commerce, as "commerce" is defined in the Flammable Fabrics Act; or

(c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce,

any fabric which, under the provisions of Section 4 of the said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

It is further ordered, That respondents Nipkow & Kobelt, Inc., and its officers, and Werner A. Kobelt and Emil G. Gress, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty under the Flammable Fabrics Act, that any fabric is not, under the provisions of Section 4 of said Act, so highly flammable as to be dangerous when worn by individuals, when respondents have reason to believe such fabric may be introduced, sold, or transported in commerce.

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

IN THE MATTER OF

JOSEPH LOUIS ZELDON DOING BUSINESS AS GUILD INSTITUTE OF MUSIC

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

Docket C-1279. Complaint, Dec. 19, 1967—Decision, Dec. 19, 1967

Consent order requiring a Washington, D.C., seller of accordions and music lessons to cease misrepresenting that his music lessons are free or at reduced prices, that prospective customers are specially selected, that his telephone contacts are for survey purposes only, that his music tests determine musical aptitude, and neglecting to disclose all the terms and conditions of his offer to do business.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Joseph

Louis Zeldon, an individual, doing business as Guild Institute of Music, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Joseph Louis Zeldon is an individual doing business as Guild Institute of Music, with his principal office and place of business located at 1319 F Street, NW., Washington, D.C.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the offering for sale, sale and distribution of music lessons and accordions to the public.

PAR. 3. In the course and conduct of his business, respondent now causes, and for some time last past has caused, his said merchandise and services to be sold to purchasers located within the District of Columbia and to purchasers in the States of Maryland and Virginia, and respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his business, and for the purpose of initially inducing the purchase of music lessons and ultimately inducing the purchase of an accordion, respondent has developed and employs a deceptive sales technique whereby numerous oral statements and representations are made respecting the nature and purpose of respondent's solicitation.

The initial step in respondent's sales technique consists of the use of telephone canvassers who use the telephone and street address directory to obtain telephone numbers to call people at home. The canvasser states that she is making a survey or listing of school age children and she asks the person called whether he or she has children and, if so, their sex and age. On occasions the child's name is asked. When the person called asks the identity of the caller or the purpose of the requested information, the canvasser is instructed to give the purpose only as a "survey" or "listing." The canvasser is instructed to avoid all questions. The canvasser is paid at the rate of 10 cents per name submitted to respondent.

The next step in respondent's technique consists of a telephone contact by a salesman whose purpose is to obtain an appointment at the parent's residence. The salesman makes oral representations

of which the following are typical and illustrative, but not all inclusive:

Hello Mrs. Jones, this is (Bob Stone) calling. I'm going to be in the neighborhood this evening testing the school children for our special music program and am interested in your (8 year old boy). Is he taking music now? Well, this is a program for the elementary and junior high school children, sponsored by the Guild Institute of Music. It's designed to see if the children have any ability along musical lines *without* the parents having to buy or rent an instrument. What I do is test your child to see if he has the interest and talent.

Answers to some questions:

"Where are you located?" Try not to give our address. "We have locations in Maryland, Washington and Virginia, and home teaching. Did you ever study music Mrs. Jones?" (change the subject).

"How much does this cost?" Try not to give any prices. "It depends on the child's talent. Is 7:00 or 7:30 o.k.?"

"What instruments do you teach?" "We can arrange lessons on most instruments. I will discuss that with you this evening. Is 7:00 or 7:30 o.k.?"

During the visit to the home the salesman's "presentation" is made. This "presentation" includes inducing the parent to permit the child to be "tested" for musical aptitude. The parent is told that:

This is a program sponsored for the elementary & Jr. High school children by the Guild Institute of Music. We work only with the younger children at this time, and have a very successful program for children with talent. The hard part of the program is finding the children with the necessary requirements.

However, most of the children accepted for this program succeed. We find that children between 8 and 12 can be orientated to music very quickly; and because of our success in working with the younger children, we have devised an excellent beginner's course to analyze your child's abilities. If your child passes the test I'm going to give him this evening, he will be acceptable to participate in this trial program. The cost of this 8 week program is $59, which is less than our cost.

* * * The first 8 lessons are given on the piano accordion. The reasons for this are that the piano accordion is the easiest instrument to learn; it is a basic instrument, which lays the foundation for all other instruments * * *.

* * * * * * *

[Closing arguments:] Please get a decision while you are still in the home. It is better to get a yes or no right away, because your chances after you leave are very slim. Many people go through life with a talent and never make use of it, whether it be in music, art, sports, etc. Now is the time to give your child the chance. Many parents decide to give their children music, and go out and buy or rent an expensive instrument. The child may take a few lessons and quit, and you are stuck with the instrument. But with us the instrument is furnished. There are many ways to spend $59 on a child and not have him get anything out of it, but this is something that the child will appreciate for the rest of his life. Now is the time to give your child a chance.

After the child is allowed to operate an accordion during the "test," the parent is informed that the child shows promise and indicates above-average talent. The parent is told that the child can go a long way in music, and enrollment for music lessons is recommended. At this point the salesman is instructed to "immediately get out your contract pad and start writing. Always assume the sale. Never wait for an OK from the parents. As you finish writing the contract, ask the parents if this will be cash or check."

In those instances in which the parent is agreeable, the child is accepted for a "trial program" of eight weeks duration and, after agreeing to pay a nominal tuition fee, the child commences a schedule of accordion lessons. During the course of or at the end of these lessons, the parent is again contacted and is informed that the child is found to be eligible for a "scholarship" consisting of free music lessons of a designated duration.

PAR. 5. By and through the use of the aforesaid oral statements and representations, and others of similar import not specifically set out herein, and through the use of the aforesaid technique and activities, respondent represents, and has represented, directly or by implication, that:

1. The purpose of the canvasser's call is to obtain information for a bona fide survey or listing of school age children;

2. There is nothing to buy as a consequence of listening to the oral presentation of respondent's representative;

3. The representative who calls upon the parent at home is concerned only with the child's interests and musical talent;

4. Respondent gives music instruction on most instruments;

5. Respondent's program is only for specially selected children who can meet certain musical qualifications;

6. The parent should reach a decision right away because the chances of the child's acceptance in respondent's program at some later time are very slim;

7. The "musical talent test" administered by respondent's representative is a bona fide test employed to obtain a true determination of the child's musical aptitude;

8. Respondent is making a bona fide offer of a scholarship consisting of free music lessons.

PAR. 6. In truth and in fact:

1. The purpose of the canvasser's call is not to obtain information for a bona fide survey or listing of school age children;

2. As a consequence of listening to the oral presentation of respondent's representatives, respondent endeavors to enroll the child in a course of music instruction for which a charge is made;

3. The representative who calls upon the parent at home is not concerned only with the child's interests and musical talent. In fact, respondent's principal interest is in obtaining leads to parents of children who are of a certain age, for the initial purpose of selling music lessons and for the ultimate purpose of selling an accordion;

4. Respondent does not give music instruction on most instruments; his course of instruction is devoted only to the accordion;

5. Respondent's program is not only for specially selected children who can meet certain musical qualifications. In fact, the only qualifications are that the child be of proper age to take music lessons (usually 7½ to 12 years old) and that the child have parents who can ultimately afford to purchase an accordion;

6. The chances of the child's acceptance in respondent's program will not be significantly diminished if the parent decides upon enrollment at some later time;

7. The "musical talent test" administered by respondent's representatives is not a bona fide test employed to obtain a true determination of the child's musical aptitude;

8. Respondent is not making a bona fide offer of a scholarship consisting of free music lessons. In fact, receipt of the "scholarship" is predicated upon the parents' purchase of an accordion, at various prices ranging generally from $400 to $2,500, depending upon the quality of the accordion and upon the sales resistance of the parents.

Therefore, the statements, representations and sales presentation as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the conduct of his business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of music lessons and accordions of the same general kind and nature as those sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's merchandise and services by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now

constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondent and counsel for the Commission having executed an agreement containing a consent order, and the Commission having accepted same and placed it on the public record for a period of thirty days, and the Commission having thereafter reconsidered the matter and withdrawn its acceptance of such agreement and the respondent having been so notified; and

Counsel for respondent and counsel for the Commission having subsequently, on November 28, 1967, executed another agreement containing an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules, and also containing an order identical to that set forth in the agreement previously accepted by the Commission except that paragraph 13 thereof has been appropriately revised and paragraph 14 appropriately added; and which agreement also provides that if it is accepted by the Commission, the Commission, if it so elects, may forthwith issue its complaint corresponding in form and substance with the copy heretofore served on respondent and enter its decision containing the order contemplated by the agreement; and

The Commission having considered such agreement and having accepted same, and it appearing to the Commission that the said paragraphs 13 and 14 of the order are not substantive in nature but solely directed to effectuating compliance with the substantive provisions of the order, and the Commission having determined that the public interest will be better served by issuance of decision now rather than staying final disposition thereof, attendant to also placing the new agreement on the public record for a period of 30 days for the reception of comments;

Now, therefore, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Joseph Louis Zeldon is an individual doing business as Guild Institute of Music, with his principal office and place of business located at 1319 F Street, NW., Washington, D.C.

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

ORDER

It is ordered, That respondent Joseph Louis Zeldon, an individual, doing business as Guild Institute of Music or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, canvassing, soliciting for purchase, offering for sale, sale or distribution of music lessons or any other course of instruction, accordions or other musical instrument, or any other products or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that the purpose of a telephone canvasser's request for information is to obtain information for a survey or listing of school children; or misrepresenting in any manner the nature or purpose of any request for information.

2. Representing, directly or by implication, that there is nothing to buy as a consequence of listening to an oral presentation; or mispresenting in any manner the nature or purpose of an oral presentation.

3. Representing, directly or by implication, that the representative who calls upon the parent at home is concerned only with the child's interests or musical talent.

4. Representing, directly or by implication, that respondent gives music lessons on any musical instrument other than the accordion; or misrepresenting in any manner the nature or scope of respondent's business.

5. Representing, directly or by implication, that respondent's program is only for specially selected children who can meet certain musical qualifications; or misrepresenting in any manner the method of selection or enrollment employed by or the qualifications required by respondent.

6. Representing, directly or by implication, that the parent should reach a decision right away because the chances of the child's acceptance in respondent's program at some later time are slim or will be significantly diminished or reduced; or misrepresenting in any manner the time or other limitations placed upon respondent's offer.

7. Representing, directly or by implication, that any musical talent test, or other test administered by respondent or respondent's representatives, is a test employed to obtain a true determination of the child's musical aptitude; or misrepresenting in any manner the nature or purpose of any test or examination given by respondent or respondent's representatives.

8. Representing, directly or by implication, through the offer of a "scholarship," or otherwise, that music lessons will be given without charge by respondent, when the offer is contingent upon the purchase of a musical instrument or when the offer is in any other respect conditional.

9. Representing, directly or by implication, that any service or article of merchandise is being given free or as a gift, or without cost or charge, or at a reduced price, in connection with the purchase of other merchandise, unless the stated price of the merchandise required to be purchased in order to obtain said article is the same or less than the customary and usual price at which such merchandise has been sold separately for a substantial period of time in the recent and regular course of business.

10. Using canvassers to contact people for the purpose of obtaining leads to persons with school age children, unless the canvasser orally discloses at the outset that the true purpose of the contact is to obtain sales leads.

11. Failing or refusing to orally disclose, regardless of any affirmative request for the information, the full name and address of respondent's business whenever contact is made with a parent for the purpose of obtaining a sales lead or for the purpose of obtaining an interview or appointment with a sales lead.

12. Instructing canvassers, salesmen or representatives to try not to give respondent's address, or the prices of any service or product, or in any manner to avoid or evade any legitimate question asked by a prospective purchaser of respondent's services or product; or failing or refusing to

answer any legitimate request for information from a purchaser or prospective purchaser.

13. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondent's products or services, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

14. Failing, after the acceptance of the initial report of compliance, to submit a report to the Commission once every year during the next three years describing all complaints respecting unauthorized representations, all complaints received from customers respecting representations by salesmen which are claimed to have been deceptive, the facts uncovered by respondent in his investigation thereof and the action taken by respondent with respect to each such complaint.

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

IN THE MATTER OF

CAROLY OF MIAMI, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-1280. Complaint, Dec. 21, 1967—Decision, Dec. 21, 1967

Consent order requiring a Miami, Fla., manufacturer of ladies' sportswear to cease misbranding and falsely guaranteeing its textile fiber products and failing to maintain required records.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Caroly of Miami, Inc., a corporation, and Lester Greger and Frances Greger, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act, and it appearing to the Commission

that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Caroly of Miami, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida.

Individual respondents Lester Greger and Frances Greger are respectively president and secretary treasurer of the corporate respondent. They formulate, direct and control the acts, practices and policies of said corporate respondent, including the acts and practices hereinafter referred to.

Respondents are engaged in the manufacture and sale of ladies' sportswear, with their office and principal place of business located at 198 NW. 24th Street, Miami, Florida.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by the respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products which were labeled to show the contents as "60% Cotton, 40% Dacron," "100% Cotton," and "100% Arnel," whereas in truth and in fact, said products contained substantially different fibers and amounts of fibers than as represented.

PAR. 4. Certain of said textile fiber products were further misbranded in that they were not stamped, tagged, labeled or

otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products with labels which failed:

1. To disclose the true generic names of the fibers present; and
2. To disclose the percentage of such fibers by weight.

PAR. 5. Respondents have failed to maintain proper records showing the fiber content of the textile fiber products manufactured by them, in violation of Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the Regulations promulgated thereunder.

PAR. 6. Respondents have furnished a false guaranty that certain of their textile fiber products were not misbranded or falsely invoiced, in violation of Section 10 of the Textile Fiber Products Identification Act.

PAR. 7. The acts and practices of the respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts or practices, in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respond-

ents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Caroly of Miami, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 198 NW. 24th Street, Miami, Florida.

Respondents Lester Greger and Frances Greger are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Caroly of Miami, Inc., a corporation, and its officers, and Lester Greger and Frances Greger, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product, which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, after shipment in commerce of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising, or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

2. Failing to affix a stamp, tag, label or other means

of identification to each such product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

B. Failing to maintain and preserve proper records showing the fiber content of textile fiber products manufactured by them, as required by Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the Regulations promulgated thereunder.

C. Furnishing false guaranties that textile fiber products are not misbranded or falsely invoiced, under the provisions of the Textile Fiber Products Identification Act.

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

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order, July 20, 1967

Order denying complaint counsel's request to appeal from examiner's ruling re: cost justification, and respondent's request to join Phillips Petroleum Company as a party respondent.

ORDER RULING ON REQUEST TO FILE AN INTERLOCUTORY APPEAL AND REQUEST FOR RECONSIDERATION

These matters are before the Commission upon complaint counsel's request for permission to file an interlocutory appeal from the hearing examiner's "Ruling on Respondent's Motion Re Cost Justification," respondent's answer in opposition thereto, and complaint counsel's reply. In addition, respondent has filed a request that the Commission reconsider its Order of May 25, 1967 [71 F.T.C. 1695], ruling on Suburban's interlocutory appeal from the examiner's denial of Suburban's motion to join Phillips Petroleum Company as a party respondent, which is opposed by complaint counsel.

I. Complaint Counsel's Request for Permission to File an Interlocutory Appeal from the Hearing Examiner's Ruling on Respondent's Motion Re Cost Justification

On May 25, 1967, the Commission ruled on respondent's interlocutory appeal on the issue of allocation of the burden of proof on the cost justification issue.[1] With that order, the matter was returned to the hearing examiner for an appropriate pretrial order on this issue. It is from the resulting pretrial order issued by the examiner on June 27 [2] that complaint counsel request permission to file an interlocutory appeal.

The operative part of the hearing examiner's pretrial order provides:

(A) that complaint counsel shall have the burden of showing, as part of their prima facie case, that the difference in the methods by which Suburban

[1] *Suburban Propane Gas Corp.* (Order Ruling On Interlocutory Appeals, May 25, 1967), Docket No. 8672 [71 F.T.C. 1695].

[2] *Suburban Propane Gas Corp.* (Hearing Examiner's Ruling On Respondent's Motion Re Cost Justification, June 27, 1967), Docket No. 8672.

was served by Phillips and the difference in the quantities purchased by Suburban from Phillips, as compared with the alleged disfavored competitors, could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the alleged differential in prices paid to Phillips by Suburban as compared with prices paid to Phillips by the alleged disfavored competitors *and* that Suburban knew or should have known that the difference in the methods by which it was served and the difference in the quantities which it purchased could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the aforesaid price differentials; and

(B) that complaint counsel file within thirty (30) days after the date of this order, an amendment to the Trial Brief of complaint counsel previously filed herein with respect to the issue of cost justification and Suburban's knowledge thereof as provided in paragraph A, in which they shall specifically:

(1) allocate Commission exhibits from the Commission Exhibit List heretofore filed to proof on (a) the issue of cost justification and (b) Suburban's knowledge thereof with reference to the specific text of the particular exhibit relied upon;

(2) state the names, addresses and occupation of their cost justification witnesses and give a brief narrative statement of the facts as to which such witnesses will testify;

(3) set out all other evidence to be offered in connection with the issues of cost justification and Suburban's knowledge thereof.

Complaint counsel takes the position that the pretrial order is contrary to precedent, contrary to our Order of May 25 and erroneous as a matter of law. Specifically, complaint counsel interpret the pretrial order to mean that, as a part of their initial burden, i.e. a showing that the difference in methods and quantities could not have given rise to cost savings sufficient to justify the differential, they are required to introduce into evidence a cost study which indicates statistically that the discriminatory prices accorded to Suburban were not cost justified. If this interpretation is correct, the pretrial order would indeed be incorrect as inconsistent with the case law on this point. It is not a part of complaint counsel's burden, as the Commission's order of May 25, 1967, stated, to show that the differences cannot in fact be cost justified. In applying the test of *Automatic Canteen*[3] in the *Alhambra*[4] case, the Commission expressly stated that no formal cost study is required. We do not, however, interpret the pretrial order to place this burden upon complaint counsel inasmuch as on its face it seems to be in conformity with the applicable case law and our Order of May 25. We cannot therefore conclude at this time that the inferences which complaint counsel draw as to the implementation of the pretrial order are correct. We must

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[3] *Automatic Canteen Company of America* v. *F.T.C.*, 346 U.S. 61.

