaning set forth above." (File No. 653 7033, released July 27, 1966.)

No. 76. Foreign origin disclosure of individual items repackaged in combination sets.

The Federal Trade Commission today announced that it had recently rendered an advisory opinion dealing with disclosure of foreign origin of imported novelty items which will be repackaged in various combination sets in this country.

The items, both textile fiber and nontextile fiber products, which are labeled as to specific country of origin at the time of

their importation, will be repackaged in sets in such a manner that the labels will not be visible to prospective purchasers.

As to sets composed entirely of imported nontextile fiber products, the Commission said "that a proceeding by it to require disclosure of origin on the package would not appear to be warranted, in the absence of any showing of material deception."

However, as to any combination set containing only imported textile fiber products, the Commission said the specific country of origin of these products must be disclosed in such a manner that it would be observed upon casual inspection by prospective purchasers before, not after, the purchase. The necessity of this disclosure is based upon the requirements of the Textile Fiber Products Identification Act and the rules issued thereunder. The disclosure, the Commission said, "does not necessarily have to be on the outside of the package; it could be inside the package, provided it would be clearly visible through the cellophane cover. The point is that the disclosure must be in some position on the package where it would be observed prior to the purchase, not afterward."

If imported textile fiber products are packaged in the same combination set with imported nontextile fiber products, the Commission advised that "it would also be necessary to disclose the foreign origin of the non-textile fiber components. Otherwise, prospective purchasers are likely to be misled into the mistaken belief, through the affirmative disclosure of the foreign origin of the textile fiber products, that the nontextile fiber products packaged therewith are of domestic origin." (File No. 653 7042, released July 27, 1966.)

No. 77. Proportionally equal treatment for competing customers under promotional assistance programs.

In advisory opinions announced today by the Federal Trade Commission, two promotional assistance programs devised by third parties for grocery retailers and suppliers have been approved if the proposed plans are implemented as represented.

Under the one plan, an independent promoter would supply food retailers with racks in which to display recipe cards and uniformly pay the retailer for providing space for each rack used. Manufacturer-suppliers (1) would furnish participating customers with cards—containing recipes calling for the use of the manufacturer's product and a picture of the finished recipe item or of the manufacturer's product—on a proportionally equal basis related to the retailer's volume of sales of the product,

(2) pay the promoter for the cards at a per-card-supplied rate, and (3) offer the plan to each customer by means necessary to insure complete notification of the plan to all competing customers. After each initial distribution, retailers would receive as many additional cards as requested up to 1,000 per month per product.

The other plan, proposed by a separate promoter, would utilize a variation of the "jigsaw puzzle." Each time a shopper would pass the check-out stand (no purchase would be required) of a participating grocery retailer, she would receive a card from which four assorted pieces of a reproduction of a label could be removed. Upon collecting pieces necessary to form a complete facsimile of either a private or name brand label, she would be awarded a prize of trading stamps, cash or merchandise. In each eight-week period the plan would be in operation, eight different products will be involved, six of which will be name brands of participating suppliers and two private labels selected by participating retailers. If the retailer does not have private labels to enter in the program, his cost will be reduced on a pro-rata basis or he may select eight name brand products and pay the regular price which will be the same to each retailer and supplier per product per 1,000 cards (the cost of the program will be defrayed out of this charge). Each retailer will receive the same in-store displays and advertising material and each supplier will have his product pictured on each give-away card. Necessary notification of the proposed plan will be given, and all competing retailers will be afforded the opportunity to participate.

The Commission pointed out to the promoters that "it remains the supplier's responsibility to assure that in fact the retailers who compete with one another are dealt with on proportionally equal terms." If the plans are implemented in such a manner, they "would appear to satisfy the supplier's obligation of proportionally equal treatment and the suppliers participating * * * would not thereby violate any Commission administered laws."

In reaching this conclusion, the Commission advised that it had relied particularly upon the below-described three representations by the promoters as to the manner in which the plans will be implemented.

In each of the two promotions, the requesting party informed the Commission that:

(1) All competing retailers would be notified of their right to participate in the plan; and

(2) The plan would be made available to all competing retailers and offered to those located on the periphery of a given marketing area who compete with the participating retailers.

The third representation relied upon by the Commission in the respective matters was that:

(Puzzle promotion) A reduction in cost or alternative choice of either name brand products would be provided participating retailers unable to enter two labels in the plan.

(Recipe card promotion) Small retailers who, for space or other reasons, cannot utilize the larger racks but wish recipe cards featuring one or two profitable items, will be provided with a "snap-on" shelf rack for this purpose. (File Nos. 653 7046, 653 7059, released Aug. 2, 1966.)

Modified July 11, 1968, 69 F.T.C. 1211.

No. 78. Disapproval of merchandising plan involving a lottery.

A retailer has been advised by the Federal Trade Commission that its proposed weekly drawings for portable radio-phonographs would be an unlawful lottery.

Participants would be required to pay two dollars a week for twenty weeks. The winner each week will be awarded a radio and will not be required to make any further payments. The participants who do not win will each receive a radio-phonograph at the end of the twenty weeks for which they would have then paid forty dollars. The retailer advised that it regularly sells these instruments for forty dollars.

This proposal, the FTC's advisory opinion stated, "would constitute a scheme to sell merchandise by means of a lottery or game of chance, a sales device long held to be illegal under laws administered by this agency. The mere fact that each participant receives a thing of value for his contribution does not negate the existence of a lottery nor change the plan's essential nature as an appeal to the public's gambling instincts. Clearly, the participants in this drawing would be motivated by the chance of receiving something of more value than the amount they contributed. Hence, the nature of the appeal is unmistakable." (File No. 653 7045, released Aug. 2, 1966.)

No. 79. Rejection of deceptive firm name for skip-tracing operation.

The Federal Trade Commission has rejected a proposal by a debt collection concern to send out skip-tracing material under a firm name such as Missing Heirs, Inc., requesting delinquent

debtors to contact the company on a matter of importance and to furnish information concerning jobs, addresses, etc.