[4] *Alhambra Motor Parts*, Docket No. 6889 (Transfer Binder 1965-1967) ¶ 17410 [68 F.T.C. 1039].

assume that the hearing examiner will apply the pretrial order in accordance with our Order of May 25. The hearing examiner is charged with the conduct of pretrial matters and of the actual hearing. In the absence of unusual circumstances, intervention by the Commission is not warranted at this stage of the proceeding. Such unusual circumstances do not appear to be present in this instance especially in light of the examiner's statement that "this order does not pretend to set out in advance the course which the introduction of evidence must follow at the hearing." Complaint counsel's fears expressed in the request for permission to file an interlocutory appeal appear to be premature. Therefore, complaint counsel's request will be denied.

II. Request for Reconsideration of Order of May 25, 1967, Ruling on Suburban's Interlocutory Appeal from the Denial of Suburban's Motion to Join Phillips as a Party Respondent

On May 25, 1967, we denied respondent's request to join Phillips Petroleum Company as a party respondent. Respondent requests reconsideration and amplification of this ruling. Suburban contends that it needs to know the reasons for the denial and, as a matter of due process, is entitled to a disclosure of these reasons. This is apparently based upon respondent's belief that the decision whether or not to issue a complaint, in this case, to join Phillips as a party respondent, must be accompanied by "findings and conclusions, and the reasons and basis therefor."

The reasons underlying the decision not to join Phillips are set forth in the Commission's Order of May 25 [71 F.T.C. 1695, 1696].[5] The Commission's views have not changed in the meantime. In addition, the administrative determination whether or not to join Phillips in the complaint is not the proper subject for further inquiry. Certainly, "findings" on the determination not to join Phillips in this proceeding, as respondent seems to suggest, are not required nor do them seem appropriate.[6] Finally, in the absence

[5] "Respondent, although asserting that it would be inconvenienced in making its defense, has not shown that it could not without Phillips make an adequate defense on the matter of possible cost justification or any other issue. It has available to it all the investigative and discovery techniques provided by the Commission's Rules, including the use of subpoenas, if necessary. Thus, it is not dependent upon the voluntary cooperation of the seller in the preparation of its defense. Furthermore, Phillips, if it were charged with a Section 2(a) violation as urged by respondent, might not seek to defend itself under the cost justification proviso and so the naming of Phillips, in that event, would be of no help to respondent. Finally, the Commission issues a complaint only when it believes that section of the laws it administers has been violated and that a proceeding in respect thereto would be in the interest of the public. The Commission would not consider it an appropriate exercise of its discretion to issue a complaint primarily as a matter of convenience to another charged with a law violation. For such reasons respondent's request to name Phillips in the complaint will be denied."

[6] *Cf. Seeburg Corporation* (Order Ruling on Hearing Examiner's Certification, October 25, 1966), Docket No. 8682 [70 F.T.C. 1818]; *R. H. Macy & Co., Inc.* (Order Ruling On Questions Certified And Denying Motion To Strike Certification, September 30, 1965), Docket No. 8650 [68 F.T.C. 1179].

of new facts supporting the request for reconsideration it will be denied. Accordingly,

It is ordered, That complaint counsel's request for permission to file an interlocutory appeal from the hearing examiner's ruling filed June 27, 1967, be, and it hereby is, denied.

It is further ordered, That respondent's request for reconsideration of the Commission's decision of May 25, 1967 [71 F.T.C. 1695], denying the request to join Phillips Petroleum Company as a party respondent in this proceeding be, and it hereby is, denied.

Commissioner Elman concurring in the result.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order, Aug. 25, 1967

Order denying respondents' requests for oral argument on examiner's ruling to complete discovery by a fixed date, renewed application for subpoenas to seven resources, and joining of seven resources as parties respondent.

ORDER DENYING RESPONDENTS' REQUESTS

This matter is before the Commission upon three separate requests of respondents. On August 3, 1967, they requested permission to file an interlocutory appeal from the hearing examiner's order of July 24, 1967, requiring them to complete their discovery pursuant to the hearing examiner's ruling of April 27, 1967, on or before September 1, 1967. Complaint counsel have filed an appeal opposing such request and respondents have filed a reply to such answer. Secondly, respondents, on August 8, 1967, filed an appeal from the hearing examiner's order of August 2, 1967, denying their renewed application for subpoenas duces tecum to seven resources. Complaint counsel, on August 15, 1967, filed a brief in opposition to this appeal. Gibson Greeting Cards, Inc., SCM Corporation, and Royal Typewriter Company, Inc., subpoenaed resources, also filed separate briefs in opposition to the appeal. Finally, respondents, in connection with their renewed application for subpoenas duces tecum, filed an alternative motion to join seven resources as parties respondent, which motion was certified to the Commission without recommendation by the hearing examiner on August 3, 1967. Briefs in opposition to such joinder were filed by Gibson Greeting Cards, Inc., SCM Corporation, and Royal Typewriter Company, Inc.

Respondents, in connection with the request for permission to appeal from the examiner's order requiring completion of discovery by September 1, 1967, assert that such time limit is impossible

of compliance. They claim, among other things, that 2100 man-hours of accountants' time is needed to complete the discovery authorized, in addition to another estimated 1000 man-hours of related attorneys' work. Respondents' argument, in sum, is that the examiner's decision is a gross abuse of discretion and that his ruling necessitates an immediate decision by the Commission to prevent detriment to the public interest. Respondents also seek oral argument on the issue and request that the examiner's order of July 24, 1967, fixing the completion date for discovery on September 1, 1967, be stayed.

We will deny respondents' request for permission to appeal on this issue. Setting a time limit for the completion of discovery is a matter peculiarly within the examiner's province and responsibility. Having been in direct contact with the parties and having heard their arguments, he clearly is best able to decide their discovery needs and to evaluate the diligence and urgency with which they have pursued the opportunities granted them. On such matters as this the examiner has a broad discretion, and the Commission will not ordinarily overrule him. (See our decision herein of June 26, 1967 [71 F.T.C. 1711], and pertinent cases cited.) We are not persuaded by respondents' argument that the examiner's time limitation is unreasonable or that his decision constitutes an abuse of his discretion. We hold, therefore, that respondents have not, on this issue, met the requirements of § 3.23 of the Commission's Rules of Practice (replacing § 3.20 of the Commission's former rules). The requests for oral argument and a stay of the discovery completion date likewise will be denied.

Respondents' appeal from the hearing examiner's order denying a renewed application for subpoenas duces tecum to seven resources concerns an issue previously considered by the Commission and disposed of by order of the Commission of June 26, 1967, denying, *inter alia,* respondents' interlocutory appeal. Nothing has been presented which would convince us that this question should be reconsidered. We note that even the allegedly limited discovery authorization has permitted respondents to engage in an extensive investigation. This is borne out by the sizable amount of discovery which respondents assert they have already engaged in or have planned. Moreover, the examiner's ruling that respondents were entitled to know that the tabulated prices are in fact "net prices" seems to have given respondents substantial leeway in obtaining the information which they originally sought. In such circumstances we will not overrule the hearing examiner. Respondents have not met the requirements of § 3.35(b) (replacing former

§ 3.17(f) of the Commission's Rules of Practice). We will, accordingly, deny this appeal.

Finally, we come to the respondents' alternative request to join the seven resources as parties respondent, which request has been certified by the hearing examiner. This joinder is sought in the event that the original subpoenas are not reinstated, and, as we have indicated above, they will not be. Accordingly, we now consider the alternative sought. Respondents appear to believe that somehow, if the seven resources are joined, they will be aided in their defense by such new respondents, who would then have to defend against amended Clayton Act, Section 2(a) charges. Such assistance, however, would not be assured. See discussion in *Suburban Propane Gas Corp.*, Docket No. 8672 (order issued May 25, 1967) [71 F.T.C. 1695]. More importantly, respondents are entitled to a fair hearing and discovery to the extent provided in the Commission's rules—which discovery may, of course, be limited by the hearing examiner—and these rights may in no way depend upon the Commission's action against a third party by the issuance of a complaint or otherwise. Thus, the issuance of a complaint is a separate matter and not relevant to any issue herein. Respondents' request for joinder of the seven resources will be denied. Accordingly,

It is ordered, That respondents' request for permission to file an interlocutory appeal from the hearing examiner's order of July 24, 1967, their request for oral argument thereon, and their further request for a stay in the date of completion of discovery ordered by the hearing examiner be, and they hereby are, denied.

It is further ordered, That respondents' appeal from the hearing examiner's order denying their renewed application for subpoenas duces tecum to seven resources be, and it hereby is, denied.

It is further ordered, That respondents' alternative request to join seven resources as parties respondent, certified by the examiner, be, and it hereby is, denied.

Commissioner Elman not participating.

NATIONAL BISCUIT COMPANY

Docket 5013. Order and Opinion, Aug. 31, 1967

Order denying respondent's motion to reopen and modify a modified order of April 26, 1954, 50 F.T.C. 932, which respondent contends was invalid for the reason that the modification was contrary to the terms of the original order of February 23, 1944, 38 F.T.C. 213, which was entered pursuant to a consent settlement.

OPINION OF THE COMMISSION

This matter is pending with the hearing examiner pursuant to Commission order issued April 14, 1967 [71 F.T.C. 1674], directing that public investigational hearings be conducted to determine compliance with the modified order to cease and desist issued under Section 2(a) of the Clayton Act, on April 26, 1954 [50 F.T.C. 932]. The matter is now before the Commission upon certification by the hearing examiner of respondent's motion, filed July 13, 1967, requesting the Commission to reopen the proceeding and modify the order issued on April 26, 1954. Commission counsel have filed an answer in opposition to respondent's motion.

The original order to cease and desist was issued on February 23, 1944 [38 F.T.C. 213], and contained three numbered paragraphs directed at prohibiting further price discriminations by respondent. The order issued on April 26, 1954, on motion of Commission counsel and opposed by respondent, retained the first two numbered paragraphs of the original order and modified paragraph number 3.

Respondent now contends that the 1954 modification of the cease-and-desist order was invalid for the reasons that the original order was entered pursuant to a consent settlement arrangement accepted and ratified in 1944 by the Commission and the modification is contrary to the terms of the original settlement; that the 1954 modification deprives respondent of a fair hearing in violation of due process of law; and that the modification improperly broadened the scope of the order to cease and desist. On this basis, respondent requests that we reopen the proceeding and substitute paragraph number 3 of the original 1944 order in lieu of the currently outstanding modified paragraph.

After the issuance of the complaint in this matter on July 20, 1943, respondent filed an answer in general denying the facts alleged. Thereafter, on January 31, 1944, respondent and the Commission's Chief Counsel entered into a stipulation as to the facts which conformed generally to the facts alleged in the complaint. Based on these stipulated facts the Commission made its findings as to the facts and conclusion, and issued its order to cease and desist.

In its present motion, respondent contends that the original order "was entered in 1944 under the then applicable consent settlement procedures." In substance, respondent states that in addition to the stipulation as to the facts, it also negotiated with the staff an order to cease and desist and a compliance report setting forth a new and revised price structure. Respondent has attached to its motion an affidavit of one of its former employees

who participated in the compliance negotiations. Respondent argues that the Commission issued the order which it had negotiated with the staff, that the Commission "received and filed" the compliance report which was filed by respondent about a week after the order issued, and that by these actions, the Commission ratified the entire settlement.

In furtherance of its argument that the 1954 modification of the order was invalid, respondent states that the Commission's opinion accompanying that order "ignored the consent nature of the 1944 settlement." We do not agree. That issue was raised in the answer and reply to the motion leading to the modification and it is clear from the opinion that the Commission considered respondent's consent order argument to be without substance. While not expressly ruling on this argument, the Commission's rejection thereof is apparent in its stated reliance on the evidence of record (the stipulated facts) in justification of the modification.

Moreover, the Commission's rules did not provide for a consent order procedure between the time the complaint and original order issued. At that time, to obviate a trial of the facts, Commission procedure provided for an admission answer or a stipulation as to the facts. Respondent, however, contends that a stipulation of facts was only a procedural requirement for a consent order settlement, and refers to a description of the Commission's "consent settlement procedures" in a 1940 treatise by the Attorney General's Committee on Administrative Procedure. As Commission counsel points out, respondent's argument is, in fact, refuted in this report which states in part that:

> Recently, the Commission instructed its attorneys that stipulations must thereafter be filed unconditionally if filed at all. The Commission's attorneys, however, still consult informally with respondents concerning the content of the findings and orders likely to be issued on the basis of the proposed stipulation. But they can go no further than to state that approval of findings and orders agreed upon by the parties will be recommended to the Commission.[1]

The Commission did approve the stipulation as to the facts negotiated between the staff and respondent in this case. However, at best, respondent has shown only that it negotiated with the staff. Even assuming that the Commission entered an order recommended to it on the basis of an approved stipulation of facts, that order does not thereby become a consent order. The element essential to a consent settlement, the conditioning of the submission to the Commission of the stipulated facts upon the entry of a specific order, is lacking.

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[1] Administrative Procedure in Government Agencies, Monograph of the Attorney General's Committee on Administrative Procedure—Federal Trade Commission, Part 6 Sen. Doc. 186, 76th Cong., 2d Sess. (1940).

Finally, the terms of the fact stipulation as executed by respondent, make it clear that the order entered by the Commission in 1944 was not subject to any consent agreement. Thus, the stipulation provides, in part, that:

> * * * the following statement of facts may be taken as a part of the record herein and may be taken as the facts in this proceeding and in lieu of all testimony in support of the charges stated in the complaint or in opposition thereto; and that the said Commission may proceed upon such statement of facts to make its report stating its findings as to the facts (including inferences which it may draw from said stipulated facts) and its conclusion based thereon and enter its order disposing of the proceeding without the presentation of argument or the filing of briefs.

Under the foregoing circumstances, respondent's position that the 1954 modification of the order is invalid for the reason that the original 1944 order was entered pursuant to a consent settlement, is rejected. Moreover, we conclude that respondent has failed to make a sufficient showing in support of its request that we direct the holding of evidentiary hearings to resolve any factual issue concerning the entry of the original order.

Respondent further argues that the 1954 modification deprived it of a fair hearing and improperly broadened the scope of the order. In commenting on this same argument in its opinion accompanying the 1954 order, the Commission stated, in part, that:

> If the (1944) order, for one reason or another, is inadequate or inappropriate for that purpose (to prohibit the respondent from continuing or resuming the unlawful practices it was found to have engaged in), we have not only the statutory authority but also the duty to modify the order in the respects necessary. Obviously, any modified order to cease and desist which we might enter must be supported and justified by the facts disclosed by the evidence in the record. No substantive rights of the respondent will be affected by any modified order which is fully supported and justified by the evidence in the record.

Respondent not having appealed from the 1944 decision, the statutory authority referred to in the Commission's opinion was embodied in Section 11 of the Clayton Act which then provided that:

> Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission, authority, or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.[2]

The record in this case discloses that not only was respondent served with notice of the proposed modification but that at respondent's request, it was granted a delay until after the Supreme

[2] Rule XXVI of the Commission's Rules of Practice, in effect at the time of the modification, followed this statutory procedure.

Court's decision in the *Ruberoid* case [3] within which to file an answer to Commission counsel's motion. Thereafter, on June 30, 1952, respondent filed an answering brief setting forth in detail its objections to the proposed modification. In addition to allowing respondent to fully brief its opposition, the record further discloses that the Commission granted and heard oral argument on the notice of proposed modification. The Commission then issued its order reopening the proceeding "solely for the purpose of modifying the order to cease and desist in the respects and in the particulars set out in said [Commission counsel's] motion." The Commission reached its determination that modification was warranted on the evidence in the record only after giving full consideration to respondent's brief and oral argument in opposition thereto.

It is thus obvious from this record that the Commission went far beyond the statutory requirement of notice to respondent and, in fact, permitted respondent to be fully heard in opposition to the proposed modification. Accordingly, respondent's argument on this issue is rejected.

On the basis of the foregoing, respondent's motion is denied. An appropriate order will be entered.

Commissioner Elman did not concur.

Commissioner MacIntyre did not participate.

ORDER DENYING RESPONDENT'S MOTION TO REOPEN PROCEEDINGS AND MODIFY ORDER

This matter having come before the Commission upon the hearing examiner's certification of respondent's motion, filed July 13, 1967, requesting that this proceeding be reopened and the outstanding order issued April 26, 1954 [50 F.T.C. 932], be modified, and upon Commission counsel's answer in opposition thereto; and

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

It is ordered, That respondent's motion, filed July 13, 1967, be, and it hereby is, denied.

Commissioner Elman not concurring and Commissioner MacIntyre not participating.

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[3] *Ruberoid Co.* v. *Federal Trade Commission,* 343 U.S. 470 (1952).

CURTISS-WRIGHT CORPORATION

Docket 8703. Order and Opinion, Sept. 1, 1967

Order denying appeal from hearing examiner's ruling denying complaint counsel's request for additional cost data.

ORDER AND OPINION DENYING INTERLOCUTORY APPEALS

This matter is before the Commission upon respondent's appeal, filed July 12, 1967, from the hearing examiner's order of June 12, 1967, to the extent it grants complaint counsel's motion to produce documents, and upon complaint counsel's direct appeal, filed June 20, 1967, from the same order of the examiner to the extent it denies their requests; the respective answers of the parties, and respondent's reply to complaint counsel's answer.

Respondent sought, and was granted on July 3, 1967, permission to file an interlocutory appeal in accordance with § 3.20 of the Commission's Rules of Practice effective August 1, 1963 (the rules applicable at the time of the order and the appeal). Complaint counsel failed to seek permission for their appeal as required by the aforementioned rule; however, in view of our disposition of their appeal, it will be unnecessary to rule directly upon such question.

The request for the production of documents, ultimately modified, and the respective positions of both parties were thoroughly considered by the hearing examiner during the course of three prehearing conference sessions. The examiner was successful in substantially narrowing the original specifications by compromise and otherwise.

The modified request is in two parts. The first covers specific sale and price data for the years 1960 through 1963. As to this, the examiner decided that the material already supplied by respondent and the reasonable inferences which can be drawn therefrom gave complaint counsel adequate information for the purposes stated in their motion. We approve of the examiner's disposition of this part of the request and, accordingly, we will deny complaint counsel's appeal.

In the second part of the request as revised, complaint counsel seek records on aircraft engine parts covering the years 1960–1963, showing engineering costs and general and administrative costs, and the cost of parts purchased finished and certain data on profits on the sale of such parts. Complaint counsel during the pre-hearing conference withdrew that part of the request dealing with standard factory costs. The examiner found that complaint counsel already had substantial information with respect to the

charges but the documents here sought are needed to "round out, extend or supply further details" that a real or actual need for them had been demonstrated and good cause shown. He observed that "there are indications that the information sought is, or has been, in respondent's records in summary form or in some other form which was readily usable by respondent for its purposes," and that "no basis is known by complaint counsel and none has been provided by counsel for respondent for describing the information more precisely than the specifications set out."

It is patent that cost data of the type requested in Part II of the modified order is relevant to the allegations of the complaint dealing with selling below cost or at unreasonably low prices. The examiner recognized "that they should be expected to 'constitute or contain evidence relevant to the subject matter involved.' "

The respondent emphasized the burden they felt the motion to produce would put on them. The examiner, in denying Part I of the motion to produce has substantially reduced the burden on respondent. That portion of his order that does require production is explicitly designed to minimize the burden of compliance on respondent.

The examiner has considered each of the criteria appropriate to the question of production of documents under Section 3.11 of the Commission's prior rule here applicable. His order, sustaining in part and denying in part, the motion for production of documents should be sustained. The conduct of adjudicative proceedings is primarily the responsibility of the hearing examiner. An examiner's rulings on evidentiary or procedural matters arising in the course of such proceedings should not be reviewed or disturbed in the absence of unusual circumstances. *Topps Chewing Gum, Inc.*, Docket No. 8463; Order issued July 2, 1963 [63 F.T.C. 2196]. Production of documents, like depositions, is part of the Commission's pre-trial discovery procedure. In the matter of discovery, the hearing examiner is given broad discretion by the Commission's Rules of Practice, and the Commission, except by a clear showing of an abuse of that discretion, will sustain the examiner in his rulings in such matters. *American Brake Shoe Company*, Docket No. 8622; Order issued September 1, 1965, Opinion of the Commission [68 F.T.C. 1169].

Neither complaint counsel nor counsel for respondent have demonstrated that the hearing examiner's ruling involves substantial rights and will materially affect the final decision so that a determination of its correctness before the conclusion of the hearing will better serve the interest of justice. Accordingly,

It is ordered, That the appeal of complaint counsel, filed June 20, 1967, and the appeal of respondent, filed June 12, 1967, be and they hereby are, denied.

Commissioner Elman not concurring.

THERMOCHEMICAL PRODUCTS, INC., ET AL.

Docket 8725. Order, Sept. 8, 1967

Order granting respondents' request for leave to appeal from hearing examiner's denial of request for change of hearing dates, and hearing examiner directed to reschedule hearings.

ORDER GRANTING REQUEST TO FILE INTERLOCUTORY APPEAL AND DIRECTING HEARING EXAMINER TO RESCHEDULE HEARINGS

This matter is before the Commission upon respondents' request, filed August 23, 1967, for leave to appeal from the hearing examiner's order of August 16, 1967, and complaint counsel's answer thereto filed August 24, 1967. On August 9, 1967, we denied a similar motion by respondents.[1] It is from the subsequent order of August 16, 1967, by the hearing examiner, denying respondents' motion to change hearing dates,[2] that respondents wish to appeal.

We have carefully reviewed respondents' request for leave to file an appeal and the hearing examiner's order of August 16.

Upon review of this matter we note that hearings had originally been scheduled in the following manner:

August 15 to 16	Greensboro, N.C.	10.00 a.m.
August 17 to 18	Houston, Texas	10:00 a.m.
August 21 to 22	Chicago, Illinois	10:00 a.m.
August 24 to 25	San Francisco, Calif.	10:00 a.m.
August 28 to 30	Los Angeles, California	10:00 a.m.

Respondents' counsel seemed to agree to this schedule.[3] Subsequently, however, he moved[4] to reschedule these hearing dates on the ground that the proximity of the hearing dates and the remoteness of the hearing locations would require air travel which respondents' counsel desires to avoid. In deference thereto, the hearing dates were rescheduled to permit sufficient time to reach by ground travel the various locations at which hearings were to be held. After a number of additional postponements, complaint counsel on August 9, 1967, moved to again reschedule the hearings,

[1] Respondents' request for leave to file an appeal from examiner's order fixing hearing dates, August 7, 1967.

[2] Respondents' answer to complaint counsel's August 9 motion to reschedule hearings, and motion to set aside examiner's order of August 10, 1967.

[3] Tr. 45.

[4] Respondent's motion to reschedule hearings, July 28, 1967.

and the examiner, on August 10, 1967, entered an order adopting *in toto* the schedule proposed in complaint counsel's motion. Pursuant to that order, the hearings are now scheduled to be held as follows:

September 11	Los Angeles, California	10:00 a.m.
September 18	San Francisco, Calif.	10:00 a.m.
September 25	Chicago, Illinois	10:00 a.m.
October 2	Houston, Texas	10:00 a.m.
October 9	Greensboro, N.C.	10:00 a.m.[5]

Complaint counsel's motion of August 9, was not served on respondents' counsel until August 11, 1967—the day after the examiner entered his order granting said motion. On August 15, 1967, respondents moved to set aside the examiner's order of August 10, which motion was denied by the examiner on August 16, 1967. It is from the examiner's order of August 16, that respondents now request leave to appeal.

Respondents' counsel notes in his request that he is a sole practitioner and does not want to absent himself from his office for a period of five weeks, which he claims would be necessary were he to adhere to the present hearing schedule by means of ground transportation. He requests that new hearing dates be fixed to afford him a minimum of two weeks at his own office between the end of hearings at one location and the start of hearings at another.

As stated in our order of August 9, 1967, the hearing examiner is in the best position to reconcile the convenience of the parties with the necessity of bringing the proceeding to an expeditious conclusion. Absent unusual circumstances or a clear abuse of discretion we will not interfere with his decision.

In the matter before us, the Commission concludes that unusual circumstances exist by reason of the fact that the hearing examiner's order scheduling hearing dates was entered before respondents were served with a copy of complaint counsel's motion, and that the present hearing schedule would necessitate respondents' counsel's absence from his office for a period of more than four weeks. Accordingly,

It is ordered, That the respondents' request for leave to appeal from the examiner's order of August 16, 1967, be, and it hereby is, granted.

It is further ordered, That the hearing examiner be, and hereby is, directed to reschedule the hearings in this matter in a manner that will permit respondents' counsel to return to his office for at least one week during the course of the hearings.

[5] Hearing examiner's order of August 10, 1967, postponing and rescheduling hearings.

By the Commission, without the concurrence of Commissioner MacIntyre.

SCHOOL SERVICES, INC., ET AL.

Docket 8729. Order, Sept. 12, 1967

Order denying application for permission to file an interlocutory appeal from the hearing examiner's order denying respondents' motion to dismiss and granting respondents' request to elicit testimony from two Commission employees in regard to certain news stories which are allegedly prejudicial to a fair trial.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL AND RULING ON RESPONDENTS' APPLICATION FOR THE PRODUCTION OF DOCUMENTS AND THE APPEARANCE OF COMMISSION EMPLOYEES

Respondents, at the conclusion of complaint counsel's case-in-chief, moved to dismiss the complaint for the reason that complaint counsel have failed to make out a prima facie case for relief under Section 5 of the Federal Trade Commission Act. The motion was aimed not only at the entire complaint, but at particular portions of the complaint. The hearing examiner, by order of July 18, 1967, denied the motion in its entirety. It is from this ruling that respondents wish to appeal. In addition, the examiner has certified, with the recommendation that it be denied, respondents' application for the production of documents and the appearance of Commission witnesses, filed July 25, 1967.

I

In connection with the request for permission to file an interlocutory appeal, respondents contend that the hearing examiner's order does not address itself with sufficient clarity and specificity to respondents' motion to dismiss the complaint. Respondents assert, since complaint counsel have failed to establish a prima facie case, that the hearing examiner should have dismissed the complaint and, failing that, should have articulated more specifically the reasons therefor in order to permit respondents to adequately prepare for their defense.

The determination at this stage of the proceeding of whether complaint counsel have established a prima facie case is one within the peculiar grasp of the hearing examiner and, absent unusual circumstances, we will not interfere with his determination.

The Commission has reviewed the hearing of July 14, 1967,

wherein respondents argued their motion to dismiss. It is evident from the motion itself, which to a considerable extent was concerned with argument about the import or significance of the testimony of the various witnesses, that the examiner did not err by failing to find complaint counsel's case-in-chief clearly insufficient at this stage of the proceeding. In view of the state of the evidence disclosed by the motion to dismiss, it appears this matter should not be disposed of without findings on the basis of a complete record.

Under § 3.23 of the Commission's Rules of Practice, permission to file an interlocutory appeal will not be granted "except upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice."

The order here challenged does not affect the substantial rights of respondents. We are unable to conclude from respondents' motion to dismiss or their application to file an interlocutory appeal either that they are under any misapprehension as to the charges made against them or that they misunderstand the thrust of complaint counsel's case-in-chief.

Nor does the order materially affect the outcome of this proceeding. Even if the hearing examiner's ruling were erroneous, respondents would not be seriously prejudiced thereby since it is not a final determination. In ruling on the motion to dismiss for failure to make out a prima facie case, the examiner has construed the evidence in the light most favorable to complaint counsel and resolved all conflicts in his favor. When he finds that a prima facie case has been established he denies the motion to dismiss. When the record closes, however, the standard is different, for a ruling on a motion to dismiss differs from a decision on the merits of the case:

> . . . [A denial of a motion to dismiss] is merely a determination that there is in the record reliable evidence which, when considered in connection with reasonable inferences which may be drawn therefrom, and if not overcome by the respondent's evidence, would support an order to cease and desist. The ultimate decision of whether an order to cease and desist will be issued, even in the absence of further evidence, is not reached; and it could well be that a hearing officer, upon full consideration of a proceeding submitted for final decision, after making appropriate determinations concerning the credibility of witnesses, the weight to be given conflicting evidence, and other pertinent questions involved, would dismiss the complaint even though he had theretofore denied a motion to dismiss for failure of the record to establish a prima facie case.[1]

[1] *Vulcanized Rubber and Plastics Co.*, Docket No. 6222, 52 F.T.C. 533, 534 (1955).

Any of the exceptional considerations that might justify us in permitting an interlocutory appeal are therefore absent. As we said in the *Vulcanized Rubber* case, *supra,* n. 1, 52 F.T.C. at 535, "It is . . . clear that for the Commission to entertain appeals of this nature would be but to encourage the submission of cases for decision piecemeal, with resulting unjustifiable delays."

II

The Commission also has before it respondents' application for production of documents and the appearance of Commission employees, filed July 25, 1967, certified by the examiner. To a considerable extent this request does not differ in substance from the matters dealt with by the Commission's order of June 16, 1967 [71 F.T.C. 1703], denying respondents' request for taking of depositions and production of documents.

Specifically, respondents request that the Commission produce, for their inspection, the minutes of any and all meetings of the Commission held on or before February 13, 1967, during which the Commission determined that it had "reason to believe" that respondents violated the Federal Trade Commission Act and that the issuance of the complaint in this proceeding "would be in the interest of the public." In addition, respondents apply for the production of the minutes of any and all meetings from February 13, 1967, to date "reflecting any discussions or decisions of the Commission with respect to this proceeding or any of the Respondents named herein."

In support of their application for these documents, respondents cite the denial in their answers that the Commission in fact had "reason to believe" that respondents had violated the Federal Trade Commission Act, or that a Commission proceeding against them would be in the public interest. In this connection, respondents also cite the defenses averred in their answers—that the Commission lacks jurisdiction since it had no basis to conclude that respondents violated the Act, or that a proceeding against them would be in the public interest; that the Commission is legally incapable of rendering a fair and impartial trial in this case, and that if there is any public interest, it is obviously *de minimis.* Respondents concede that these reasons given in support of their application have already been dealt with by the Commission's order of June 16, 1967.[2]

Since the date of that order, respondents contend, however, that there has been testimony in the proceeding affirming respondents'

[2] *School Services, Inc.,* Docket No. 8729, Order Denying Request For Taking Of Depositions And Production Of Documents (June 16, 1967), pp. 3, 4 [71 F.T.C. 1703, 1705].

contention with respect to the "reason to believe" issue which now makes this defense "more meaningful than ever." Respondents allege that two witnesses whose testimony they contend is crucial to certain charges against them were not contacted prior to the issuance of complaint. This circumstance, they argue, supports their contention that the Commission had no information at the time complaint was issued providing "reason to believe" that these allegations of the complaint had any basis. Assuming the two witnesses in question were the ones best qualified to testify on these particular issues, it does not follow there arises a presumption that the Commission's precomplaint investigation failed to bring to light information sufficient to give the Commission "reason to believe" that these charges were well founded. In short, respondents have failed to show that there are any unusual circumstances in this case requiring us to deviate from our previous determination that the preservation of the integrity of the administrative process precludes their proposed inquiry.[3]

In addition to their application for the Commission minutes relating to this proceeding respondents have also requested that the Commission direct the appearance of four of its employees at the hearings, namely, Janet Saxon, an attorney in the Bureau of Deceptive Practices; June L. Greene,[4] an attorney in the Bureau of Field Operations; Charles Sweeny, Director, Bureau of Deceptive Practices; and Sheldon Feldman, described in respondents' application as Director, Special Consumer Protection Program.

Respondents desire the appearance of Miss Saxon on the ground that she was involved in the negotiation and formulation of the consent decree in *Patricia Stevens, Inc.,* Docket No. C–840 (1964) [66 F.T.C. 908]. Respondents state: "According to the theory of the case-in-chief, there is a connection between the advertising in this proceeding and the advertising of Respondent Patricia Stevens, Inc., in Docket No. C–840." They contend that Janet Saxon has "conferred with and passed upon the advertising in Docket No. C–840 and, indeed has expressed opinions concerning it." In further support of their request for the appearance of Miss Saxon, respondents assert that complaint counsel has suggested that Patricia Stevens, Inc., was the reason for bringing complaint against School Services, Inc., in this proceeding. They allege that in order to place into its proper perspective the adver-

[3] *Ibid.; The Seeburg Corp.*, Docket No. 8682, Order Ruling On Hearing Examiner's Certification (October 25, 1966), p. 11 [70 F.T.C. 1818, 1826]. See also *Modern Marketing Service, Inc.*, Docket No. 3783, Order Ruling On Questions Certified (January 7, 1966) [69 F.T.C. 1077].

[4] Presumably respondents desire the appearance of Jean F. Greene, an attorney in the Commission's Washington area field office.

tising in this case and to meet the theory of complaint counsel with respect to School Services, Inc., it will be necessary to have the testimony of Miss Saxon concerning the advertising involved in Docket No. C–840.

The request for the appearance of Miss Saxon in this proceeding will be denied. Neither the vague allusion to complaint counsel's "theory of the case" nor the equally vague contention that the appearance of Miss Saxon would enable respondents to place this advertising "into a proper perspective" gives the Commission sufficient information to make a determination as to the validity of respondents' application on this point. Since respondents have failed to demonstrate the pertinence of Miss Saxon's testimony to their defense, they have not met the relevance requirement of § 3.36 of the Commission's Rules of Practice.

With respect to the appearance of Miss Greene, respondents allege that she is the principal investigator in this proceeding. Respondents further allege that in conversation with one of the respondents "she made various statements with respect to the advertisements of the respondents. Some of these statements have been placed expressly in issue by virtue of the Answers of [three of the] Respondents . . . particularly the Seventh Defense." The Seventh Defense of these respondents seems to be essentially that they relied upon the "clearly implied assurances" of Commission representatives that as a result of certain revisions their practices were in accordance with the law and "could and would never be subject to attack or complaint by the Commission." In addition, respondents contend that witnesses called during the case-in-chief have made references to the statements of Miss Greene. Respondents allege that it will be impossible to prove their defense without the testimony of this witnesses and that her presence at the hearing is essential to their defense.

The request for this witness, too, is couched in general terms making it difficult for the Commission to evaluate its validity and lending support to the view that the request is merely a dilatory tactic. Since the testimony sought from Miss Greene concerns the substance of conversations which she had with respondents, it is reasonable to assume that they already have in their possession any information that she might provide. We conclude that respondents have failed to show good cause for requiring Miss Greene's appearance; the application shall therefore be denied.

In the case of Charles Sweeny, respondents desire his testimony with respect to the issues of jurisdiction, prejudice and *de minimis* public interest. In short, it appears that respondents desire the

appearance of Mr. Sweeny to probe again the question of whether the Commission had "reason to believe" that respondents were violating the law and whether the proceeding is in the public interest. The request for Mr. Sweeny's appearance on these grounds will be denied for the reason set forth in the Commission's order of June 16, 1967 [71 F.T.C. 1703].

Respondents also seek the testimony of Mr. Sweeny and Mr. Feldman with respect to statements attributed to Commission employees in the public press. Respondents, it appears, seek this testimony to document their assertion that these stories demonstrate bias and prejudice and to furnish support for their further contention which charges, in effect, that such stories have created a climate prejudicial to a fair trial. The Commission has determined that respondents should be permitted to elicit the testimony of Messrs. Sweeny and Feldman on their contact with the press allegedly giving rise to the articles of which respondents complain. The appearance of Messrs. Sweeny and Feldman will be limited to that purpose.

III

In view of the foregoing, respondents' application for permission to file an interlocutory appeal will be denied as will be respondents' application for the production of confidential documents and the application for the appearance of the Commission employees Janet Saxon and Jean F. Greene. Respondents' application for the appearance of Messrs. Sweeny and Feldman will be granted within the context indicated above. Accordingly,

It is ordered, That respondents' application for permission to file an interlocutory appeal from the hearing examiner's order denying respondents' motion to dismiss be, and it hereby is, denied.

It is further ordered, That respondents' application for the production of Commission documents and the appearance of Commission employees Janet Saxon and Jean F. Greene be, and it hereby is, denied.

It is further ordered, That respondents' application for the appearance of the Commission employees Charles A. Sweeny and Sheldon Feldman be, and it hereby is, granted.

It is further ordered, That Messrs. Sweeny and Feldman be, and they hereby are, directed that their appearance is limited to the elicitation of testimony relating to their alleged contact with the press resulting in the articles of which respondents complain.

INTER-STATE BUILDERS, INC., ET AL.

Docket 8624. Order and Opinion, Oct. 23, 1967

Order denying petition for reconsideration of two provisions of the final order and toll the time for appeal.