Advising that "this proposal would be clearly illegal under previous Commission and court decisions dealing with skip-tracing practices," the Commission pointed out that its first "case involving a skip-tracing device was decided in 1943 and dealt with an identical subterfuge to that here proposed, that is the attempt to deceive debtors into believing that they were being contacted in connection with the settlement of estates. No matter what the device employed, and there have been many down through the years, the law has set its stamp against this type of deception."

Consequently, the advisory opinion continued, the FTC "cannot approve the use of any representations or trade names which would have the effect of deceiving others as to the true nature of your activity or which fail to reveal that the purpose for which the representations are made or the information requested is that of obtaining information concerning delinquent debtors." (File No. 653 7039, released Aug. 6, 1966.)

No. 80. Bylaw prohibiting certain advertising claims by members of trade association.

The Federal Trade Commission has informed a trade association that it cannot give its approval to a proposed amendment to the association's bylaws which would prohibit a member from advertising that its service is faster and better in other towns than that of members who actually are in business in these towns.

The Commission said in its advisory opinion that "the adoption of this proposal would be highly questionable under the antitrust laws for the reason that advertising is an element or form of competition and any agreement among competitors to refrain from legitimate and truthful advertising restricts competition.

"If * * * [an industry member] wishing to compete in another city is denied the right to advertise that despite his geographical disadvantage he can furnish faster and better service than his local competitors, assuming the representation to be truthful, he is to that extent denied the right to compete effectively and local * * * [industry members] are thus insulated from outside competition.

"If competition in an industry is to survive, the members must be left free to exploit in a lawful manner such advantages as they actually possess. Consequently, the proposed amendment

to the Association's by-laws cannot receive Commission approval." (File No. 653 7035, released Aug. 6, 1966.)

No. 81. Advertised satisfaction guarantee.

In an advisory opinion announced today the Federal Trade Commission gave qualified approval to the proposal by a marketer of a facial cream to advertise a "10 day trial" satisfaction guarantee.

Its approval, the Commission said, "is based upon the assumption that there are no material limitations or conditions whatsoever attached to the guarantee. If there are any such conditions or limitations, they must be disclosed." (File No. 653 7002, released Aug. 12, 1966.)

No. 82. Disapproval of the marking "US Made" for items with substantial imported components.

A Federal Trade Commission advisory opinion made public today disapproved the marking "US Made" for two electric devices, one consisting of an imported motor assembled with an American-made casing and cord, and the other of which both the motor and the casing are imported and the cord is domestic.

The Commission stated that "it would be improper to label either of the finished products as 'US Made' because this would constitute an affirmative representation that the entire product was of domestic origin, when in fact a substantial part thereof was imported." (File No. 653 7022, released Aug. 12, 1966.)

No. 83. Impropriety of labeling foreign-made machine with American-made parts added to it as "Made in U.S.A."

The Federal Trade Commission has advised an American manufacturer that a machine made in a foreign country with certain American-made parts added to it by the domestic manufacturer may not be labeled "Made in U.S.A."

The Commission said that it would be "improper to label the machine in question as 'Made in U.S.A.' because this would constitute an affirmative representation that the entire machine was of domestic origin, when in fact a substantial part thereof was imported." (File No. 653 7019, released Aug. 19, 1966.)

No. 84. Proper labeling of rebuilt fuses.

The Federal Trade Commission today made public an advisory opinion concerning the proper labeling of rebuilt fuses to be used by public utilities and commercial consumers of electricity.

The requesting company inquired as to whether it will be necessary to label a fuse as "rebuilt" or "remanufactured" if it is broken down to its smallest components and all parts that are used are inspected to meet new parts standards.

Advising that the concern's "rebuilt fuses would have to be labeled as such," the Commission cited its frequent holding, "in connection with a variety of products, that in the absence of an adequate disclosure to the contrary, merchandise which resembles and has the appearance of merchandise composed of new materials but which is, in fact, composed of reclaimed materials, will be regarded by purchasers as being entirely new and that a substantial segment of the consuming public has a preference for merchandise which is composed of new and unused materials. This has been held to be so without regard to the comparative quality of the new and rebuilt products, for in such matters the public is entitled to get what it chooses no matter what dictates the choice."

Answering other questions posed by the company, the Commission stated:

All "advertising material promoting the sale of these fuses should also contain a disclosure of their used or rebuilt nature, [but] it is not necessary, once this disclosure is clearly and conspicuously made, to repeat the word over and over again even where technical instructions are being given. Technical instructions for the use of these fuses are not ordinarily part of the advertising designed to induce customers to buy and, if not, there would be no requirement for disclosure in the instructions as distinguished from advertising."

"Generally speaking, * * * the disclosure must be on the cartons, invoices and in advertising literature, as well as on the fuses themselves. However, the disclosure need not be placed on the fuses themselves if you can establish that the disclosure on the bags, boxes or other containers is such that the ultimate purchasers, at the point of sale, are informed that they are rebuilt fuses. The question of informing the ultimate purchasers here becomes important in the event any of your customers also resell the fuses to others under circumstances where those ultimate purchasers are not informed as to their rebuilt nature." (File No. 653 7028, released Aug. 19, 1966.)

No. 85. Reference service for members of trade association.

A national trade association has been advised by the Federal Trade Commission that its proposed reference service for mem-

bers concerning problems encountered by them would not be unlawful "so long as the program embraces only an interchange of information and experience among members of the Association, and is not used as a device for a concerted boycott of particular sellers."

The Association stated the purpose of the program is to assist its members to communicate with each other so that there may be a greater availability of the knowledge and experience acquired by them on materials used in the industry. Especially of interest is the experience of members with materials that have been newly developed and the properties and suitability of which are not yet widely known. Under the reference service members would be invited to write the Association advising it of any special experience or knowledge they have had with materials, either favorable or unfavorable. (File No. 653 7030, released Aug. 26, 1966.)

No. 86. Sales promotion plan involving a lottery rejected.