OPINION AND ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION

On September 18, 1967, respondents petitioned for reconsideration by the Commission of certain sections in the order entered in the instant matter. The decision and order in this matter were served upon respondents by registered mail. Service was completed on August 21, 1967. On September 6, 1967, the Commission granted to respondents an extension of the time until September 18, 1967, for filing a petition for reconsideration.

The first issue respondents bring before the Commission for reconsideration involves paragraph 8(d) of the order which in effect requires respondents to advise customers that they may cancel contracts within a designated period if in executing them they relied in whole or in part on any oral representations not contained in the contract.[1] Respondents argue that no evidence was presented and no findings were made dealing with or supporting the provision of paragraph 8(d), that the particular section extends far beyond the violation charged and that it is vague and ambiguous and beyond the authority of the Commission. Respondents ask that the Commission withdraw its order and remand the case to the hearing examiner "to take evidence, hear argument and make appropriate findings and conclusions" upon what respondents call the "new issues" described above.

Rule 3.55 of the Commission's Rules of Practice for adjudicative proceedings limits reconsideration to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission.

Respondents have raised no new questions nor have they adduced any grounds in the instant petition as to why issues with respect to the illegality of these practices and the scope of the order dealing with them should now be relitigated. The issues were fully explored at the hearing and on appeal before this Commission.

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[1] Respondents are ordered to cease and desist from failing:

"8(d) Prior to the acceptance of any contract, to deliver to the customer who has executed the contract a copy of the contract and a separate written statement clearly and conspicuously advising the customer (1) that no oral representation which may have been made by any salesman or representative of respondents and which is not contained in the contract is binding upon respondents; and (2) that such customer may, within a designated period which shall in no case be less than ten days after receipt of such statement from respondents, elect to cancel this contract if in executing it he has relied in whole or in part upon any oral representation not contained in the contract."

Respondents' deceptive practices in issue in the complaint were embodied in the representations made orally by their salesmen. The written contracts signed by respondents' customers expressly stated that respondents were not responsible for any oral statements not contained in the contract.

The provision of the order now questioned by respondents was directly designed to prevent respondents from continuing their practice of inducing contracts by oral representations and then disclaiming responsibility for such statements in the text of their contracts.

It is not true as respondents argue that no evidence was presented or findings made dealing with or supporting the provisions of paragraph 8(d). Findings on these issues are contained in the Hearing Examiner's Initial Decision, findings 6 to 11. The Commission opinion deals with them expressly at pp. 22 to 32 [pp. 397–404 herein].

The mere fact that the order entered by the Commission contained provisions which were not found in the order proposed by the examiner does not constitute "new questions raised by the decision or final order" such as to require reconsideration or remand. The scope of the order is always in issue in every proceeding and the mere fact of new provisions in an order entered by the Commission does not warrant remand. See *Williams Co.* v. *FTC,* 381 F. 2d 884, 888 (6th Cir. 1967).

Paragraph 8(d) of the order on which respondents would have a full evidentiary hearing is merely a method of implementation, selected by the Commission, to enforce its findings of violation of the act. *FTC* v. *The National Lead Company,* 352 U.S. 419, 508 (1957). The framing of an order is of necessity a matter of discretion, an area in which the Commission has wide latitude. *Jacob Siegel* v. *FTC,* 327 U.S. 608 (1946); *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 473 (1952).

Respondents also call for full evidentiary hearings on the excision of the "unless" clause from paragraphs 1 and 2 of the order entered by the hearing examiner. Here again respondents argue that no evidence was presented or findings made supporting the absolute ban imposed by these paragraphs of the order on the enumerated representations which the Commission found to have been deceptive, false and misleading.

There is no basis for respondents' arguments. The order provisions in question were directed to respondents' model home-special price representations, factual issues which were fully explored in the hearings, Initial Decision of the examiner and Opinion of the Commission. See Hearing Examiner's findings

3 to 9. Commission Opinion, pp. 23, 32–35 [pp. 398, 404–407 herein]. Respondents admitted these practices as we pointed out in our opinion:

> At the hearing respondent Gottesman conceded on examination by complaint counsel that Inter-State had never used the home of any customer as a model home (Tr. 93). There is no indication in the record that respondents ever intend in the future to use a home as a point of reference for advertising purposes. Since purchasers' premises are not used as models we fail to see how in any case respondents could grant allowances or discounts in return for such use. Moreover, it would make little business sense for respondents in the future to use this kind of advertising and thereby discount their own prices when they can simply use photographs of homes, which they are presently doing, in order to illustrate what aluminum siding looks like (Slip Opinion, p. 34) [p. 406 herein].

Respondents had full opportunity to argue their position with respect to the ruling which should be entered in connection with these misrepresentations. Again as we pointed out above, the scope of orders is always in issue in Commission proceedings and new issues within the meaning of the applicable rule are not raised by provisions of the order entered by the Commission after argument on appeal. In the instant case, the Commission determined that in order to have an effective remedy to cure respondents' misrepresentations, the "unless" clauses in the prohibitions of paragraphs 1 and 2 of the order must be excised. The Commission noted in its opinion in this matter that its ban was subject to modification.

> If respondents devise a nondeceptive sales message embracing some type of testimonial which might violate these two paragraphs in the order, the Commission's procedures afford such respondents ample opportunity to petition the Commission, either for an interpretation of the order as to whether the new sales program would or would not violate the order, or for a modification of the order if one is clearly necessary in order to permit respondents to engage in what can be demonstrated to be a nondeceptive sales promotional solicitation (Op. p. 35) [p. 406 herein].

A similar action by the Commission in other cases has been sustained by the Courts (*Century Metalcraft Corp.* v. *FTC*, 112 F. 2d 443, 446 (7th Cir. 1940)).

There is nothing novel about including absolute bans on certain types of representations even though they conceivably in some situations might be true under certain conditions. The test is always whether under existing facts they are likely to ever be true. *Consumers Sales Corp.* v. *FTC*, 198 F. 2d 404, 408–409 (1952); *Carolyn R. Macher, et al.* v. *FTC*, 126 F. 2d 420 (2nd Cir. 1942); *Century Metalcraft Corp.* v. *FTC*, 112 F. 2d 443, 446–47 (7th Cir. 1940); *Product Testing Company Inc.*, Docket No. 8534, Opinion of the Commission, February 17, 1964, pp. 4–5 [64 F.T.C. 857, 882–883]; See *P. Lorillard* v. *FTC*, 186 F. 2d 52, 59 (4th Cir. 1950).

Thus respondents can hardly be heard to argue that they did not have an opportunity to argue fully the scope of the ruling before the Commission. Respondents have had full opportunity to litigate these issues. Respondents have pointed to no new questions raised by the decision or final order which they could not have anticipated or on which they did not have full opportunity to offer evidence before the examiner and to argue before the Commission.

Respondents have requested that the Commission stay the effectiveness of its Final Order and toll the running of the time for appeal. Section 3.55 of the Commission's Rules of Practice for adjudicative proceedings provides that the filing of a petition for reconsideration shall *not* operate to toll the running of any statutory time period affecting such decisions or order unless specifically so ordered by the Commission. Respondents have offered no cause as to why the time for filing appeal should be tolled and we see none.

For the foregoing reasons, respondents' Petition for Reconsideration and its motion to toll time for appeal should be and they hereby are ordered denied.

Commissioner Elman dissents for the reason that the petition for reconsideration satisfies the requirement of Section 3.55 of the Commission's Rules of Practice that it "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."

NATIONAL BISCUIT COMPANY

Docket 5013. Order, Nov. 9, 1967

Order denying respondent's request to suspend compliance proceedings on grounds of appeal to circuit court.

ORDER DENYING RESPONDENT'S REQUEST TO SUSPEND COMPLIANCE PROCEEDINGS

This matter is before the Commission upon certification by the hearing examiner of respondent's motion, filed October 10, 1967, requesting suspension of the compliance proceeding herein until such time as the court of appeals rules on respondent's petition to set aside both the modified cease-and-desist order entered on April 26, 1954 [50 F.T.C. 932], and the order issued by the Commission on August 31, 1967 [p. 994 herein], denying respondent's motion to reopen the proceeding.

Respondent contends that since, on its petition, the record has

now been certified to the court of appeals, the Commission has no authority to exercise jurisdiction. In support of this argument, respondent relies in part on the provision in Section 11 of the Clayton Act, prior to its amendment by the Finality Act of 1959, that upon the filing of the record with the court on a petition to review an order:

> The jurisdiction of the United States court of appeals to enforce, set aside, or modify orders of the Commission or Board shall be exclusive.

There can be no doubt that upon respondent's petition, the court of appeals has exclusive jurisdiction to affirm, modify, or set aside the Commission's order. However, since the petition before the court is that of respondent, there is no issue as to enforcement of the order. In this regard, Section 11 of the Clayton Act, prior to 1959, provided that "If any person fails or neglects to obey such order of the Commission or Board while the same is in effect, the Commission or Board may apply to the United States court of appeals, * * * for the enforcement of its order, * * *." In construing this provision, the courts have held that an evidentiary hearing is required on the question of whether a person has failed or neglected to obey an order of the Commission. The present compliance proceeding in this matter constitutes such a hearing. It is, therefore, a step which must be taken before a determination is made whether or not to petition the court of appeals for enforcement. Since the compliance proceeding does not, of itself, constitute the enforcement, setting aside or modification of an order, it does not come within the purview of that provision in Section 11 which vests exclusive jurisdiction in the court of appeals. Accordingly, respondent's argument that the Commission does not have authority to proceed is rejected.

In further support of its contention that the Commission must suspend the compliance hearings, respondent relies on a parenthetical comment by the court in *Standard Brands* [1] that:

> If, in future cases, a respondent, believing the Commission's order invalid, wishes to avoid what it may consider the needless expense of such a [compliance] hearing if the order is invalid, such a respondent can promptly test the order's validity by a petition to review the order.

The modified order to cease and desist, which the respondent contends is invalid, was issued in 1954. At that time, respondent contested the validity of the modification before the Commission, and now states that the original order was modified over its strong objections. However, thirteen years elapsed from the issuance of the modified order until respondent decided to test its validity.

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[1] *Federal Trade Commission* v. *Standard Brands, Inc.*, 189 F. 2d 510 (2d Cir. 1951).

Certainly, this does not constitute a prompt testing of the order's validity, as specified by the court. In any event, we do not believe the court's comment can be construed to condone an attempt to avoid the expense of a compliance hearing by a decision to test the validity of an order after such hearing has been instituted.

Respondent further contends that, as a matter of comity to the court of appeals and of fair play to it, the Commission should suspend the compliance hearings while the validity of the modified order is *sub judice*. Respondent alleges that, with full knowledge of its pricing structure, the Commission delayed for thirteen years in invoking the modified order, and rejected its attempt to achieve immediate voluntary compliance. These are the same arguments advanced by respondent in its motion of May 12, 1967, requesting that the order directing compliance hearings be rescinded. We have ruled on these contentions in our order issued June 26, 1967, denying the request for the reason, among others, that respondent has been aware since at least 1964 that its reported compliance was not satisfactory and that, in its administrative discretion, the Commission had determined that an investigational hearing is necessary to develop sufficient facts to ascertain compliance with the order.

There are additional factors which must be considered in weighing a decision as to whether the public interest requires a continuation of the compliance hearing. The Commission has issued orders against several of respondent's major competitors, which orders, as is respondent's, are directed at prohibiting discriminatory pricing practices in the sale of biscuits and crackers. The pricing programs developed and engaged in by these competitors are allegedly patterned after those engaged in by respondent. Accordingly, the evidence developed in this proceeding will directly affect the Commission's decision in other matters involving members of this industry.

Respondent's argument of alleged unfairness loses sight of one other factor. Basically, it is respondent's position that the end result of the compliance hearing would be "utterly futile" if the court of appeals determines to enter its order modifying the Commission's modified order issued in 1954. We do not agree with this contention. Respondent has raised no issue as to the validity of the original order issued in 1944. Thus, the information developed in the compliance hearing may be used to determine whether respondent's pricing practices comply with the 1944 order or such information may serve as a basis for a determination as to whether a new proceeding is warranted.

Finally, respondent's argument that a continuation of the com-

pliance proceeding would be an affront to the court must be rejected. As Commission counsel point out, by suspending the compliance proceeding at this time, the court may be burdened with twice considering what is essentially but two phases of the same case. The court may prefer a final disposition of the compliance proceeding before ruling on respondent's petition in order that the matter of enforcement, if deemed warranted by the Commission, may be determined at the same time.

For the foregoing reasons, it is the Commission's position that a continuation of the compliance proceeding is necessary and proper. Accordingly,

It is ordered, That respondent's motion, filed October 10, 1967, be, and it hereby is, denied.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for further compliance hearings as directed by Commission order issued April 14, 1967 [71 F.T.C. 1674].

Commissioners Elman and MacIntyre not participating.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order and Opinion, Nov. 13, 1967

Order denying respondents' appeal from hearing examiner's denial of application for depositions and subpoenas duces tecum of 173 witnesses. Interprets Secs. 3.33 and 3.35(b) of the rules of practice.

OPINION OF THE COMMISSION

This matter is before the Commission upon respondents' appeal from the hearing examiner's order filed October 5, 1967, denying their application for depositions of, and the issuance of subpoenas duces tecum to, certain companies and persons listed in the application. Respondents have appealed pursuant to § 3.17(f) of the Commission's Rules of Practice effective August 1, 1963, which they deemed applicable, and they have also appealed, in the alternative, under § 3.35(b) of the Commission's current rules effective July 1, 1967. We believe it is clear, since respondents' motion and the ruling complained of occurred subsequent to the effective date of the Commission's present rules (*i.e.,* July 1, 1967), that such current rules are applicable to the subject matter concerning which appeal is sought. In any event, there has been no claim made nor is there any indication that the application of the Commission's present Rules of Practice to this issue would be in any way prejudicial to respondents.

Respondents' application for depositions and the issuance of subpoenas duces tecum to "nonresource" companies and persons was filed September 22, 1967, with the hearing examiner. The request covered 173 persons, assertedly designated by complaint counsel as witnesses against respondents, as well as 50 persons not designated as witnesses by complaint counsel. The latter include 47 organizations described by respondents as "buying offices" and 3 large retail chains, namely, Sears-Roebuck, Montgomery Ward, and J. C. Penney. These are all individually listed in Exhibits A through D attached to the application. Respondents assert that of the 173 designated as witnesses 153 were described by complaint counsel as "unfavored customers" of the vendors who allegedly discriminated in respondents' favor, 15 described as "wholesalers" and 5 as "competitors."

Respondents included in their application for depositions a statement as to justification on each grouping of persons named. Referring to the "unfavored customers," respondents contended that an important purpose of examining them would be to test the validity, accuracy and relevance of complaint counsel's tabulations of alleged discriminatory transactions. They also stated that they would question the alleged unfavored customers as to any affiliations with buying offices, cooperatives and similar organizations, the opportunities of these customers to affiliate with such organizations and the reasons that they may not have chosen to do so. On the "wholesalers" and the "competitors," respondents stated that they as yet had no indication of the specific legal or factual matters which will be involved in these depositions, claiming that complaint counsel had failed to provide any information concerning the anticipated testimony of such witnesses.

With reference to so-called "buying offices" and retail chains, which include such organizations as R. H. Macy & Co., New York, New York, Gimbel Brothers, Inc., New York, New York, and others, respondents state they seek to discover broad categories of information, including the accuracy and validity of complaint counsel's figures, the extent to which buying offices received rebates on purchases made by their affiliated retailers, and other data. On the chain stores in particular, they claim the depositions are essential because these retailers are major competitors of the store respondents and that through them respondents would seek to establish that any competitive injury suffered by alleged unfavored customers was due to price benefits accorded the chain stores.

Respondents, in justification for subpoenas duces tecum, in conjunction with their request for depositions, claim that they have

encountered difficulties concerning the retaining of records in the prior discovery of resources (suppliers). The assertion is that in numerous instances relevant documents had already been destroyed or lost. Respondents also state that compulsory process is necessary because all witnesses to which the discovery pertains are hostile by definition and none of them can be expected to cooperate voluntarily in satisfying respondents' discovery requirements.

Complaint counsel, on October 4, 1967, filed a document which included an answer in opposition to respondents' application for depositions and subpoenas. Therein counsel state that respondents' application, if granted, would involve the holding of approximately 206 different pretrial discovery depositions in 12 different cities and the issuance of about 250 different subpoenas duces tecum. They assert that the delay involved in such discovery would be intolerable. Complaint counsel, in general, argue against the application on the ground that under § 3.33(a) of the Commission's rules depositions are not to be ordered when it appears that such would result in undue delay of the proceeding.

The hearing examiner, by order of October 5, 1967, denied respondents' application. He stated that in the main he subscribed to complaint counsel's statement and that to depose 173 persons—most, if not all, of whom he asserted would be called as witnesses in this proceeding—would unduly delay commencement of formal proceedings.[1] The examiner's position was that the overriding criteria for the taking of depositions is the question of undue delay, and he concluded that, particularly in light of respondents' previous actions, the depositions requested would result in interminable delay.

Respondents, as stated, have appealed from the examiner's order of October 5, 1967, denying their request. In their brief on appeal they dwell mainly on the merits of their request for the depositions. Additionally, they seem to be charging the Commission with unfairness in the application of its discovery rules by assertedly applying one standard for its rules to complaint counsel and another to the respondents. Finally, they aver that the Commission ought to abide by the *Hickman* v. *Taylor*[2] precept, which they claim is that the deposition-discovery rules are to be accorded a broad and liberal treatment. Complaint counsel, in answer to respondents' appeal, argue or seem to argue that in a big case

[1] The examiner, possibly inadvertently, referred specifically in his order only to the 173 persons to be called as witnesses. We believe it clear from his disposition of the matter that he was also ruling as to the 50 nonwitness organizations on which respondents seek depositions; however, if there is any doubt on this, respondents are not prejudiced from requesting the examiner to reconsider that part of their application.

[2] 329 U.S. 495 (1947).

discovery should be narrowly limited; that the Commission's rules specifically provide for not ordering depositions where undue delay will result; and, finally, they charge respondents with delay in making the application for depositions.

Under § 3.35(b) of the Commission's Rules of Practice, an appeal will be entertained only upon a showing that the ruling complained of involves substantial rights or will materially affect the final decision and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice. Respondents, relying as they do on broad principles of claimed rights to discovery and the asserted unequal application of the Commission's discovery rules, have completely neglected to justify their appeal under the rule. Perhaps they intended to do so in connection with their claims of justification for the requested depositions and subpoenas. However, they have failed to spell out in what respects the rejection of their request brings them within the express terms of the Commission's rule.