In an advisory opinion which it recently issued, the Federal Trade Commission informed a retailer that his proposed sales promotion is illegal because it involves the sale of merchandise by means of a lottery and therefore is an unfair method of competition and an unfair practice.

The retailer planned to list certain selected items with the local bank. After the customer makes his regular purchase at the retail store, he checks with the bank, and if that particular item is listed with the bank, the customer is entitled to keep the merchandise without charge. On the other hand, if the item is not listed at the bank, the purchaser must pay the regular price for it.

In reaching its conclusion that the plan was illegal, the Commission reasoned that "the mere fact that a purchaser receives a thing of value for his contribution does not negate the existence of a lottery." (File No. 663 7059, released Aug. 26, 1966.)

No. 87. Sale of silverware through plan involving lottery rejected.

The Commission issued an advisory opinion today (with Commissioner Elman not concurring) in which it disapproved a silverware manufacturer's plan because it involved the sale of merchandise by means of a lottery.

Under the terms of the proposed plan, advertisements will be published inviting the reader to complete a contest entry form

specifying his preference among certain flatware featured therein, together with his name and address. The reader will be invited to leave said form with the manufacturer's dealer or, in lieu of using the form featured in the advertisement, he can obtain the same form at his dealer or print the same information on a blank piece of paper and leave it with the dealer. At the conclusion of the contest, each dealer will draw the name of one contestant who will receive a free 4-piece place setting in the pattern specified on his entry form.

There is absolutely no requirement on the part of any participant or winner to purchase or promise to purchase any merchandise. However, the rules further provide that if the winner purchased other settings in his particular pattern during the period of the contest, the dealer will donate additional pieces in that pattern equivalent in retail value to those purchased.

In its advisory opinion, the Commission took the position that "the portion of the plan which awards a 4-piece place setting to the winner is unobjectionable."

"However," the Commission added, "the matching provision on the part of the dealer creates the element of consideration on the part of participants and therefore constitutes the sale of merchandise by means of a lottery or by means of a chance or gaming device contrary to the provisions of Sec. 5 of the FTC Act. As a result, the Commission cannot give its approval to this aspect of your proposed plan in its present form." (File No. 663 7063, released Sept. 2, 1966.)

No. 88. Three-way promotional plan set up by radio station and financed by participating retailers and their suppliers.

A radio station has been advised by the Federal Trade Commission that its proposed three-party promotional plan as originally presented would be unlawful because it would not be available to all competing customers in a practical business sense, but that subsequent revisions in the basic plan, coupled with the addition of an alternative plan, now bring the basic plan within the requirements of functional availability. However, the revised plan contains one defect which will be discussed later, and which will require correction before Commission approval can be given.

The proposal involves the furnishing of background music and in-store commercial announcements to retail establishments. The radio station would install, without cost, the necessary receiving equipment in each participating retail store. The prod-

ucts advertised will be limited primarily to grocery store items. Each store would pay a fixed amount for the background music, depending upon the number of speakers (one speaker for every 600 square feet of floor space). The value of the in-store message to the participating supplier will be measured and paid for on the basis of the total number of persons exposed to the in-store commercials at a fixed rate per thousand estimated weekly transactions. As originally submitted, no alternative plan or plans would be offered.

In its first advisory opinion, the Commission said that the legality of the proposed plan raised the following two questions: (1) Did it meet the requirement of functional availability since there was no provision for an alternative plan or plans? (2) Did it provide for payments to all competing purchasers on proportionally equal terms if the method of payment for the in-store commercials is based upon the number of customers who are exposed to said commercials?

With respect to the first question, the Commission noted that a promotional plan must be within the reach of all competing customers of the supplier in a practical business sense, otherwise it does not comply with the requirement of functional availability. After having examined the plan, the Commission concluded it would not be available to all competing customers in a practical business sense for a variety of reasons.

"In the first place," the Commission said, "retail outlets such as drug and department stores which may carry some food products but which may also carry a variety of other products may find it impractical to participate in the plan, since due to the layout of these stores, the broadcasting of commercials limited primarily to food products, may interfere with their sales of other products. Second, retailers who already have existing contracts for background music from other sources would find it difficult, if not impossible, to operate under the proposed plan. Third, those food stores which do not carry all participating brands could not be expected to broadcast in-store commercials promoting the sale of products which they do not stock and which may be carried by their competitors. We have doubts that the alternate solution offered under the plan would resolve these difficulties. In the first place, an assumption of contracts of competitors by the radio station under the circumstances might raise other antitrust problems. Second, although the proposed plan provides that any store may discontinue the plan at the end of the first year without any obligation for outstanding charges if the credits earned for in-store commercials do not

offset music and speaker charges, this provision would in no way eliminate possible discrimination against such stores during subsequent years."

The Commission was of the opinion that the foregoing examples "clearly demonstrate that the basic plan would not be available in a practical business sense to a substantial number of competing retailers and therefore would not meet the requirement of functional availability." Under these circumstances, and in the absence of an alternative plan or plans for those who cannot use the basic plan, the Commission concluded that the proposed plan, if enacted, would not be in conformity with the requirements of Sections 2 (d) and (e) of the Robinson-Patman Act. It cited with approval the following portion of its announcement of September 21, 1965, setting forth certain guidelines for three-party promotional assistance plans:

* * * a reasonable alternative means of participation must be included in such plans for eligible customers who are unable to use the basic plan.

Having concluded in its original opinion that the proposed plan does not meet the test of functional availability, the Commission did not find it necessary to discuss or reach a conclusion with respect to the second question presented by the request as to whether the method of payment for the in-store commercials, which is to be based upon the number of customers exposed to said commercials, meets the requirement of proportionality.

Commissioner Philip Elman dissented to the above opinion.

Shortly after the Commission issued its original opinion, counsel for the requesting party filed an amendment to the original plan. The amended plan made provision for an alternative plan for those who could not use the basic plan, and also made certain revisions in the basic plan.