Furthermore, the examiner, as we have frequently observed, is vested with a broad discretion in matters of discovery, *e.g., Topps Chewing Gum, Inc.*, Docket No. 8463 (order issued July 2, 1963) [63 F.T.C. 2196]; *American Brake Shoe Company*, Docket No. 8622 (order issued September 1, 1965) [68 F.T.C. 1169]. The rule on the taking of depositions (§ 3.33) explicitly grants the hearing examiner discretion in such matters. It states in part:

> . . . At any time during the course of a proceeding, whether or not issue has been joined, the hearing examiner, *in his discretion*, may order the taking of a deposition and the production of documents by the deponent. . . . (Emphasis supplied.)

Unless it can be clearly demonstrated that the hearing examiner has abused his discretion, his rulings in such a matter must stand. There has been no such showing here. As we have indicated above, respondents' contentions center mainly on the claim of broad discovery as a fundamental right. They fail to demonstrate that they could not adequately defend themselves without the depositions requested. They do not show, nor make any attempt to show, that there are no alternatives to the sweeping discovery demands made.

The second sentence of § 3.33 on depositions reads as follows:

> Such order may be entered upon a showing that the deposition is necessary for purposes of discovery, and that such discovery could not be accomplished by voluntary methods.

Respondents have failed to make a satisfactory showing that the discovery here requested could not be made by voluntary methods. Their only apparent attempt in this direction is the statement in

their application to the examiner in which they aver, in a general way, that the witnesses are by definition hostile and that they cannot be expected to cooperate voluntarily. They do not suggest that voluntary methods were attempted and that such proved to be unsuccessful. This, we believe, is a wholly inadequate showing under the rule.

Section 3.33 of the Commission's rules also provides that a deposition should not be ordered to obtain evidence from a person relating to matters with regard to which he is expected to testify at the hearing or to obtain evidence which there is reason to believe can be presented at a hearing without the need for deposition or to circumvent the orderly presentation of the evidence at the hearing. Respondents' request for depositions relates mostly to persons who will be called as witnesses. They have made no showing that their application—at least so far as witnesses are concerned—should not be governed by the aforementioned provision in the Commission's rule.

Finally, § 3.33 also provides that, insofar as consistent with considerations of fairness and requirements of due process and the rules in such part, a deposition should not be ordered when it appears that it will result in undue burden to any party or in undue delay of the proceeding. The examiner clearly indicated his belief that the request was of such a broad and comprehensive nature that to grant it would unduly delay the commencement of formal hearings. To some extent he was influenced by the length of time respondents have already taken in connection with a previous request for discovery. We believe it is also clear that the examiner, in making his ruling, considered the questions of fairness to respondents and due process and found that respondents would not be prejudiced by his denial of their request. He has indicated his sensitivity to such considerations throughout this proceeding.

Full and adequate discovery is provided for under the Commission's rules, including the taking of justified depositions. The rules, however, carefully delineate the scope of discovery permitted by deposition and the circumstances under which such will be granted. Discovery provided under the rules does not require the examiner to grant every request or any particular request for a deposition—he has discretion in the matter. Moreover, there is nothing in the Commission's rules which would necessarily, or even ordinarily, require the examiner to grant the discovery of the vast scope here sought. In instances of broad requests for discovery (such as here), which, in essence, parallel the contemplated trial, a consideration—in addition to those of fairness and

justice—is whether or not the benefits, if any, could possibly justify the repetitive calling of witnesses, the extra burdens, and the delay, and in this case we do not believe they would. We do not hold that respondents are foreclosed from all discovery by deposition; our determination here is only that the broad request made has not been adequately justified. In the circumstances, we cannot say—nor has it been shown—that the examiner erred in denying respondents' application for depositions and subpoenas duces tecum.

We hold that respondents have not justified their appeal under the requirements of § 3.35(b) of the Commission's Rules of Practice, and, accordingly, it is directed that such appeal be denied. An appropriate order will be entered.

Commissioner Elman did not participate.

ORDER DENYING APPEAL FROM EXAMINER'S DENIAL OF APPLICATION FOR DEPOSITIONS AND SUBPOENAS

Respondents having filed an appeal from the hearing examiner's order filed October 5, 1967, which order denies respondents' application for depositions and supporting subpoenas duces tecum; and

The Commission having considered such appeal, the answer filed thereto by complaint counsel on October 23, 1967, and the reply of the respondents filed October 27, 1967, and having determined, in accordance with the views expressed in the accompanying opinion, that respondents' appeal should be denied:

It is ordered, That respondents' appeal from the hearing examiner's order filed October 5, 1967, denying their application for depositions and subpoenas duces tecum, be, and it hereby is, denied.

Commissioner Elman not participating.

ALL-STATE INDUSTRIES OF NORTH CAROLINA, INC., ET AL.

Docket 8738. Order and Opinion, Nov. 13, 1967

Order granting respondent's motion to quash hearing examiner's order permitting inspection and copying of documents. Interprets Secs. 3.32, 3.33, and 3.34 of the rules of practice.

OPINION OF THE COMMISSION

On June 19, 1967, the Commission issued its complaint, stating it had reason to believe that respondents violated Section 5 of the Federal Trade Commission Act in the advertising, sale and installation of various home improvement products, including aluminum siding and storm windows. This matter is before the Commission upon respondents' interlocutory appeal, filed pursuant to § 3.35 of the Commission's rules of practice, from the hearing

examiner's order of August 30, 1967, denying respondents' motion to quash the hearing examiner's order to permit the inspection and copying of documents.

The motion filed by complaint counsel and granted by the examiner would require respondents to permit the inspection and copying of various documents described in seventeen specifications.

Respondents argue that the examiner's order, ostensibly issued under § 3.32 of the new rules of practice (effective July 1, 1967), is inappropriate since the former rules of practice (effective August 1, 1963) apply to these proceedings. Respondents assert that complaint counsel have requested the production of documents and that only § 3.11 of the former rules of practice authorizes motions for production. Alternatively, respondents assert that if the July 1, 1967, rules do apply, there is no longer any authority for the motion granted by the examiner inasmuch as orders requiring the production of documents are no longer provided for. Irrespective of which rules apply, respondents also argue that the order must be quashed because it is overly broad, basically investigative in nature, and outside the scope of the Commission's intended discovery processes. The Commission agrees with respondents' last contention.

The complaint in this proceeding was served upon respondents on June 22, 1967. The Commission's rules of practice which went into effect on July 1, 1967, were first published in the *Federal Register* on June 13, 1967. The motion which gave rise to this appeal was filed on July 24, 1967. The examiner held that the July 1, 1967, rules were applicable throughout the trial of this proceeding. Respondents have not called our attention to any instance or manner in which they will be prejudiced by the application of the new rules. In the absence of a showing of prejudice, the examiner's ruling was correct.

Since the July 1, 1967, rules apply, it is obvious that if complaint counsel's motion and the examiner's order call for the *production* of documents, as such, the order must be quashed. The new rules authorize the hearing examiner to issue orders directing access to files (§ 3.32), the taking of depositions (§ 3.33), or the issuance of subpoenas (§ 3.34), but not the production of documents, except as such may be incidentally involved in granting access to files or as may be required in responding to an order for the taking of a deposition or to a subpoena.

The Commission, on occasion, has excused a respondent's technical noncompliance with the rules where the failure was insubstantial and inadvertent or where respondent's counsel was not

sufficiently familiar with Commission procedure.[1] Where justice would be served, we may extend similar limited exemptions to counsel supporting the complaint. However, as a general proposition, it is not unreasonable to insist that the Commission's own staff scrupulously adhere to the letter and the spirit of the rules of practice.

Complaint counsel appears to have fused the provisions of former § 3.11 (production of documents) with the present § 3.32 (orders requiring access). Both the caption and the request by complaint counsel are for a motion to *produce* documents, books and papers. The hearing examiner in his order of August 8, 1967, appears to have adhered more closely to the letter of § 3.32. The examiner, however, did order respondents to "produce" documents for inspection and copying.

Although we admit to considerable perplexity as to whether the order in question is more like an order calling for production, or an order calling for access, we rule that, under the circumstances of this case, respondents will not be prejudiced by treating the examiner's order as one calling for access.

Inasmuch as this appeal indicates some confusion concerning particular provisions of the present rules of practice, a few general comments concerning the underlying reasons for some of the provisions of the rules are appropriate.

Sections 2.7 (subpoenas in investigations), 2.10 (depositions), 2.11 (orders requiring access), and 2.12 (reports) authorize Commission counsel's broad and extensive use of these procedures in *pre*complaint *investigation.*

The Supreme Court has distinguished between the Commission's "power to get information from those who best can give it" and the judicial power to summon evidence in the course of litigation, saying that the Commission—

> * * * has a power of inquisition if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.[2]

Holding that the order of the Commission requiring the filing of a special report did not transgress the Fourth and Fifth Amendments, the Court stated:

> Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies

[1] *E.g., The Carl Mfg. Co.*, Docket No. 8689, order issued December 23, 1966 [70 F.T.C. 1846].
[2] *United States* v. *Morton Salt Co.*, 338 U.S. 632, 636 (1950).

have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.

Of course, a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter under inquiry to exceed the investigatory power. . . . But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.[3]

Therefore, it should be manifest that the Commission's rules of practice are intended to and do provide for comprehensive *pre-complaint investigation.*

The rules for adjudicatory proceedings are intended to embody the Commission's conviction that, to the fullest extent practicable, the strategy of surprise and the art of concealment will have no place in a Commission proceeding. Hence, we have also provided for thorough *post* complaint *discovery* procedures. It should be obvious that discovery is a two-way street and that it is the hearing examiner's responsibility to insist that both complaint counsel and respondent's counsel be provided with sufficient data to insure an expeditious and completely fair hearing.[4]

To attain this end, the rules provide several different discovery techniques. Wherever possible, opposing counsel are encouraged and authorized to make extensive use of admissions as to facts and documents (§ 3.31). Opposing counsel are also authorized to use depositions (§ 3.33)[5] and subpoenas (§ 3.34).[6]

Orders for the production of documents, as such, are no longer authorized because proper use of § 3.33 and/or § 3.34 makes the use of such orders superfluous.

Complaint counsel may also make application for an order requiring a respondent corporation to grant access to files for the purpose of examination and the right to copy documentary evidence (§ 3.32). Such application must meet the same requirements as an application for subpoena (§ 3.34).

A subpoena, deposition, or order requiring access aimed at obtaining information not ordinarily obtainable before issuance

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[3] *Id.*, at 641.

[4] The examiner is responsible for the conduct of adjudicative proceedings, and his rulings on procedural matters in the absence of unusual circumstances will not be reviewed or disturbed by the Commission (*Topps Chewing Gum, Inc.*, Docket No. 8463, order issued July 2, 1963) [63 F.T.C. 2196].

[5] Section 3.33 states, in pertinent part, "[T]he hearing examiner, in his discretion, may order the taking of a deposition and the production of documents . . . upon a showing that the deposition is necessary for purposes of discovery, and that such discovery could not be accomplished by voluntary methods."

[6] Section 3.34 states, in pertinent part, "Application for issuance of a subpoena . . . shall be made in writing to the hearing examiner, and shall specify as exactly as possible the documents to be produced, showing the general relevancy of the documents and the reasonableness of the scope of the subpoena.

". . . Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents for use in evidence, or for both purposes."

of the complaint, additional details, or an extension of information as to disclosed transactions or events for which evidence is to be adduced in support of the complaint is manifestly within the bounds of proper pretrial discovery. Section 3.1 which provides for the expedition of adjudicative proceedings in no way prevents and is in no way inconsistent with a complaint counsel's request for access to a respondent's records or for a deposition or for a subpoena duces tecum for records in the possession of a respondent. There is no provision in the Commission's rules, nor is there any precedent which would, in effect, require complaint counsel to have *all* evidence that he will need prior to the issuance of the complaint.[7]

The general rule still remains that an onerous burden would be placed not only on the investigator but upon the party or parties investigated if the preliminary investigation must encompass the gathering of *all* of the details for each and every transaction which may eventually become an evidentiary item in a subsequent complaint. Many Federal Trade Commission proceedings present factual and conceptual complexities. In such cases, complaint counsel may properly find, particularly after the issues are refined in a prehearing conference, that some additional documentation may be required to *round out, extend, or supply further details* for the particular transactions to be pursued.

Thus, the rules are not intended to provide for comprehensive postcomplaint investigation, but only postcomplaint discovery. The Commission recognizes that, in the abstract, the meaning of "discovery" is necessarily vague. We are also aware that terms such as "round out," "extend," or "supply further details" are incapable of concise definition and will depend on the particular facts and circumstances in every instance.

Whatever the conceptual difficulties, it is clear that the particular order which is the subject of this appeal goes far beyond the proper scope of discovery and must be quashed.

The order in question, taken as a whole, appears to be more in the nature of an investigational subpoena. For example, we are unaware of any reason why, at this stage of the proceeding, complaint counsel requested and the examiner ordered the inspection and copying of broad classes of documents such as "Records or files containing all correspondence relating to purchases, sales and

[7] That is not to say that §§ 3.32, 3.33 and 3.34 are to be used for broad investigational purposes even though the Commission has the authority to investigate after complaint issues. *Federal Trade Commission* v. *Menzies*, 242 F. 2d 81 (4th Cir. 1957), *Federal Trade Commission* v. *Waltham Watch Co.*, 169 F. Supp. 614 (S.D.N.Y. 1959). See also *Kaiser Industries Corporation*, Docket No. 8341, order issued March 2, 1962, where the Commission held that it has the authority to issue subpoenas in the course of an investigation to obtain information which relates to the subject matter of an adjudicative proceeding.

we can't have RTB if subpoena is narrow.

advertising for the period January 1, 1965 to date." While there may be innumerable instances where such broad specifications may be generally relevant, reasonable in scope, and within the bounds of proper discovery, it is incumbent upon the moving party, in explaining the reasonableness of scope, to offer some explanation for the failure to specify the needed documents more exactly and for the failure to obtain the requested information by other less burdensome means—for example, a request for admissions under § 3.31 of the rules.

In short, we have been presented with a legal chimera. It has the head of an order for the production of documents, the body of a broad investigational subpoena, and the tail of an order requiring access. While we cannot condone the existence of such a creature, upon proper application by complaint counsel the examiner is fully empowered to issue a more limited and unified order which measures up to the letter and spirit of the current rules of practice. Accordingly, respondents' appeal is granted and an appropriate order will be entered.

ORDER GRANTING INTERLOCUTORY APPEAL

This matter is before the Commission upon respondents' interlocutory appeal, filed pursuant to § 3.35 of the Commission's rules of practice, from the hearing examiner's order of August 30, 1967, denying respondents' motion to quash the hearing examiner's order to permit the inspection and copying of documents, and upon briefs and argument in support thereof and in opposition thereto. The Commission has determined that the appeal should be granted. Accordingly,

It is ordered, That the respondents' motion to quash the hearing examiner's August 8, 1967, order to permit the inspection and copying of documents, be, and it hereby is, granted.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings in accordance with the views expressed in the accompanying opinion.

A & R AGENCY, INC., ET AL.

Docket 8716. Order, Nov. 28, 1967

Order denying effective date of initial decision until further order of the Commission. See 73 F.T.C. 5, for final order.

ORDER STAYING EFFECTIVE DATE OF INITIAL DECISION

The initial decision in this case having been mailed on October 27, 1967; and service thereof having been made as to some of the respondents but not as to all of the respondents:

It is ordered, That the effective date of the initial decision of the hearing examiner filed October 25, 1967 [73 F.T.C. 5], be, and it hereby is, stayed until further order of the Commission.

It is further ordered, That this order is not to be construed as extending the time provided under Section 3.52 of the Commission's Rules of Practice for filing notice of intention to appeal from the initial decision by any party to this proceeding.

BROWN & WILLIAMSON TOBACCO CORPORATION ET AL.

Docket 7688. Order, Dec. 1, 1967

Order reopening proceeding and proposing modification of paragraph 3 of the cease and desist order. See 73 F.T.C. 439 for modified order.

ORDER REOPENING PROCEEDING AND PROPOSING MODIFICATION OF ORDER TO CEASE AND DESIST

On September 28, 1967, respondents, Brown & Williamson Tobacco Corporation and Ted Bates & Company, Inc., filed a petition to reopen the proceeding for the purpose of modifying the order entered by the Commission on February 24, 1960 [56 F.T.C. 956]. In substance, respondents request that Paragraph 3 of the order be modified so as to permit representations of government findings concerning the tar and nicotine content of Brown & Williamson's filter cigarettes as compared with the smoke of other filter cigarettes. Complaint counsel has filed an answer not opposing the petition.

Upon consideration, the Commission has concluded that good cause has been shown for modifying the order, but not in the precise language proposed by respondents. Accordingly,

It is ordered, That this proceeding be reopened and that, within thirty (30) days after service of this order, respondents Brown & Williamson Tobacco Corporation and Ted Bates & Company, Inc., shall show cause why Paragraph 3 of the order to cease and desist heretofore entered in this proceeding should not be modified to read as follows:

> "3. Representing, directly or by implication, that the United States Government, or any agency thereof, has found that the smoke of Life cigarettes, or any other filter cigarette, is lower in tar or nicotine content when compared with the smoke of other filter cigarettes, unless such Government or agency thereof in fact has so found, and such findings are presented in a manner that is fair and not misleading and the basis for comparison is fully and fairly stated."

CURTISS-WRIGHT CORPORATION

Docket 8703. Order and Opinion, Dec. 1, 1967

Order denying respondent's and Martin A. Sherry's appeals from hearing examiner's denial of their motions to quash subpoenas duces tecum and remanding case to hearing examiner for further proceedings.

OPINION OF THE COMMISSION

This matter is before the Commission upon the hearing examiner's certification, filed November 3, 1967, of Martin A. Sherry's and respondent's motion to quash subpoena duces tecum, filed October 26, 1967, which he denied in part, and respondent's additional motion to quash the same subpoena duces tecum; and upon respondent's and Martin A. Sherry's interlocutory appeal, filed November 15, 1967, from the hearing examiner's order denying motion to quash subpoena duces tecum. Complaint counsel, on November 21, 1967, filed an answer in opposition to respondent's and Martin A. Sherry's appeal, and respondent, on November 28, 1967, filed a reply to such answer.