Revisions of the basic plan provide for the installation of broadcast equipment in drug and department stores in such a manner that the in-store commercials will not interfere with the sale of other products. Retailers who presently subscribe to background music from other sources may have equipment installed by the requesting party, without cost, which would permit interruption of the music by spot announcements (alternative plan 1). Retailers who do not carry all products sponsored under the plan can have in-store announcements which merely urge customers to buy those products identified by the sponsor's marker, rather than promoting specific brands (alternative plan 2). A third alternative plan has also been proposed under which the

facilities of retail stores will be provided with promotional and advertising services at the point-of-sale of the sponsor's products.

Under both the basic plan and the alternative plans, the value of the services performed by the retailers for the participating supplier will be measured and paid for on the basis of the total number of persons exposed to the in-store commercials and point-of-sale material at a fixed rate per thousand estimated weekly transactions.

After having reviewed the plans as now proposed, the Commission was of the opinion that the basic plan now meets the requirement of functional availability. The Commission was also of the opinion that under the circumstances of the intended use of this plan, the proposed method of payment for the in-store commercials and point-of-sale advertising, which is to be based upon the number of consumers exposed to said advertising, meets the requirement of proportionality under Sections 2 (d) and (e) of the Robinson-Patman Act.

Insofar as using the number of consumers exposed to the commercials as the standard for measuring payments to retailers, the Commission felt this method accords with the value of the service to the supplier and in the long run will probably correspond fairly closely to the amount of purchases of the supplier's product. One reason for this is that suppliers probably will not join the plan or stay with it if they find they are making payments to stores without any corresponding increase in their volume of sales by those stores. Therefore, under these circumstances the Commission felt it was reasonable to permit proportionalization to be based on the estimated number of customers, particularly where, as in this case, the measure for estimating the number of customers is weighted in favor of the smaller stores.

The Commission, however, was of the opinion that the proposed plan must be rejected because the rate of payment under the alternative plans is one-half the amount paid under the basic plan and is therefore clearly not proportionally equal to the payments to be made under the basic plan. The Commission feels that such discriminatory payment provisions cannot be justified on the ground that the services rendered under the basic plan may be more valuable to the supplier. In a typical case under the basic plan, a store with 20 speakers would clear approximately $65 per month over and above the amount it would pay for music charges, whereas an equivalent size store utilizing the alternative plan would clear approximately $5. Thus, if a supplier were to furnish free music to one store and not to its

competitor, it would be clear that Section 2(e) would be violated; the discrimination herein would be equally unlawful. The Commission felt, therefore, that this substantial disparity in payments must be eliminated before the plan can be approved. If this is done, the Commission would give its approval to the plan.

Commissioner Elman dissents and would approve the plan submitted by the requesting party. (File No. 663 7022, released Sept. 14, 1966.)

No. 89. Proportionalized equal treatment for competing customers under three-way promotional program involving recipes for free distribution.

The Commission announced today it has approved, with qualification, the use of a tripartite recipe plan promoting the sale of food products.

Under the terms of the proposed plan, recipes will be supplied without charge to all food stores in a given marketing area for free distribution to the stores' customers. Each store which participates in the plan will have its name imprinted on the recipe card, together with the names of the participating food suppliers and their products. Availability of the plan will be publicized in a monthly trade magazine.

No money will be paid to retail stores which participate in the plan, and it will be supported solely on the basis of the sale of advertising to various food suppliers who will pay a certain fee per 1,000 recipe cards to the promoter of the plan. The promoter will in turn have the recipe cards printed and distributed to the participating retailers.

In its opinion the Commission said that Section 2(e) of the Robinson-Patman Act "requires a supplier to treat all of his competing customers on a nondiscriminatory basis, which means that if the supplier furnishes promotional assistance to one customer he must make that assistance available on proportionally equal terms to all competing customers." The Commission also pointed out that the courts have affirmed the principle that a "supplier must comply with this provision of the law [Section 2(e) of the R–P Act] irrespective of whether the promotional assistance is furnished to the retailer directly or through an intermediary."

In giving its qualified approval to the proposed plan, the Commission said that the following three conditions must be met:

1. All competing retailers must in fact be notified of their

right to participate in the proposed plan. (The Commission did not pass upon the adequacy of the proposed means of notification because it did not have the facts upon which to base a judgment.)

2. The plan will be offered to all competing retailers. This means that some retailers who, geographically, are not in a given marketing area must be offered the plan if they are on the periphery of that marketing area and in fact compete with the favored retailers.

3. The plan will be made available to all competing retailers irrespective of their functional classification. Thus, nonfood stores which handle food items sold in grocery stores must also be accorded the same opportunity to participate in any promotional assistance given by the food suppliers to competing grocery outlets. (File No. 673 7001, released Sept. 14, 1966.)

Modified July 11, 1968, 69 F.T.C. 1211.

No. 90. Legality of notice calling attention to page on which magazine publisher's promotional assistance program is located.

The Commission recently advised the publisher of a monthly magazine that implementation of the promotional assistance plan outlined below would not result in violation of Commission administered law.

Under the plan, a notice would be printed quarterly on the cover of the magazine calling attention to the page in that issue on which the payment and the essentials of the retailers' service obligations would be set forth in an item in the same size type as the magazine's textual material. The item would also reflect that the retailer must write to the magazine distributor to obtain a copy of the Agreement containing full details. A retailer would obtain quarterly payments of 10 percent of the cover price of copies sold after certifying to the distributor that he—the retailer—had complied with the terms of the Agreement. The Agreement requires display of the magazine full cover flat or full cover prominent position on the principal magazine rack or full cover vertical in a rack at each checkout counter for the entire sales period of an issue. (File No. 673 7003, released Sept. 21, 1966.)

No. 91. Supplying domestic markets from foreign plant operated by an export trade association member raises possibility of unlawful interference with domestic trade and commerce.

In an advisory opinion made public today, the Federal Trade Commission stated that an export trade association loses its

statutory exemption from the antitrust laws if domestic prices are artificially or intentionally raised or lowered by the foreign operations of members with both foreign and domestic plants.

The 1918 Webb-Pomerene Act authorizes American exporters to engage collectively in foreign trade through cooperatively organized trade associations registered with the FTC and subject to its supervision. The statute qualifiedly exempts such associations from the antitrust laws in joint foreign trade ventures. For example, they may fix prices and quotas, pool products for shipment, and establish terms and conditions of sales to foreign markets.

The requesting association said that certain American companies have both foreign and domestic plants producing the product involved, and asked whether a Webb-Pomerene association might include such companies as members if the membership only discuss the price of their exports from their domestic plants.

The Commission's advisory opinion noted that some of these American-owned foreign plants "are shipping a substantial proportion of their output into the United States and are supplying a substantial share of the domestic consumption * * *. Although it has been held that members of Webb-Pomerene associations may own plants located outside the United States, the use of such plants to supply the domestic market raises a possibility that domestic prices may be intentionally or artificially enhanced or depressed in contravention of the Webb-Pomerene Act."

In short, the Commission advised, "while membership in a Webb-Pomerene association by firms owning foreign establishments is permissible the statutory exemption enjoyed by the association is lost if artificial or intentional enhancement or depression of domestic prices is in any way traceable to the foreign operation of member firms." (File No. 663 7025, released Sept. 21, 1966.)

No. 92. Cooperative advertising program must be made available to all competing customers.

The Commission was requested to furnish an advisory opinion concerning a proposal by an advertising agency to solicit suppliers of products sold in drugstores to permit the agency to place some of their money for advertising in one trade area. Suppliers were to be charged at the rate of $3 per each store which agrees to participate. The agency will notify all drugstores in the area that, for example, supplier A wants to participate in the plan and ask each store to mark a self-addressed card as to whether they either displayed the item and/or if they

would purchase additional products either for the display or in anticipation of the advertising campaign of that product. If 700 stores return the card as evidence of their in-store cooperation, the supplier would then pay the agency $2,100 at the rate of $3 per store. The agency will then take this sum and place the money in an advertising campaign for the supplier. In return for the pharmacists' cooperation, the agency will tag each supplier's advertising with "this product available at your local pharmacy." No specific names will be mentioned.

Although each supplier's advertising will be run separately and there will be no joint advertising, each will be able to buy advertising under discounts earned from collective buying of space under the contract for all participating suppliers. There will be no payment to any individual druggist or association of druggists. Payments to the agency will be by the media in the form of agency commissions. Further, none of the advertisements to be published will contain selling prices for any of the products featured therein.

The plan was subsequently amended so that the offer would be extended to all competing retailers of the products advertised instead of just to drugstores. However, the agency advised that it had already received negative answers from a number of food chains and other retailers and, consequently, it proposed to leave the tag reading as above, but that if any of the others subsequently indicated they would like to participate, the tag would be amended to read "available at your local pharmacy and grocery store" or "variety store" as the case may be. All of these stores will continue to be notified periodically.

The Commission advised that while no specific customer will be named in the proposed advertisements, the fact that a class of customers will be specified, namely, pharmacies, means that the principles of Section 2(e) of the Robinson-Patman Act apply and each supplier would owe a duty to make this proposal available on proportionally equal terms to all of their competing customers. The Commission further advised that it appeared the agency proposed to operate the plan in such manner as to meet the test of that Section, assuming, of course, that all competing retailers will be notified of the availability of the plan and offered an opportunity to participate and that the tag will be changed in an appropriate manner if other than pharmacies evidence an interest. (File No. 673 7009, released Oct. 13, 1966.)

Modified July 11, 1968, 69 F.T.C. 1211.

No. 93. Newspapers right to reject advertising.

The Commission was requested to render an advisory opinion with respect to the right of a newspaper to reject advertising which it regarded as false and misleading. While the question propounded involved the right of the paper to reject an advertisement by an automobile dealer which impliedly represented that a used car in its stock was a repossession when it was not, the Commission noted that the question presented went far beyond the fate of the particular advertisement and involved the basic question of whether or not a newspaper has the right under the antitrust laws to reject advertisements which are submitted to it for publication.

The Commission further noted the fact that the newspaper, which is in open competition with other newspapers in the same area, is acting in accord with the exercise of its own independent judgment and not in concert with others in proposing to reject the particular advertisement.

Under these circumstances, the Commission advised that it could see no objection to the exercise by the newspaper of its right to refuse to accept the advertisement. (File No. 663 7062, released Oct. 13, 1966.)

No. 94. Promotional assistance plans must be reasonable and nondiscriminatory.

The Commission recently issued an advisory opinion regarding the obligations of a supplier in offering alternatives to his basic plan for providing promotional assistance to his competing, retailer-customers by placing advertisements on shopping carts.

The requesting party, a promoter, had a basic promotional assistance plan which some competing retailer-customers of suppliers participating in the plan were functionally unable to use because the retailer-customers did not have or use shopping carts. The plan provided that such competing retailer-customers were to be offered a reasonably usable alternative way of obtaining the proportionally equal assistance to which they are entitled under the provisions of Sections 2 (d) and (e) of the Robinson-Patman amendment to the Clayton Act.

The question presented was whether a retailer-customer, whose business operation was such that he was functionally able to use and benefit from the basic—shopping cart—plan could demand the alternative form of assistance, if he so desired.

In its opinion, the Commission stated that whether a supplier's promotional assistance plans are reasonable and nondis-

criminatory in their application is essentially a question of fact. The Commission held that if the retailer-customer was able, in fact, to use and benefit from the basic plan offered, but rejected same, the supplier need not offer such retailer-customer the alternative plan. The Commission pointed out that the burden of proof on this issue of fact as it may arise in particular cases will rest upon the supplier. The Commission added that if a competing retailer-customer is unable to use the basic plan, because of the nature of his business operation, he must be offered an alternative plan. However, if he rejects the alternative plan for reasons of his own and said plan could be reasonably used to his benefit, then, the supplier would incur no liability for declining to offer another alternative. (File No. 663 7037, released Oct. 18, 1966.)

Modified July 11, 1968, 69 F.T.C. 1211.