In this matter, the hearing examiner, on June 12, 1967, issued an order against respondent to produce documents covering certain of respondent's cost and profit data on aircraft engine parts for the years 1960 through 1963. Upon respondent's refusal to comply therewith the matter was certified to the Commission on September 25, 1967. The Commission, on October 2, 1967, issued an order directing the hearing examiner to withdraw the order to produce documents and to consider, upon application and in lieu of the order to produce, the issuance of a subpoena duces tecum pursuant to § 3.34 of the Commission's Rules of Practice "to the extent that the production may be justified under such rule." Thereafter, upon application by complaint counsel, a subpoena duces tecum was issued, directed to Martin A. Sherry, Curtiss-Wright Corporation, One Passaic Street, Wood-Ridge, New Jersey 07075. This subpoena required the appearance of Martin A Sherry and the production of documents pursuant to specifications which are, except as to certain modifications in form, the same as the specifications in the earlier order to produce. It is in connection with such subpoena duces tecum that respondent (and in the one case, Martin A. Sherry) has made its motions to quash and to certify to the Commission. It is also from such subpoena that respondent and Martin A. Sherry have filed interlocutory appeal.[1]

The contentions of respondent and Martin A. Sherry in the

[1] Complaint counsel, on November 2, filed answer in opposition to the motions to quash. Respondent, on November 7, 1967, filed a reply to the answer in opposition to respondent's motion to quash and request to certify.

first motion to quash and in the appeal from the hearing examiner's order denying motion to quash are principally as follows: (1) that under the Commission's Rules of Practice dated July 1, 1967, the Commission cannot continue an investigation after an adjudicative proceeding has commenced, and (2) that the subpoena duces tecum is oppressive, burdensome and unreasonable and violates respondent's rights under the due process clause of the Constitution. The additional assertion is made that the subpoena was improperly addressed to Martin A. Sherry—who, it is asserted, is not a party to this proceeding—and therefore that no proper call has yet been made upon respondent's documents.

In respondent's second motion to quash subpoena duces tecum and requesting the certification of such motion to the Commission, respondent argues mainly that the Commission is bound by *stare decisis* and that it cannot retroactively apply the 1967 Rules of Practice to a question previously decided under the 1963 rules. Respondent contends that this action is beyond the Commission's authority and a violation of respondent's rights.

Apparently there has been some misunderstanding over the Commission's ordering herein of the substitution of a subpoena duces tecum, if applied for, in lieu of the previously issued order to produce. Our purpose and intent was that a request for a subpoena, if made, was to be evaluated in terms of the requirements of the new rules to insure that such request concerned discovery and did not constitute a postcomplaint investigation. We are not clear that the examiner has considered the issue before him on the subpoena duces tecum in exactly these terms. For one thing, he did not have the benefit of the Commission's recent opinion covering the scope of its new discovery rules—that is, *All-State Industries of North Carolina, Inc., et al.* (order granting interlocutory appeal issued November 13, 1967 [p. 1020 herein]. Therein the Commission held in effect that while complaint counsel is not required to have *all* evidence that he will need prior to the issuance of the complaint—that is, he may properly seek additional documentation which may be required to *round out, extend or supply further details* for the particular transactions to be pursued—he may not, under the new rules, engage in "comprehensive postcomplaint investigation." [2]

[2] In *All-State Industries of North Carolina, Inc., et al.*, the Commission held that complaint counsel would be entitled to gather "additional documentation . . . to *round out, extend or supply further details* for the particular transactions to be pursued." (Emphasis in original.) The Commission further elaborated on the question of discovery as follows:

"Thus, the rules are not intended to provide for comprehensive postcomplaint investigation, but only postcomplaint discovery. The Commission recognizes that, in the abstract, the meaning of 'discovery' is necessarily vague. We are also aware that terms such as 'round out,' 'extend,' or 'supply further details' are incapable of concise definition and will depend on the particular facts and circumstances in every instance."

In connection with the subpoena in issue, it is apparent that the request is, in relatively broad terms, seeking the production of a whole category of documents. We believe that the examiner should have evaluated this request in terms of whether or not it was justified and appropriate postcomplaint discovery. We will remand this matter to the examiner for such an evaluation and for a determination consistent therewith. That is, if he finds the subpoena duces tecum to contravene the Commission's policy against conducting a comprehensive postcomplaint investigation, he should quash, or, if possible and appropriate, limit the subpoena to proper bounds. If he finds otherwise he should order compliance.

So far as this matter concerns the argument that the Commission has improperly proceeded in directing the withdrawal of the order to produce and to consider, upon application, the issuance of a subpoena duces tecum in substitution therefor, we hold against the respondent. After it is made clear that the examiner has evaluated the request and proceeded in terms of the limits of a subpoena duces tecum under the Commission's adjudicative rules, *i.e.*, § 3.34, it will be manifest that the Commission's action will not be to the prejudice of respondent.[3] So far as the other issues raised are concerned, by both respondent and the individual referred to in the subpoena, we believe that such are matters, in the present posture of the case, to be left to the discretion of the hearing examiner. Accordingly, the motions to quash subpoena duces tecum, to the extent certified, will be denied, and the interlocutory appeal from the hearing examiner's denial of the motion to quash will be denied. An appropriate order will be entered.

Commissioner Elman did not participate.

ORDER DENYING CERTIFIED MOTIONS TO QUASH AND INTERLOCUTORY APPEAL AND REMANDING WITH INSTRUCTIONS

This matter having come on to be heard upon the hearing examiner's certification, filed November 3, 1967, of Martin A. Sherry's and respondent's motion to quash subpoena duces tecum, filed October 26, 1967, which he denied in part, and respondent's additional motion to quash the same subpoena duces tecum; and upon respondent's and Martin A. Sherry's interlocutory appeal, filed

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[3] Respondent does not challenge "the Commission's right to apply new rules of practice retroactively in a pending proceeding—in the absence of a showing of prejudice to a respondent." (Request to certify, p. 11.) Moreover, respondent does not contest complaint counsel's right of discovery. It states:

". . . (of course, respondent has never contended that the Commission was barred from discovery after the issuance of a complaint—nor that Section 3.11 forbids discovery. Its argument has always been that the Commission is barred from continuing a pre-complaint investigation after the institution of an adjudicative proceeding.)" (Request to certify, p. 9.)

November 15, 1967, from the hearing examiner's order denying motion to quash subpoena duces tecum; and

The Commission, for reasons appearing in the accompanying opinion, having determined that respondent's and Martin A. Sherry's motion and respondent's separate motion to quash subpoena duces tecum and their appeal from the examiner's denial of their motions to quash subpoena duces tecum should be denied and that the matter should be remanded for further proceedings in accordance with the Commission's views expressed in the accompanying opinion:

It is ordered, That respondent's and Martin A. Sherry's motion and the separate motion of respondent filed October 26, 1967, to quash subpoena duces tecum, to the extent that they have not been denied by the hearing examiner, be, and they hereby are, denied.

It is further ordered, That respondent's and Martin A. Sherry's appeal from the examiner's denial, on November 3, 1967, of their motions to quash subpoena duces tecum, be, and it hereby is, denied.

It is further ordered, That the matter be, and it hereby is, remanded to the hearing examiner for further proceedings in accordance with the views expressed by the Commission in the accompanying opinion.

Commissioner Elman not participating.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order, Dec. 11, 1967

Order denying respondents' request for the production of certain documents.

ORDER RULING ON HEARING EXAMINER'S CERTIFICATION OF RESPONDENTS' MOTION FOR PRODUCTION OF DOCUMENTS

This matter is before the Commission on the hearing examiner's certification of respondents' motion for production of documents filed September 22, 1967. The request is made pursuant to Amended Prehearing Order No. 1, and to § 3.11 of the Commission's rules of practice, effective August 1, 1963. Respondents move that complaint counsel be required to produce or permit them to inspect and copy certain books and papers which they contend are non-privileged, constitute evidence relevant to the subject matter of this proceeding, and are in the possession, custody or control of complaint counsel.

Specifically, the motion encompasses "all books, records and other documents" obtained by complaint counsel, or any employee or agent of the Federal Trade Commission in conjunction with

this proceeding or the investigation preceding complaint from the following companies:

American Artists Group, Inc.;
Detecto Scales, Inc.;
Fleck Bros.;
Frolick Specialties;
Gibson Greeting Cards, Inc.;
Johnson & Johnson;
Protex Products Company;
The Richelieu Corp.;
Royal Typewriter Company, Inc.;
SCM Corporation.

Excluded from the request are those records obtained from the respondents or which have been previously offered for inspection to the respondents.

Respondents contend their request meets the good cause standard under § 3.11 of the rules in effect prior to July 1, 1967. They assert, in this connection, that they had been informed during pretrial discovery that complaint counsel had secured a number of documents from the files of these companies prior to issuance of complaint and that many of the documents previously examined by complaint counsel had been destroyed in the ordinary course of business. Many of these documents, according to the motion, relate to specific transactions described in complaint counsel's tabulations and have a bearing upon the question of whether the tabulations reflect the actual net prices at which the merchandise was sold. In addition, respondents assert that they have reason to believe that complaint counsel has omitted from his exhibit list documents which would aid in the preparation of respondents' defense. The motion concludes that since all the data involved in this request came from the suppliers "whose dealings with respondents comprise the entire case against respondents" they are necessarily relevant.

Complaint counsel by answer filed October 4, 1967, opposes the motion for production on the ground that the documents involved are confidential and that respondents have failed to establish the relevancy of their request.

The hearing examiner recommends that in the absence of a more clear and definite showing on the part of complaint counsel, of the sensitive nature of the data requested, that they should be released for the inspection of respondents. This recommendation is made on the assumption that the requested materials merely relate to day-to-day sales transactions and routine correspondence.

§ 3.36 of the Commission's rules now in effect governs the release of confidential records from the Commission's files. Any request

for such data must meet the standards set forth in that rule. In this connection, the rule states that motions made pursuant to this provision shall specify as exactly as possible, the material to be produced and the nature of the information to be disclosed. The rule also requires that the motion shall contain a statement showing the general relevancy of the material or information involved and the reasonableness of the scope of the application, together with a showing that such material or information is not available from other sources by voluntary methods or through other provisions under Part 3 of the rules.

Respondents' request was not made pursuant to § 3.36 and their motion does not meet the standards set forth therein. The rule requires that the material to be produced or the information which is to be disclosed shall be identified as exactly as possible to permit a determination of whether the request meets the prerequisites to disclosure specified by the rule. In short, the rule contemplates review by the Commission of the applications made thereunder and that they contain sufficient information to insure that the review be an intelligent one. Respondents' request broadly defining the material they desire as all books, records and documents obtained from the suppliers listed in their motion can only be evaluated with difficulty, if at all, against the standards of the rule. Another relevant consideration is the fact that the Commission's files contain all manner of documents and information, some of which would have no relevance to the issues involved in litigation. The necessity for adhering to the procedures set forth in § 3.36 is accordingly clear.

Further, some of the information secured in the course of a Commission investigation is necessarily more sensitive than other data obtained through the Commission's investigative processes. At this juncture, on the basis of respondents' motion of September 22, 1967, the Commission is not in a position to determine whether all books, records and other documents obtained from the ten companies are in fact non-privileged as respondents assert.

Finally, it seems evident on the basis of the assertions in respondents' motion alone, that they could specify far more explicitly the materials they desire than the description in their application of September 22, 1967. In this connection, respondents have had, as they assert, pretrial discovery of the ten suppliers involved in this case and were in fact informed by these companies that a number of documents from these suppliers were turned over to the Commission and that certain material had been destroyed by the suppliers. On the basis of these contentions, it is reasonable to assume that respondents should be able to specify with greater

exactitude the identity of or at least the categories of documents which they desire. In this connection, respondents should also set forth with more precision than in their motion the issues with respect to which the material they desire is relevant. Accordingly, the motion for production will be denied without prejudice. Respondents may renew the motion pursuant to § 3.36 of the Commission's rules in conformity with the views expressed above. Accordingly,

It is ordered, That respondents' motion for production of documents filed September 22, 1967, and certified by the examiner on October 5, be, and it hereby is, denied without prejudice.

Commissioner Elman dissenting.

STATESMAN LIFE INSURANCE COMPANY

Docket 8686. Order and Opinion, Dec. 21, 1967

Order denying motion to defer issuance of press release on initial decision. Interprets Freedom of Information Act, Sec. 3.

ORDER AND OPINION DENYING MOTION TO DEFER ISSUANCE OF PRESS RELEASE

Respondent, Statesman Life Insurance Company, has filed a motion with the Hearing Examiner requesting the Commission to defer issuance of all further press releases in this matter pending final hearing and adjudication by the Commission or until final action favorable to the Commission by the United States Court of Appeals for the District of Columbia Circuit in *Federal Trade Commission* v. *Cinderella Career and Finishing School, Inc.*, No. 21,118, 1967 Trade Cases ¶72,072 [8 S.&D. 470, 660].

The Hearing Examiner has now filed his initial decision in this matter in which respondent was charged with engaging in false and deceptive advertising of life insurance policies in violation of Section 5 of the Federal Trade Commission Act. The initial decision has been served on respondent. Respondent argues that if such decision is adverse to it, issuance of a press release announcing the facts of this decision might cause policy holders in respondent to cancel their policies and thus prejudice and cause injury to respondent. Respondent asserts in its brief without any supporting documentation that the issuance by the Commission of a press release concerning the Commission's filing of the complaint in this matter caused many of respondent's policy holders to cancel their policies to the injury of respondent and perhaps also of the policy holders in question. However, no objection was ever made by respondent to the issuance by the Commission of this press

release nor of that issued by the Commission making public respondent's answer to the complaint.

Complaint counsel opposes the instant motion of respondent on the ground that the initial decision of the Hearing Examiner is a public document and that the granting of the motion would therefore be contrary to the public interest.

The Hearing Examiner has certified the motion to the Commission without recommendation.

Under Section 3 of the Administrative Procedure Act as amended by the recent Freedom of Information Act, administrative agencies are required to make available for public inspection and copying, in accordance with the published rule "all final opinions (including concurring and dissenting opinions) and all orders made in the adjudication of cases." Section 8(b) of that Act requires that "all decisions (including initial, recommended or tentative decisions) shall become part of the record."

The Commission's Procedures and Rules of Practice provide expressly that the adjudicative proceedings of the Commission are public unless otherwise ordered by the Commission and that the initial decisions of the Hearing Examiners are part of the public record and are available to the public without charge. (Sec. 3.41 and 4.9 (a), (d), and (e)(4).) It should be noted that all Commission news releases respecting publication of initial decisions of its hearing examiners contain the following express explanation of the status of these decisions:

This is not a final decision of the Commission and may be appealed, stayed or docketed for review. (Emphasis in original.)

It is difficult to understand that respondent or its policy holders could be prejudiced by the publication of the initial decision in this case which publication will simply record the findings and conclusions of the examiner all of which are matters of public record. This is particularly true in this case where the facts of the complaint and respondent's answers have already been made public. We cannot understand how publication of the initial decision of the hearing examiner can constitute prejudgment of these issues by the Commission. The granting of the instant motion, in our judgment, would contravene both the Freedom of Information Act and the Commission's own rules. Initial decisions by hearing examiners in publicly conducted adjudicative proceedings are matters of public interest of which the public has a right to be informed. The Commission's news releases containing such information are designed to be entirely factual and objective. It is an unwarranted libel on the Commission to suggest that it is thereby

attempting to "smear" respondents or to try its cases in the newspapers. No special or unusual circumstances having been shown by respondent in support of its motion, we are constrained to deny the motion and are issuing our order to this effect.

ADVISORY OPINION DIGESTS*

No. 133. Agreement among members of trade association to comply with government ruling

A trade association requested an advisory opinion as to its proposal to hold joint discussions among its members as to the proper description of the industry's product looking toward a possible agreement among all concerned to comply with ruling of a government agency as to how the product should be labeled. The Association assured the Commission that the discussion would be for this limited purpose only and that there would be no price fixing, monopoly or other antitrust question involved.

The Commission advised that there could be no objection to a discussion among the members looking toward a limited agreement to comply with this ruling on a voluntary basis. The members were further advised, however, that nothing in this opinion was to be construed as approval of any steps which might be taken by the members, acting in their private capacity, to enforce this ruling themselves as to any members who might not be inclined to agree. Such approval as was given was limited to the simple agreement in principle to comply with the ruling, with enforcement being left to the properly constituted government authorities. (File No. 673 7104, released July 13, 1967.)

No. 134. Proposed lease of patented industrial machine

A manufacturer of a patented industrial machine designed to produce a nonpatented end product has requested an advisory opinion as to the legality of its proposed form of lease.

The manufacturer posed two specific questions pertaining to the lease and requested an opinion as to any other phase which the Commission might feel should be covered. The first question related to the lease term and royalty provisions, which provide that the lease shall continue in effect for three years with the lessee having the right to terminate upon 90 days notice during the second and third years and that the rental shall be 2.2 percent of the gross sales of products produced on the machine by the lessee.

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

The Commission stated that it viewed the patent grant as conveying to the patentee the right to charge whatever royalty was satisfactory to the parties, measured by whatever patented or unpatented royalty base he desired for as long a period of time as he elects, so long as there is no attempt thereby to extend the patent monopoly beyond its intended scope. Therefore, it could see no objection to three provisions as written.

The second question related to the paragraph providing that the lessor will not make any sales of the equipment and will not enter into a lease agreement for such equipment with anyone else whose place of business is located within the lessee's trading area as defined in the lease. The Commission noted that this provision did not grant the licensee an exclusive territory, although it had been advised that the nature of the end product would make it difficult for anyone else to compete within that area because of the freight factor. Be that as it may, the Commission was of the opinion that the owner or holder of exclusive patent rights to make, use and sell may carve out of his grant a limited monopoly for a licensee and, therefore, it could see no objection to this provision.

The Commission further noted that following discussions with the staff the manufacturer authorized deletion of one sentence in the lease for editorial purposes and that in the paragraph dealing with alterations, the manufacturer requested deletion of the sentence requiring that any alterations, improvements, or changes, which are or may be patentable, shall, upon request, be assigned to the lessor. Thus the manufacturer did not request an opinion as to the required grant-back of improved patents incorporated in the original submittal.

While the Commission did not purport to pass upon the purely contractual aspects of the lease, it did state that it had reviewed the other provisions of the lease and expressed no objections thereto from the standpoint of the laws it administers, particularly in view of the fact that it had been advised that there were other competitive machines which the lessees are free to rent or purchase and in view of the fact that there were no tie-ins requiring the purchase of auxiliary or other equipment or supplies from the lessor. (File No. 673 7108, released July 13, 1967.)

No. 135. Tripartite promotional assistance plan featuring rewards to customers.

The Commission was requested to render an advisory opinion concerning the legality of a tripartite promotional program featuring the sale by a promoter to grocery retailers of books in

which customers can paste labels from suppliers' products and receive a cash reward depending upon the number of labels collected.

Under the plan, manufacturers will be solicited for permission to show reproductions of their labels, box tops, etc., within the pages of the books at no charge. The promoter will then offer the books for sale to all retailers within the boundaries of the initial test area. The retailers can then distribute the books in any manner they choose, either by mail, house-to-house, or at their stores. They may offer them as a bonus for a certain purchase or for purchases of a specified amount.

Consumers will be invited to buy and try the products shown and to paste or otherwise fasten the actual label or other product identification over the designated space in the book. The books are redeemable for cash at the issuing retailer's store and the value depends upon either the total number of product identifications returned in one type of book or whether all product identifications are returned in the other type of book. The retailer advances the cash reward to consumers redeeming books issued by him. The promoter will then reimburse the retailer the full amount advanced and in addition pay him a checking and handling fee, which will vary depending upon whether it is a completely filled or partially filled book. The promoter will then invoice suppliers based on the number of product identifications returned. This invoice will include an amount sufficient to cover the cash reward to the consumer, and fee to be paid the retailer and a payment to the promoter for his costs plus his profit.

Retailers stocking all the items shown on the inside pages, or willing to do so, will be offered a choice of the two types of books. First, a book offering a cash reward based on the number of product identifications returned. The consumer can fasten one or more of the product identifications in the book and return it to the retailer for a cash reward. Second, a book offering a flat cash reward for completely filling the book with all identifications shown. Retailers stocking one or more of the items shown, but not all of them, will be offered the book where redemption value is based on the number of identifications returned. The consumer can make purchases anywhere and fill as many spaces as desired, regardless of limit to items stocked by the issuing retailer.

Retailers using either type of book can choose from individualized covers or preprinted stock covers and will have a choice of using a name coined by the promoter or a name of their own choosing. The cost to the retailer will vary according to the type and quantity of books purchased. The promoter has advised that

the differences in costs of both the standard and individualized covers is solely attributable to differences in the cost of printing and distributing different quantities and that the books are to be sold to retailers at cost.

The promoter will mail an "Offer to Retailers" to all grocery stores, supermarkets, headquarters of each local, regional and national chain, wholesalers and the area headquarters or warehouses of each cooperative or association within the geographic area, as their names can be found in trade and telephone directories, route lists, etc. Realizing that some stores might be missing from these lists and also that other types of retailers might be offering at least some of the products shown, the promoter will run an advertisement in every daily newspaper within the area outlining the features of the books and offering to furnish a copy of the notice to any interested retailer. In any county where there is no daily newspaper, the notice of advertisement will be run in a weekly newspaper of general circulation.

The Commission advised that while it believed the promoter had done a commendable job of devising a plan which contained alternatives which should prove to be usable in one form or another by every customer of the participating suppliers, there was still lacking the element of proportionally equal treatment of those customers as required by Sections 2(d) and (e) of the Clayton Act, as amended. In brief, these sections require that whenever a seller makes payments and furnishes services for the benefit of one customer, he must make those payments or services available on proportionally equal terms to all competing customers. If a situation such as this, where a number of suppliers will be making payments to the promoter which will inure to the benefit of their customers, the responsibility rests on the promoter and the suppliers to see that the promotional assistance thereby rendered is made available on proportionally equal terms to each competing customer of each participating supplier.

The Commission's concern with this proposal stemmed first from the fact that the retailers will be charged different prices for these books depending upon the quantities ordered. In one sense, this could be viewed simply as a sale from the promoter to the retailers and thus subject to the cost justification defense which the statute makes available to one charged with a discrimination in price. However, the Commission found it conceptually impossible to lift this transaction out of the whole and view it as a separate price discrimination problem. The proposal involves one essentially promotional program in which the parts cannot be separated from the whole. While it is true that the promoter will sell the books to

the retailers, he will do so at cost and this would not be possible were it not for the fact that he will derive his profit from payments made by the suppliers. Thus the Commission ruled that the entire plan was keyed to payments which emanate from the suppliers and this being all parts must be judged according to the standards set forth in Sections 2(d) and (e) of the Act.

This brought the Commission into confrontation with the fact that the defense of cost justification is not available to one charged with a violation of these Sections. It followed, in the Commission's view, that there was no way to escape the conclusion that the smaller dealers were not being afforded proportionally equal treatment when they had to pay more for the books than did their larger competitors. The opinion acknowledged it to be true that these prices are equally available to all in that all will be charged the same price for the same quantities. But is is equally true that all will not be able to buy in the same quantities. Since the retailers' profits from this plan will equal the amount by which their payments for redeeming books exceed their cost of purchasing such books, the Commission could not view the plan as being available on proportionally equal terms so long as there is a disparity in the prices they must pay in order to participate.

In this connection, the Commission made it clear that it was only concerned with the prices charged for the books with standard covers since those were the real base of the plan. The purchase of books with individualized covers appeared to be purely optional with the retailer if he cared to spend more in order to more closely identify the plan with his own store.

A second respect in which this proposal was held to be deficient under the law stemmed from the fact that the large retailers were apparently to be offered both the fully completed and the partially completed book plans, while the smaller retailers were to be offered only the latter. In the Commission's view, both plans must be affirmatively offered to and made available to all retailers before the overall plan could be said to be available to all competing customers on proportionally equal terms.

The opinion singled out two additional factors of the proposal which should be borne in mind if it is to be conducted within the law. The first concerned the fact that grocery retailers will be notified by mail and all other customers of the participating suppliers will be notified by advertisement. While the statute prescribes no particular method by which the availability of allowances or services is to be communicated to a seller's customers, it is clear that the duty rests upon such seller to see that all competing customers are informed. A plan can only be said to be available

to a customer if he knows about its existence. If the method of notification chosen actually reaches all competing customers, there could be no objection to the plan on that score. However, the promoter was cautioned to keep in mind that the suppliers could incur liability if it subsequently developed that some did not as a matter of fact receive notice because of the method chosen.

The second factor stemmed from the fact that was proposed initially to test the program in nine contiguous counties. Even though this is a test area the promoter was advised to be careful here not to discriminate against customers located on the fringes but outside the area selected since they may be actually competing with those who are participating. In such situation, the existence of competition prevails, not geographic or political subdivisions, and the fringe area customers, if any there be, who in fact compete must be afforded an equal opportunity to participate. (File No. 673 7096, released July 19, 1967.)

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

No. 136. Selective leasing of shopping center space

The Federal Trade Commission was asked its views as to the legality of the following proposed course of conduct:

A real estate developer plans to develop a new city composed of some 5,000 families. In connection therewith space is to be made available for business and service facilities. Prospective lessees of this space will be accepted, or rejected, in light of a statistical study purporting to show an optimum occupancy mix.

The Commission advised the requesting party that, in the absence of any purpose or intent to create a monopoly, prospective lessees could be accepted or rejected at will provided the action taken was taken independently and as the result of the lessor's individual judgment.

The Commission noted, however, that it expressed no views as to the propriety, under the trade regulation laws, of any agreement between lessor and lessee as to others to whom space might be leased. (File No. 673 7105, released July 19, 1967.)

No. 137. Proposed trade association discussion seeking firm price guarantees from suppliers

The Commission was requested to render an advisory opinion with respect to the legality of a user's trade association discussing and seeking a "guarantee that a quoted price will remain firm for a definite number of days" from individual suppliers or from their national association.

It was represented that the product constitutes about 30 percent

of the cost of doing business and that while some users buy direct, others purchase from intermediate suppliers. Regardless of the supply source, product suppliers change prices without notice and will not guarantee firm prices unless the purchase contract calls for a large quantity of the product. As users' customers demand firm price quotations on their needs and because of the normal time lapse between a quotation and actual product purchase, an interim price increase by producers results in a lessening of the users' profit. The Association added that there is no agreement not to do business with those producers who decline to guarantee firm prices, but that individual users will continue to bargain for concessions as they do at present.

The Commission advised that it could neither approve nor sanction the proposed industry discussions. Though such discussion might be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish the desired result. Even if the discussions were accompanied by disclaimers, there is implicit therein too grave a danger that it would serve as advice whereby the concerted power of members of the local association, and even of the national association, might be brought to bear to coerce the producers, or their association, to conform pricing policies to the standard desired, or at the very least as an invitation to enter into agreements among themselves to do so. (File No. 683 7022, released Aug. 24, 1967.)

No. 138. Use of symbols and names having fur-bearing animal connotations in labeling textile fiber products

The Commission was requested to render an opinion with respect to the labeling of textile fiber products manufactured so as to simulate a fur or fur product.

The requesting party proposed using a label which would bear the depiction of a fur-bearing animal commercially used in fur products, a trade name and trademark having a fur-bearing animal connotation, and the required fiber content disclosures.

The Commission pointed out that the Rules and Regulations promulgated under authority of the Textile Fiber Products Identification Act provide, in Rule 9, that the label of a textile fiber product shall not contain a name, word, depiction, descriptive matter, or other symbol which connotes or signifies a fur-bearing animal, unless such product is a fur product within the meaning of the Fur Products Labeling Act. Subject to this proviso, a textile fiber product may not be described on the label with the name or part of a name of a fur-bearing animal, whether as a single or

combination word similar to a fur-bearing animal name, for example, "Broadtail."

The Rules permit the nondeceptive use on textile fiber products of fur-bearing animal names but only where the animal fur is not commonly or commercially used in fur products, as for example, "Bear." Further, the Rules do not prevent nor prohibit the nondeceptive use of a trademark or trade name containing the name, symbol, or depiction of a fur-bearing animal unless "the textile fiber product in connection with which such trademark or trade name is used simulates a fur or fur product."

The Commission advised that it would not be proper, in the labeling of textile fiber products, to use a label bearing the depiction of a fur-bearing animal nor a trademark and trade name having fur-bearing animal connotations. Such labeling, with or without the required fiber content disclosures, of a textile fiber product manufactured so as to simulate the fur of an animal commonly or commercially used in fur products would have the tendency and capacity of inducing prospective customers into the mistaken belief that the textile fiber product to which such label is affixed contains the fur of the animal depicted of fur fibers from such animal. (File No. 683 7007, released Aug. 24, 1967.)

No. 139. Advertising claims for spray deodorant

The Commission rendered an advisory opinion in regard to some proposed advertising claims for a personal deodorant spray.

Specifically, the Commission considered the propriety of the following two claims: (1) that the product meets the U.S. Government requirements for safety and effectiveness and (2) that no other medicated personal deodorant spray equals its safety and effectiveness.

In regard to the first claim, the Commission said there were no specific standards or requirements officially recognized by the U.S. Government relating to the safety and effectiveness of personal deodorant sprays. Under these circumstances, therefore, the Commission said it would be improper to claim that such requirements exist and that the product meets those requirements.

With respect to the second claim, the Commission said that opinion evidence indicated there are other medicated deodorant sprays on the market which are equally as safe and effective as the product in question. In view of this opinion evidence, and in the absence of reports of properly controlled studies establishing the validity of the claim, the Commission said that it could not

give its approval to the second claim. (File No. 683 7004, released Aug. 30, 1967.)

No. 140. Advertising allowances by book publisher

The Commission rendered an advisory opinion in regard to the legality of a book publisher's promotional plan calling for the payment of advertising allowances. Specifically, the Commission ruled that the proposed plan would be in compliance with Sec. 2(d) of the Clayton Act, as amended.

Under the terms of the proposed plan, the book publisher proposes to offer to retailers, wholesalers and retailers who purchase through wholesalers advertising allowances equal to 75 percent of the actual cost for newspaper and magazine advertisements at local rates, but not to exceed 10 percent of the net value of confirmed orders for the advertised titles. Additionally, allowances will be paid for the use of stuffers, circulars and catalogs, but not to exceed 10 percent of the dealers' net purchases. Regardless of which method of advertising is used, promotional payments will not exceed 10 percent of the buyers' total net purchases. (File No. 673 7107, released Aug. 30, 1967.)

No. 141. Proposed advertising for mink oil skin lotion

The Commission was requested to render an advisory opinion with respect to proposed advertising for a skin lotion containing mink oil, which would represent that the product will relieve the scaling, itching and redness of psoriasis and eczema.

The opinion advised the advertiser that while the Commission has no objection to representations that the product will afford temporary relief of itching and scales of psoriasis, any mention of eczema or representations in advertising that the product will relieve redness would appear to have the capacity and tendency to deceive. (File No. 683 7014, released Sept. 6, 1967.)

No. 142. Information required on label affixed to textile fiber products

The Commission was requested to render an opinion with respect to the labeling of textile fiber products manufactured so as to stimulate a fur or fur product.

The requesting party proposed using two labels on his products. The first would bear his trademark and trade name and would be affixed inside the neck of the garment in the conventional manner. The second, bearing the required fiber content disclosures, would be a separate tag hung elsewhere on the garment.

The Commission pointed out that the Rules and Regulations

promulgated under authority of the Textile Fiber Products Identification Act define "required information" as that which must appear on labels, and "label" as the means of identification required to be affixed on textile fiber products and on which the "required information" is to appear (Rule 1, paragraphs (e) and (f)). The "required information" includes "the generic names and percentages by weight of the constituent fibers present" which shall be "conspicuously and separately set out on the same side of the label in a manner as to be clearly legible and readily accessible" to such a prospective purchaser (Rule 16). The name to be used on such labels "shall be the name under which the person is doing business" or his word trademark if registered (Rule 19).

The opinion pointed out that Rule 16(b) provides that the required name or registered identification number may be conspicuously set out on a separate label which is prominently displayed in close proximity to the label containing the other required information. However, in this instance, the Commission believed that it would not be proper, in the labeling of a textile product, to identify the product with one label bearing a trademark and trade name including fur terminology and to make the fiber content disclosure on another label or tag hung elsewhere on the product. It was the Commission's opinion that the proposed labeling of a textile fiber product manufactured so as to simulate the fur of an animal commonly or commercially used in fur products would have the tendency and capacity of inducing prospective purchasers into the mistaken belief that such product was a fur or fur product. (File No. 683 7008, released Sept. 6, 1967.)

No. 143. Promotional allowances by fabric supplier

In an advisory opinion the Commission ruled that a fabric supplier who makes advertising allowances available to one or more resellers of a finished product, irrespective of the fact that an intermediary performs work on the raw material which transforms it into the finished product, thereby adopts those resellers of the finished product as his customers and must comply with Sec. 2(d) of the Robinson-Patman Act.

Commenting further upon the customer relationship, the Commission said:

> We think Congress clearly intended to ban discriminations in the form of advertising allowances, regardless of the fact that intermediaries might be interposed, where the grantor deliberately contacts hundreds of retailers directly with the purpose of expending thousands of dollars for advertising purposes. Thus where a supplier initiates such a promotional program with retailers and has primary, if not the sole, responsibility over the control and administration of the plan, we think the customer relationship has been

established and the plan must be tested in the light of the requirements of Sec. 2(d) of the Act.

Under the terms of the proposed plan, the fabric supplier would pay 50 percent of retailers' advertising costs if the retailer sells and advertises wearing apparel manufactured from a certain line of fabric, up to a total cost of 1,200 lines published in Advertising Checking Bureau (ACB) newspapers. Retailers who use non-ACB rated newspapers, radio, television, handbills or mail stuffers will be paid an equivalent measurable cost. The plan will be made available to all retailers located in selected trading areas of all wearing apparel manufacturers who purchase and produce the finished product from the fabric in question. Only dealers who purchase apparel at regular wholesale prices will be eligible to participate.

In its opinion, the Commission concluded that the plan complies with Sec. 2(d) of the Robinson-Patman Act with two reservations. In commenting upon the first reservation, the Commission said:

> The statute requires one who gives advertising allowances to make those payments available to all competing customers. Availability means that the grantor of the allowance must notify all competing customers of their right to participate in the plan. Thus the provision of the plan which requires a retailer located just outside one of the selected areas to show that he competes with one or more of the favored retailers in order to have the offer made available to him would appear to shift the responsibility of notification required under the statute. For this reason, the Commission cannot approve this particular provision of the plan should it result in discrimination against retailers located on the periphery of the selected trading areas.

With respect to its second reservation, the Commission said that its opinion should not be construed as implying approval of the phrase "at regular wholesale prices" if the practical effect of that language is to procure resale price maintenance. (File No. 673 7103, released Sept. 12, 1967.)

No. 144. Proposed license agreement for process patent

The Commission rendered an advisory opinion in which it informed the owner of patented process for preparing food that it could see no objection to the form of a proposed licensing agreement with the food processing industry.

The proposed agreement, which was the only form of agreement to be used, was described as nonexclusive in nature and provided for the licensees to use the process and machinery at one uniform rental rate regardless of the physical location of the licensee. Although the process patent contemplates the use of the machinery and the agreement contemplates use by the licensees of that ma-

chinery, there is no absolute requirement that the licensees use any particular machinery in connection with the process.

The hourly rental to be charged all licensees was to be measured by a meter attached to the machine and the licensor reserved the right to cancel the license if the annual rental due from operation of the machinery fell below a stated minimum amount, unless the licensee paid the difference between the actual rental due and the required minimum. The duration of the agreement was to be for a period of five years.

The Commission advised that while it did not purport to pass upon the purely contractual aspects of the agreement, it could see no objection to the form of the agreement from the standpoint of the laws it administered, as distinguished from matters pertaining to the implementation thereof. (File No. 683 7016, released Sept. 29, 1967.)

No. 145. Aggregating purchases of multi-unit organizations

The Commission rendered an advisory opinion in which it concluded that it would not be permissible under Sec. 2(a) of the amended Clayton Act to aggregate the purchases of three centrally owned retail grocery stores for the purpose of cost justifying a lower price to those stores.

"The reason for this," the Commission said, "is that discounts to multi-unit purchasers must be cost justified on a store-to-store basis where, as here, each store orders separately, receives separate delivery and is invoiced separately."

Concluding its opinion, the Commission said:

> Since independent and singly owned retail stores are served in identically the same manner, it would confer an advantage on the multi-unit store, not by virtue of any savings in cost to the store but solely by reason of its membership in the centrally owned organization. Combining or *aggregating purchases*, therefore, for the purpose of determining costs of a multi-unit organization is not related to the realities of the market since the independent or singly owned store competes with the individual stores of the chain organization.