No. 95. Foreign origin; computers.

The Commission recently issued an advisory opinion to the effect that it would be improper to use the "Made in U.S.A." designation in labeling or advertising a computer of which 23% of the factory cost was accounted for by imported parts and 77% was accounted for by domestically produced parts, assembling and factory testing in the United States. (File No. 673 7007, released Oct. 18, 1966.)

No. 96. Product certification program.

The Federal Trade Commission recently advised a producer association that its proposed certification program for its industry product, including the award of a certification mark, would not be objected to under Commission-administered law provided certain conditions are met.

Under the proposed program, certification would be based on availability of production personnel with defined minimum training and experience, the possession of minimum test and quality control equipment, and the use of recognized production techniques. A certification mark could be awarded to, and used by, those qualifying.

Certified producers would be subject to periodic checks to ensure that the required standards were being maintained. Failure to maintain standards could result in decertification and withdrawal of the right to use the mark.

The Commission opinion contained the following conditions:

(1) All present or future producers are to have free, unre-

stricted, and nondiscriminatory access to the program, whether association members or not,

(2) The association will affirmatively offer and accord to nonmembers an equal opportunity for certification at a cost no greater than, and on conditions no more onerous than, those imposed upon comparably situated association members for whom comparable services are rendered,

(3) A uniform certification mark will be awarded to all who qualify,

(4) General supervision of the certification program will be vested in a policy board, or committee, substantially representative of all producers, such board, or committee, to have, among its other duties, the responsibility for ensuring nondiscriminatory access to the program.

Finally, the Commission noted (1) that it expresses no opinion as to the validity of the standards which are adopted, and (2) that its approval would be of no force or effect should the proposed program be implemented in a way which contravened Commission-administered law. (File No. 673 7006, released Oct. 19, 1966.)

No. 97. Trade association code governing dealings with customers.

The Commission recently rendered an advisory opinion advising a trade association of suppliers that a number of serious questions would be likely to arise from an agreement by its members as to a code or set of conditions governing the members' dealing with their customers.

Among the conditions singled out by the Commission for question was one creating uniformity in the terms of delivery. The Commission stated its view to be that the method and manner of delivery can be an element of competition among the members of an industry which this provision would at least have a tendency to eliminate. The creation of uniformity in the terms of delivery may be convenient for the members of an industry but this factor is outweighed by the benefits to the public of competition among those members and it is this competition which the law seeks to protect and preserve.

Much the same objection was raised to the sections which provided that by accepting goods the purchaser shall be deemed to have approved them and no action shall lie against the vendor except as regards hidden defects; that claims for defects must be made within thirty days; and that the purchaser shall not be

entitled to any compensation for any consequential loss whatsoever. The Commission advised that while it may be that a unilateral agreement among the members could not change the legal liabilities as between the parties when disputes arise, entering into this agreement could result in the suppliers presenting a solid front to their customers. In the Commission's view, such matters are best left to the business judgment of the individual suppliers.

The Commission then singled out the provision dealing with prices, which provided that the purchaser shall pay the prices current in the relative trade area at the time of delivery and that the vendor shall, if so requested, send to the purchaser a list stating the prices of goods and the period for which such prices are to apply. Noting that the section was ambiguously worded and susceptible of more than one interpretation, the Commission concluded that the suppliers might well feel justified thereunder in agreeing among themselves to adhere to their published price lists until such are changed. Under well settled principles of antitrust law, such an agreement would clearly be illegal.

The Commission also expressed some concern with the section dealing with payments, which provides that the purchaser shall pay the invoiced amounts within thirty days after date of delivery and if payment is made at a later date the vendor shall be entitled to interest. The Commission advised that it could not put its stamp of approval upon an agreement by the members of an industry as to the length of time during which credit is to be extended, stating that it would seem such matters are best left to the independent judgment of each supplier and should not be determined adversely to the interests of the customers by agreement among those suppliers.

Finally, the Commission took note of the provision dealing with contracts, which stated that all or part of the conditions could be declared applicable to a contract entered into for a specified period, which could be a calendar year unless otherwise agreed. Such contract shall imply that the purchaser agrees that during the period specified in the contract all and any goods specified "or as customarily purchased from such suppliers will be obtained solely from the vendor. . . ." The Commission felt that this clearly sanctions full requirements contracts for periods of one year or more and that such contracts are nothing more than exclusive dealing agreements for limited periods of time. Whereas they are not *per se* illegal, generally, the law may be stated to be that they are illegal if they foreclose competition in a sub-

stantial share of the market. This would naturally require knowledge of a number of factors not known to the Commission and not likely to be known when dealing with a proposed course of action. In the case of any particular supplier, the Commission would need to know the duration of the agreements, the number of customers covered by such agreements and the percentage of the total market which would thereby be foreclosed to competitors. In view of these uncertainties, the Commission felt the best it could do would be to advise that the problem exists but that no opinion could be expressed on a prospective basis because of lack of knowledge of the essential factors which would need to be known before an opinion could be rendered. (File No. 673 7016, released Oct. 26, 1966.)

No. 98. Removal of foreign origin disclosure and use of word "manufacturing."

The Commission announced today it had advised a distributor of imported time clocks that the "removal or obliteration of foreign origin disclosures on imported products is under certain circumstances a violation of the Tariff Act which is administered by the Bureau of Customs" and invited the distributor to contact that Bureau on this particular point. The distributor wanted permission to remove the foreign origin label prior to reselling the time clocks in the United States. "Regardless of the position of that Bureau," the Commission added, "such removal or obliteration in the circumstances you describe may result in a deception of the purchasing public as to the country of origin" and might be found to be in violation of the FTC Act.

Permission was also requested to use the word "manufacturing" in the trade name of the company and in advertising, even though the time clocks are imported in their finished state. The Commission was of the opinion that the use of such word "would have the tendency to lead consumers and others into the belief, contrary to fact, that they are dealing directly with the manufacturer and so to mislead or deceive them. In these circumstances, it would not be proper to use the word 'manufacturing' or any other word of similar import in your trade name or in your advertising or to otherwise represent your company as a manufacturer."

Finally, the distributor wanted to know if it would be proper to represent his company as a manufacturer if it performed a "small part" of the manufacturing process on the time clocks. In regard to this question, the Commission reached the following conclusion:

"The amount of manufacturing which a concern must engage in to justify representing itself as a manufacturer will vary from case to case, depending on the specific circumstances. Your question, however, indicates you intend to operate as a manufacturer only in the technical sense and not in a substantive way, in an attempt to justify the use of a term not otherwise a correct description of your business. We likewise do not believe, in these circumstances, that it would be proper to represent your company as a manufacturer." (File No. 673 7010, released Oct. 31, 1966.)

No. 99. Retailer's advertising of "reward" approved.

The Commission recently advised a retailer of mobile homes and house trailers that he might properly advertise a $100.00 "reward" to be paid to anyone referring a purchasing prospective customer provided such offer was a bona fide offer implemented in good faith. In the Commission's view, such advertisement would amount to the offering of a finder's fee or, perhaps, a commission on a sale.

The Commission pointed out that the prospective purchaser might himself claim the "reward." In such case, the purchaser must realistically benefit in the amount of $100. (File No. 673 7022, released Oct. 31, 1966.)

No. 100. Lifetime guarantees for aluminum siding.

A seller of aluminum siding recently requested the Commission to render an advisory opinion concerning the legality of its proposed use of a "Lifetime Guarantee" for aluminum siding.

The proposed guarantee would represent that the siding will not rust, peel, blister, flake, chip or split under conditions of normal weathering for the lifetime of the original owner. If, after inspection, the seller determines that a claim is valid under the guarantee the seller will within three years after installation furnish all materials and labor necessary to repair or replace, at the seller's option, all siding at no cost to the owner. For the next seven years, the seller will furnish all materials and labor at a cost to the owner of 8% of the then current price for each year or part thereof after the third year. For the next ten years, the seller will furnish all materials and labor at a cost to the owner of an additional 3% of the then current price for each year or part thereof after the tenth year. Thereafter, the seller will furnish only the material necessary to repair or replace, at the seller's option, at a cost to the seller of 10% of the then cur-

rent price. The owner must assume all other costs, including 90% of the cost of materials and 100% of the cost of labor.

In addition, the seller furnished the results of extensive laboratory and field testing of house siding since 1948 under every type of environment which would lead to the conclusion that no aluminum siding, no matter what its finish, will last for a lifetime. In fact, the evidence submitted, if accepted as true, would establish that the maximum life expectancy of such siding under normal conditions would come closer to twenty years and would be considerably less under more extreme circumstances. This is based upon experience indicating that even if it does not rust, peel, blister, flake, chip or split, the finish will weather to such an extent as to require repainting within that time.

The Commission made it plain that it has not conducted its own investigation in order to verify the accuracy of this evidence and that the comments set forth in its opinion were based upon the facts as presented and upon the assumption that those facts were correct. On this basis, the Commission advised that it would not be legal for the seller to employ a guarantee to represent that the siding will last for a lifetime or for any other period beyond what can reasonably be expected.

The opinion pointed out that both the trade practice rules for the Residential Aluminum Siding Industry and the Commission's Guides Against Deceptive Advertising of Guarantees contain the principle that a guarantee shall not be used which exaggerates the life expectancy of a product. In such a case, the guarantee itself constitutes a misrepresentation of fact even though all required disclosures of material terms and conditions might be made in all advertising of the guarantee. This simply recognizes the principle that a guarantee can be used as a representation of an existing fact as well as a guarantee. Viewed in this light, use of this guarantee would constitute an affirmative representation that the siding will last for the lifetime of the owner when the evidence furnished would indicate this is not true. The gravamen of the offense would be the affirmative misrepresentation of the life expectancy of the product and this could not be corrected by a mere disclosure that what is represented to be a fact is not actually true.

Of equal importance in the Commission's view was the fact that the seller here proposed to couple two basically inconsistent provisions in the same guarantee. One was the use of the lifetime representation and the other was the prorated feature. The Commission stated its opinion to be that it is conceptually im-

possible to combine the two in the same guarantee when the proration period virtually terminates at the end of twenty years. A guarantee cannot be for a lifetime if it terminates after twenty years. Undoubtedly, many owners will live far beyond that period of time and so the guarantee cannot help but confuse even though a careful reading of its terms might show that it states all relevant facts and even though all advertisements make the required disclosures.

Literally speaking, some benefit may be claimed for the remainder of the owner's life after the expiration of the twenty year period, for the seller will still assume 10% of the cost of materials. But this would appear to be more a matter of form than substance. The owner would be given a mere pittance in order to furnish some color of justification for the claim that the guarantee is for a lifetime. The situation is that the owner must pay more than 90% of all costs in order to receive the benefit of the remaining 10% of the cost of materials, which does not leave him with anything of substantial value to justify the representation of lifetime warranty. In the Commission's view, the purchaser must be afforded something of substantial value for his lifetime in order to support the representation and the Commission did not feel that less than 10% of all costs was of substantial value.

Finally, the Commission noted that the proposed guarantee excludes damages resulting from normal weathering of surfaces. In view of the fact that this appears to be the most prevalent cause for repainting aluminum siding, the Commission also advised that this is a material term or condition which not only should be set forth in the guarantee, for whatever period of time it runs, but also should be clearly and conspicuously set forth in all advertising which mentions the guarantee. (File No. 673 7014, released Nov. 9, 1966.)

No. 101. Recipe promotional plan.

The Commission announced today it had given conditional approval to the use of a tripartite recipe plan promoting the sale of food products.

According to the terms of the proposed plan, the promoter will install a dispensing machine (approximately 18″ square) in each retail grocery store containing a sufficient number of recipe cards to meet the demands of its customers. In addition to containing a recipe of the week, the card will also feature the specific brand name of one of the ingredients of the participating food suppliers.