The particular facts in the advisory opinion involved three centrally owned retail grocery stores. Each store placed separate orders with the wholesaler, had its goods delivered separately and was invoiced separately. In addition, some single owned stores bought in larger volume than the smallest store which belonged to the centrally owned organization. (File No. 683 7023, released Oct. 17, 1967.)

No. 146. Request for revision of advisory opinion pertaining to use of the word "new"

The Commission was requested to reconsider and revise its advisory opinion as to the permissible period of time during which an advertiser may continue to describe a new product as being "new." The opinion in question was announced in Advisory Opinion Digest No. 120 [71 F.T.C. 1729] and took the position that until such time as later developments may show the need for a different rule, the Commission would be inclined to question use of any claim that a product was new for a longer period of time than six months.

The request was that the Commission revise this opinion to omit specifying any time limit or, in the alternative, to specify a period of at least one year, with the same proviso as was written into the present opinion that exceptional circumstances may warrant a longer or shorter period. In response to this request, the Commission stated its basic conclusion that the general rule announced in the opinion, which was announced as the rule which would be followed until later developments might show the need for a different rule, has not been in existence long enough for the accumulation of any additional experience which would indicate the need for a change at this time.

However, the Commission did take note of the argument that six months is not adequate time for test marketing new products, which are usually tested in areas representing between 1 and 15 percent of the population and run for an average of six months to two years. In this regard, the Commission advised that the six months rule announced in its previous opinion does not apply to the bona fide test marketing of a new product. So long as the test marketing program does not cover more than 15 percent of the population, so long as the test period does not exceed six months in duration and so long as it is being conducted in good faith for test purposes only, the Commission stated that it did not intend to apply the six months rule until the test period had ended and the product had been introduced to the general market.

The requesting party had further contended that the time selected was not long enough to cover the average life of packaging materials and advertising literature and thus would necessitate scrapping such materials after the time had expired. With respect to this point, the Commission stated that while it was always anxious to minimize such losses to advertisers whenever it could do so consistently with its duty to protect the public from deception, it would seem that here the advertiser is peculiarly in control of

the situation and able to protect himself against being caught with a large inventory of such materials on hand.

When an advertiser introduces a new product to the market he is at that time on notice that the claim "new" can remain valid for only a temporary period of time and he is at that time charged with the responsibility of preparing only so much material containing the word as can be used within the period of time during which the product can accurately be described as new. Even granting that one cannot predict with mathematical accuracy how fast the inventory will be consumed, still one experienced in such matters should be able to predict with reasonable accuracy how much will be needed for six months use and be prepared to discontinue use of such material at the end of that time without the loss of significant amounts.

Finally, the Commission stated that it had announced in its first advisory opinion on this subject (Advisory Opinion No. 120) that shorter or longer periods of time would be considered for particular products upon a showing that such different period was more appropriate for the product in question. No such showing had been made on this application warranting the Commission to make any change in its announced time period. (File No. 683 7017, released Oct. 24, 1967.)

No. 147. Granting of "back-haul" allowances to customers picking up their own orders

The Commission rendered an advisory opinion advising a manufacturer of food products that it would probably be illegal to grant so-called "back-haul" allowances to customers who pick up their own purchases at the manufacturer's warehouses.

The manufacturer in question presently sells its products on a delivered price basis with bracket pricing and does not permit customers to pick up products at warehouses or plants. Customers with trucks returning empty to their warehouses along routes near the manufacturer's warehouses and plants are now demanding the opportunity to pick up products and to earn an allowance by so doing. Consequently, the manufacturer proposed to institute a program whereunder customers would be permitted to pick up products and be paid an allowance equal to the amount the manufacturer would otherwise have to pay a common carrier to deliver to the customer.

The Commission advised that the proposal was governed by the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which, in brief, provides that it shall be unlawful for a seller to discriminate in price between different

purchasers of goods of like grade and quality where the effect may be substantially to lessen competition or to create a monopoly and where none of the defenses afforded by the Act are present. Considered in the light of this statute, the Commission concluded that, assuming the presence of all the other elements necessary to a determination of a violation of the statute, the implementation of this proposal would probably result in a violation of the law. This result seemed to the Commission necessarily to flow from the use of a delivered pricing system, for in such a case the freight factor included within the price is not the actual freight to any given point, but an average of the freight costs for all customers within the zone wherein the delivered price is quoted, or, at least, a figure determined by some formula apart from actual costs. If one customer is then given a "back-haul" allowance for the actual freight saved, the opinion advised serious possibility of discrimination would exist in any delivered pricing system and it is highly doubtful that the defense of cost justification, at least, would be available.

While this conclusion may seem unreasonable from one point of view, since the allowance would be for no more than the actual freight saved, it seemed to the Commission to be a necessary result of using a delivered pricing system. Whenever such a seller departs from his delivered prices for the benefit of one customer, he leaves himself open to a charge of discriminating against his other competing customers who order in the same quantities and hence fall within the same pricing bracket because he failed to make allowances for the individual cost factors present in their situations. The law does not require that a seller pass on his cost savings to his customers, the Commission stated, but where he elects to do so in one instance it does require that he not discriminate between his purchasers where such discrimination has the proscribed adverse effect on competition.

Commissioner Elman did not concur. (File No. 683 7026, released Oct. 24, 1967.)

No. 148. Corsage wearing apparel under Flammable Fabrics Act

The Commission was requested to render an advisory opinion as to whether a corsage made a wood fiber chips is considered to be wearing apparel under the Flammable Fabrics Act.

The Commission has advised the requesting party that in its opinion a corsage made of wood fiber chips is an article of wearing apparel as the term "article of wearing apparel" is defined in the Flammable Fabrics Act, and is subject to the Act. (File No.

D–8217, released Nov. 7, 1967.) (Issued under authority of Section 3.61 (c) of the Commission's Rules of Practice (1967).

No. 149. Payment for recruiting new students

The Commission advised a school that it might properly offer and pay a stated sum of money to present students under the following circumstances:

At, or near, the conclusion of a course of instruction students would be supplied with cards recommending the school for distribution to their friends. When and if a recipient of one of the distributed cards contracted for, and paid the fee for, a course of study offered by the school, the student who had distributed that card would be, at his option, paid a stated sum or would have an equal sum credited against the cost of his further studies.

DISSENTING OPINION

BY JONES, *Commissioner:*

In her view this particular type of paid testimonial (where students are to receive $10 credit on tuition for every new enrollee recruited by them) without disclosing the fact of such payment is inherently deceptive. (File No. 683 7036, released Nov. 21, 1967.)

No. 150. Trade association publication of advertisements for use by members featuring range of prices to be charged consumers

The Commission advised a trade association in the home improvement field that it would probably not be illegal for the association to furnish its members with advertising featuring a range of prices to be charged consumers.

The advertisements in question were to be included in a booklet to be sent to all members and would be suitable for mailing to the members' customers. The advertisements would depict typical home improvement projects, list the specifications for the project and state a range of prices in terms of dollar amounts per month for a specified number of years. The prices would be qualified by stating that they will vary according to labor and material costs in various areas. One page of the booklet would include a schedule of financing charges for one, two, three years, etc. The advertisements would be marked "Proof" and members purchasing the booklets to send to their customers would have the option of changing any of the suggested project prices if they desire.

The opinion stated that, in general, there could be no objection to the proposal if implemented exactly as outlined above. In this connection, however, the Commission added that all involved should be aware of the dangers of suppressing or eliminating or

restraining price competition among individual builders or contractors because of the fact that prices are to be included in the advertisements. Thus, this plan would be rendered unlawful if in practice the suggested prices were used as a subterfuge or pretext for horizontal price agreements, or otherwise restraining competition, between contractors or builders in particular market areas. Special care must therefore be taken to insure that the legality of the plan is not impaired by the manner in which it is implemented. This advisory opinion is expressly predicated on the assumption that the proposal will be implemented in strict conformity with the representations made to the Commission. (File No. 683 7028, released Nov. 21, 1967.)

No. 151. Commission cannot approve substantial additional annual volume discount pricing program

The Commission advised a manufacturer it cannot approve a pricing proposal to provide customers an additional 10 percent discount on all purchases above $15,000 in volume within the calendar year. The additional discount would be granted as soon as the $15,000 volume is reached in the year. The proposal was scheduled to go into operation in 1968. The same rules would apply for each succeeding calendar year. Also, the program would provide a further discount on purchases above $25,000 in annual volume. The present pricing program is not under examination.

The manufacturer sells his products solely to nonexclusive distributors who resell them, and similar commodities produced by other suppliers, to end–users.

The Commission told the manufacturer it cannot approve the proposal because there is a strong likelihood that price discriminations in violation of Section 2(a) of the Clayton Act may result if the proposal is put into operation. The Commission pointed out that price discriminations to customers who in fact compete with each other in resale of commodities of like grade and quality would violate Section 2(a) of the Clayton Act unless cost justified or unless the lower price is a good faith meeting of a competitor's equally low price. (File No. 683 7054, released Dec. 8, 1967.)

No. 152. Product certification program

The Commission rendered and advisory opinion involving a trade association's proposed use of a certification mark which is designed to upgrade the safety and quality of a particular product.

Specifically, the Commission was requested to rule upon the following two questions:

1. Can the association require non-members to join the association as a condition precedent to using the association's patented certification mark?

2. If not, can the association charge non-members a higher fee than members for use of the mark?

In response to the first question, the Commission said that it should not grant approval to a program where the "trade association requires non-members to join the association as a condition to using the association's patented certification mark because there is at this time insufficient information to evaluate the impact on competition of such a restriction." Commenting further on the first question, the Commission sent the requesting party a copy of Advisory Opinion Digest No. 96 [70 F.T.C. 1878], dealing with a closely related situation where the Commission did give its ap-aproval to a similar program on condition that all competitors be given unrestricted and nondiscriminatory access to its certification program whether they were members of the association or not.

In response to the second question, the Commission reached the following conclusion:

> . . . non-members of the association may be charged a higher fee than members provided it represents no more than a reasonable differential to insure that members and non-members of the association alike pay an equal share of the costs necessary to support the program. In short, if members of the association by payment of dues or other assessments have borne some of the cost of the program not reflected in the certification fees charged them then the payment of that portion of the costs may be reflected in the fees charged to non-members. This advisory opinion of course can not give you more than general guidance on this matter and the question of what is a reasonable differential would have to be decided on the facts of each case.

DISSENTING OPINION

BY JONES, *Commissioner:*

I have no quarrel with the substance of the Commission's response to the applicant Association's request for an advisory opinion on two questions relating to the availability to non-members of the Association of the certification mark to be adopted by the Association relative to a particular type of safety device and to the right of the mark by non-members. However, I am dissenting from this opinion because in my view the Commission should not have responded to what are obviously peripheral aspects of the Association's certification program without full knowledge of the substantive features of the program.

The members of the applicant trade association manufacture the safety device involved. They describe their products as "high performance" ones which are used in particular fields. The certifi-

cation program which gave rise to the advisory opinion request is said to have been adopted in order to upgrade the quality of the safety device involved and to insure that no one requiring such a product places too great a reliance on an inadequate product. We do not know whether the certification mark represents minimum or maximum safety standards, nor do we know whether the product test standards being used were designed for the particular uses for which this product might be purchased. It is highly possible that a product failing to qualify under the mark may be entirely adequate for some uses though not for others. It is equally possible that a product meeting the standards might be quite inadequate for other purposes. Thus, some manufacturers who make adequate products for certain purposes might nevertheless be excluded from obtaining the mark. We also have no information on the procedures used in formulating the standards on which the mark will be based. Finally, we are not informed as to how the mark might be advertised and what the impact of the name of the standards institute which formulated the standard might have on the public's attitude towards the Association's mark.

In short, we are asked to give an opinion on a peripheral aspect of this program when the program itself, either in its conception or in its administration, might be in violation of the laws administered by this Commission. I do not believe that we should give advisory opinions under such circumstances.

Commissioner REILLY concurs with the dissenting statement. (File No. 683 7042, released Dec. 13, 1967.)

No. 153. Proposal to grant discounts for increased annual purchases

The Commission rendered an advisory opinion in which an applicant was informed a proposal to grant discounts to a certain class of customers—jobbers who bought his products for resale—to be given at the end of a sales year based on increased amounts of purchases over purchases in the preceding sales year cannot be approved because it appears on its face the proposal would violate Section 2(a) of the Clayton Act if it were put into operation. The proposal was based on the following scale:

(a) 2% discount on a 20% to 29% inclusive increase;
(b) 3% discount on a 30% to 39% inclusive increase;
(c) 4% discount on a 40% to 49% inclusive increase; and
(d) 5% discount on a 50% or more increase.

The Commission further pointed out that price discriminations to customers who in fact compete with each other in resale of commodities of like grade and quality would violate Section 2(a)

of the Clayton Act unless cost justified or unless the lower price is a good faith meeting of a competitor's equally low price. (File No. 683 7037, released Dec. 19, 1967.)

No. 154. Legality under antitrust laws of complying with State milk marketing orders

The Commission rendered an advisory opinion that a distributor who complied with a state's milk marketing order fixing the minimum resale prices of dairy products would not be subject to a charge of violating the antitrust laws.

The distributor in question did not have a warehouse in the state in question, but shipped dairy products into the state from its warehouses located in neighboring states. In most cases, the price increases required by the order issued pursuant to the state's dairy products marketing act would be significant and the distributor sells the same products at substantially lower prices to stores located in the neighboring states because competitive pressures dictate lower prices except where the higher prices are required by law.

The distributor expressed concern that by agreeing to comply with the orders of the state, it would subject itself to possible action under the Sherman Act, the Federal Trade Commission Act, or possibly even the Clayton Act, as amended by the Robinson-Patman Act, since sales will be made at different prices to purchasers in different states of commodities of like grade and quality. Hence an opinion was requested as to whether the distributor will be in violation of any of the laws administered by the Commission if it complies with the state laws fixing the minimum resale prices of dairy products.

The Commission advised that it was of the opinion that the distributor would not be subject to a charge of violating any of the laws it administers because of its compliance with the lawful orders of the state as to the minimum resale prices of dairy products. In the Commission's view, it is well settled that the antitrust laws have application to the actions of individuals, partnerships and corporations and not to the activities of a state. While a state may not authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful, it may, in the exercise of its sovereign power, itself conduct such regulation of business activities within its borders as its own legislature shall properly deem necessary in the public interest. So long as the resulting regulation is a state as opposed to individual activity, those subject to the regulation would not be subject to a charge of

violating the antitrust laws by reason of their compliance with the state's orders. (File No. 683 7044, released Dec. 22, 1967.)

No. 155. Varying discount price schedule—distributor recruitment through grant of override

The Federal Trade Commission advised a manufacturer of household products that his proposed varying discount price schedule and his proposed granting of bonus payments to recruiting distributors on the business of distributors whom they recruit would, under the facts presented, in all probability result in violation of both Section 2(a) of the amended Clayton Act and Section 5 of the Federal Trade Commission Act.

The manufacturer proposed to appoint as independent distributors such persons as would buy the requisite amount of inventory. Initial sales to such distributors would be at 33⅓ percent of the manufacturer's suggested prices for his products. Incentive bonuses, computed at from 5 percent to 60 percent of the value of their purchases, increasing as the value of purchases increased, would be paid from time to time to the distributors. Distributors would be encouraged to recruit additional distributors who would also make a capital investment in inventory. A recruiting distributor would be given at 10 percent to 12 percent override on the dollar volume of purchases of any distributor whom he had recruited.

The Commission noted that because of the nature of the plan it was almost inevitable that very wide differences in prices would be charged customers, some of whom would, by reasonable assumption, be competitive with others. These differences would be so great that the anti-competitive effects made unlawful by the amended Clayton Act would almost certainly follow.

In addition, it is clear from the facts presented that the requesting party contemplates that the so-called independent distributors would be for the most part selling at retail. The marketing plan is not primarily designed as an offer to knowledgeable businessmen, competent to weight and evaluate commercial risks. It is designed, rather, to appeal to uninformed members of the general public, unaware of and unadvised of, the true nature of the risks run—persons with limited capital who are led to part with that capital by promise and hopes which are seldom, if ever, fulfilled. A particular vice of the plan is that part which provides override bonuses for recruited distributors. Implicit in such an arrangement is the promise, rarely if ever kept, that the recruiting distributor can, without himself working, profit greatly from the work of others. (File No. 683 7043, released Dec. 29, 1967.)

No. 156. Origin of toilet preparations

The Commission rendered an advisory opinion in regard to the legality of using foreign words indicating French origin in the brand name of a toilet preparation, where the product is blended in the United States with domestic alcohol and French oils. Specifically involved in the opinion was the propriety of using foreign words in the brand name of the product immediately followed by the following qualification—"BLENDED WITH FRENCH OILS IN USA."

In its opinion, the Commission said that the question posed is governed by Rule 3(b) of trade practice rules for the Cosmetic and Toilet Preparations Industry. "This rule," the Commission said, "specifically forbids the use of any foreign word or depiction in the brand name of a toilet preparation which may tend to convey the erroneous impression that the product is made wholly in a foreign country, unless a conspicuous disclosure is made in close conjunction therewith of the fact that such product was blended in the United States."

Concluding its opinion, the Commission said:

> . . . the proposed disclosure, "BLENDED WITH FRENCH OILS IN USA," would meet the requirements of Rule 3(b) as an adequate qualification of a French brand name to describe a product blended in the United States with domestic alcohol and French oils. It is not necessary to disclose the presence of French oils, but this diclosure is permissible so long as the statement is factually true.

(File No. 683 7061, released Dec. 29, 1967.)

TABLE OF COMMODITIES[1]

DECISIONS AND ORDERS

[1] Commodities involved in dismissing or vacating orders are indicated by *italicized* page reference.

Decisions and Orders

Decisions and Orders

ADVISORY OPINION DIGESTS

INDEX[1]

DECISIONS AND ORDERS

[1] Covering practices and matters involved in Commission orders. For index of commodities, *see* Table of Commodities. References to matters involved in vacating or dismissing orders are indicated by *italics*.

Decisions and Orders

Decisions and Orders

Decisions and Orders

Decisions and Orders

Decisions and Orders

Decisions and Orders

ADVISORY OPINION DIGESTS

Decisions and Orders

Decisions and Orders

INDEX

ADVISORY OPINION DIGESTS

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