Each participating retailer will be paid $10 per month and furnished with posters and shelf markers publicizing the recipe cards and products of the participating manufacturers. Cost of the plan will be borne by the participating manufacturers. Notification of the plan will be by a printed promotional piece and/or letter to be mailed to all retailers in an area which was not defined with exact precision.

In its opinion the Commission said that Sections 2 (d) and (e) of the Robinson-Patman Act "require a supplier to treat all of his competing customers on a nondiscriminatory basis, which means that if the supplier furnishes promotional assistance to one customer he must make that assistance available on proportionally equal terms to all competing customers. The courts have also held that the supplier must comply with these provisions of the law irrespective of whether the promotional assistance is furnished to the retailer directly or through an intermediary."

The three conditions which must be met before the Commission can give its approval to the plan are as follows:

First, the plan must be offered to all competing retailers within a given *marketing area.* Under the facts outlined in your letter, there appears to be an indication that the plan, as presently contemplated, may be offered only to those competing retailers within an arbitrarily drawn geographical area. Second, the plan must be offered to *all* competing retailers within that marketing area. Competing retailers located on the periphery of said market areas are considered by the Commission to be included within the marketing area if in fact they do compete with those therein who are offered participation in the plan. Third, the plan must be made available to all competing retailers irrespective of their functional classification. It appears that grocery stores will be the principal beneficiaries of the plan. However, if the items involved in the plan are also sold by nongrocery stores, they must be accorded the same opportunity to participate in any promotional assistance given by the suppliers to competing grocery outlets.

(File No. 673 7018, released Nov. 11, 1966.)
Modified July 11, 1968, 69 F.T.C. 1211.

No. 102. Disapproval of proposed weight-reducing claims for garments.

The Federal Trade Commission, basing its action on scientific information available to it and on its knowledge and experience, recently advised a manufacturer of plastic slimming garments that the Commission had reason to believe that proposed advertising and representations to the effect that these garments, through inducing perspiration, would effectively cause weight reduction, or spot weight reduction in preselected body areas or

reducing generally, would be actionable under Section 12 of the Federal Trade Commission Act. (File No. 673 7024, released Nov. 11, 1966.)

No. 103. Three-day promotional and merchandising assistance plan available to direct and indirect purchasers.

The Commission recently advised the promoter of the three-party promotional assistance plan outlined below that, subject to the admonitions indicated, the plan would not violate Commission administered law.

The Plan

The promoter proposes to provide promotional and merchandising assistance to suppliers of products normally sold in grocery and drug stores. In return for in-store promotion of participating suppliers' products by (1) providing shelf space at least equal to that given competing products selling in the same volume, (2) installing shelf markers or other in-store signs furnished by the promoter advertising the promoted products, (3) maintaining adequate supplies (i.e. what the *retailer* decides he needs to avoid a sellout) of promoted products and (4) periodic (one week in each quarter) off shelf displays (aisle end or other than normal shelf position), the retailer would earn an amount equal to 2% of his net purchases of promoted products, subject to a maximum monthly payment of $40 per store. Earnings would be computed on a store-by-store basis. The amount earned would be based on purchases of promoted products regardless of whether the retailer purchased directly from the supplier or through a wholesaler.

In addition, retailers could, at their option, buy or rent in-store sound equipment and purchase a background music service from the promoter. The speakers could be used for in-store announcements by the retailers; however, participating suppliers' advertisements would not be broadcast over the network stores. The charges to the retailers for the sound system and music would be applied monthly or quarterly to promotional assistance payments earned for participation in the Plan (*i.e.* the 2% of purchases). Any excess of earnings over charges would be paid to the retailers in cash.

At the outset and every six months thereafter, the plan would be offered by letter from the promoter to all drug and grocery outlets listed in the yellow pages of the telephone book, which list would be supplemented by participating suppliers' lists of competing customers selling the promoted product.

Participating retailers would agree to allow the promoter's representatives to check on performance and submit reports to suppliers. The reports would contain information regarding the shelf space given the supplier's promoted product, the prices at which it is sold, its shelf position (eye, waist or bottom level) and the like.

With regard to the admonitions, the Commission expressed the view that:

(1) In addition to the letter at the outset and every six months to each competing reseller of promoted products of the supplier, new, competing customers should be offered the plan when the first sale of the promoted product is made to them. The reason is that such new customers are entitled to be offered the assistance promptly.

(2) The reports the promoter submits to suppliers should not contain information which may be used for price fixing purposes.

(3) Prospective participants in the plan should be told: (1) the fact that the promoter is positioned between the supplier and the supplier's customers—the retailers—does not effect applicability of Sections 2 (d) and (e) of the Robinson-Patman Act and Section 5 of the Federal Trade Commission Act to the plan; (2) even though the promoter is employed, it is the supplier's responsibility to make certain that each of his customers who compete with one another in selling the promoted product is offered the opportunity to participate.

If opportunity is not offered, or an illegal discrimination results, the supplier, the retailer and the promoter may be acting in violation of Section 2 (d) or (e) of the Robinson-Patman amendment to the Clayton Act and/or Section 5 of the Federal Trade Commission Act. (File No. 673 7012, released Nov. 22, 1966.)

Modified July 11, 1968, 69 F.T.C. 1211.

No. 104. Approval of descriptions to be used by exclusive seller to U.S. Government.

The Federal Trade Commission recently advised a manufacturer's representative that in connection with its firm name it might properly describe its office as a "Government Sales and Contract Office," that it might in its promotional literature describe those of its products specifically designed for and sold only to the United States Government as "Model No. * * * G, designed exclusively for and sold only to the United States Government (or thus and so agency)," and that it might properly state on labels affixed to the machinery which it sells that

"equipment parts and service are supplied by * * *" (whoever is the supplier).

The advice given was predicated on assurances by the manufacturer's representative that his company sells exclusively to the United States Government, that the company's promotional material is sent only to, and is generally available only to, United States Government agencies, and that the company is the sole source for parts and service for certain of the products which it sells. (File No. 673 7032, released Dec. 6, 1966.)

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