It is ordered, That the respondent's appeal from the hearing examiner's order of April 2, 1958, be, and it hereby is, denied.

It is further ordered, That the respondent's motion to dismiss the complaint be, and it hereby is, also denied, without prejudice, however, to the right of the respondent to renew said motion after introduction of all of the evidence in the case.

NATIONAL RESEARCH CO. ET AL.

Docket 6236. Order and Opinion, May 22, 1958

Order remanding case to hearing examiner to consider whether changes in conditions of law or fact, or the public interest, require modification of desist order.

OPINION OF THE COMMISSION

By GWYNNE, Chairman:

This matter is before the Commission on a notice and opportunity for hearing in the matter of modification of the order heretofore entered. Both parties have presented written briefs and oral arguments.

The original complaint charged respondents with violation of the Federal Trade Commission Act by engaging in unfair and deceptive acts and practices through the dissemination and use of "skip tracing" forms. After a hearing, the hearing examiner found against respondents and entered an order requiring respondents to cease and desist from:

(1) Using or placing in the hands of others for use, any form, questionnaire, or other material, printed or written, which represents, directly or by implication, that the purpose for which the information is requested is other than that of obtaining information concerning delinquent debtors;

(2) Representing, or placing in the hands of others any means of representing, directly or by implication, that money is being held for or is due, persons concerning whom information is sought, or is collectible by such persons, unless money is in fact due and collectible by such persons and the amount of such money is accurately stated;

(3) Using the terms "Claims Office," "Reverification Office," or "United States Credit Control Bureau" or the picturization of an eagle, or any other word or phrase, or picturization of similar import to designate, describe or refer to respondent's business; or otherwise representing, directly or by implication, that requests for information concerning delinquent debtors are from the U.S. Government or any agency or branch thereof, or that their business is in any way connected with the U.S. Government;

(4) Using the name "New Employment Status Questionnaire," or any other name of similar import to designate, describe, or refer to respondents' business; or otherwise representing directly or by implication that respondents' business is that of gathering and furnishing information relative to employment;

(5) Using the name "Disbursements Office," or any other name of similar import to designate, describe or refer to respondents' business; or otherwise representing, directly or by implication, that money has been deposited with them

for persons from whom information is requested, unless or until the money has in fact been so deposited, and then only when the amount so deposited is clearly and expressly stated;

(6) Using the name "Cigarette and Tobacco Research Bureau," or "National Gasoline Research Bureau," or any other name of similar import to designate, describe or refer to respondent's business; or otherwise representing, directly or by implication, that respondents are a research bureau, or are engaged in research.

Counsel supporting the complaint urges that the Commission reopen the proceedings and modify the order as set forth in its notice and opportunity for hearing. Respondents' answer, among other matters, denies the jurisdiction of the Commission to so modify such order, because there is no showing since the issuance of the original order that there are changed conditions of fact or of law, or that the public interest requires the reopening and modification, and requests that a hearing be granted before the Commission in respect to the proposed modification.

Section 5(b) of the Federal Trade Commission Act provides in part:

Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of theUnited States, as hereinafter provided, the Commission 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. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require:

Clayton Act orders do not become final merely by lapse of time. Consequently, that Act contains the following provision as to modification:

Until a transcript of the record in such hearing shall have been filed in a U.S. court of appeals, as hereinafter provided, the Commission 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 of any order made or issued by it under this section.

See also *In the Matter of National Biscuit Co.*, docket No. 5013.

The Federal Trade Commission Act's provision for modification was considered by the court in *American Drug Corp.* v. *Federal Trade Commission* (1944) 149 F. 2d 608. There, the Commission, in 1934, had issued an order against respondent. In 1944, the staff of the Commission moved to set aside the order and dismiss the complaint without prejudice. In response to a show cause order, respondent filed a return, challenging the jurisdiction of the Commission to set

aside its earlier order on the ground that such action was not in the public interest. The Commission set aside its 1934 order and dismissed the complaint without prejudice, from which the appeal to the court was taken. The Commission moved to dismiss the appeal on the grounds (a) that the court had no jurisdiction to review the order, and (b) that respondent was in no way aggrieved by the order. The court held it did have jurisdiction and, as to (b), held as follows:

Whether the petitioner is aggrieved by this order depends upon the merits of the controversy and is not open to us upon this motion to dismiss.

While these were the only matters actually decided, nevertheless, the following from the court's opinion indicates the procedure to be followed by the Commission in these matters:

Subsection (b) provides that until the time allowed for filing a petition for review has passed or until the transcript of the record in the proceeding has been filed in the circuit court in a review proceeding, the Commission may at any time upon 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." This subsection further provides that if no petition for review has been filed within the allowable time, the Commission may, at any time, "after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require." The just quoted provision as to reopening carries a proviso "that the said person, partnership, or corporation may, within 60 days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section."

The just quoted proviso seems to settle the right of this petitioner to file a petition for review. Here no petition for review had been filed to the order of 1934 and the time for such filing had long expired. In this situation the statute clearly gives the Commission the power at any time to "reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section." However, the sentence governs such action by the Commission in two respects: (1) it requires the opinion of the Commission as to changed conditions of fact or law or the opinion of the Commission that the public interest requires the exercise of such power; and (2) it requires that the exercise of such power be only "after notice and opportunity for hearing." Acting under these conditions and limitations the Commission may reach any result it deems proper. Among these specifically authorized results are to "set aside, in whole or in part, any report or order made or issued by it under this section." What the Commission has done here is to set aside in whole the order made by it in 1934. Whether it took that action because of changed conditions of fact or law or because the public interest so required is not revealed in the papers now before the court. But whatever may have prompted its action, the before quoted proviso expressly gives the right to review to the petitioner from this "order entered after such a reopening."

Obviously, changed conditions of fact or of law may be contestable issues. No less true is the issue of whether such action is required by "the public interest" (*Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 23, 27, 30) [13 F.T.C. 581; 1 S. & D. 1166].

In the instant case, no petition has been filed for review of the original decision and order and the time therefor had expired prior to the application for modification.

Since the effective date of the order, respondents have been using some new forms. Counsel for the complaint claims that there is difficulty and confusion in securing compliance, that the public is still being deceived, and that the language of the order appears to be susceptible of interpretation contrary to the real intent and purpose of the Commission in using it. Some of these claims are controverted by respondents.

The Commission concludes that further consideration should be given to the question of whether changed conditions of fact or of law or the public interest require that the original order entered herein be reopened, altered, modified, or set aside in whole or in part.

The case is remanded to the hearing examiner for the holding of such hearings as may be necessary, and for consideration and report with recommendation to the Commission for its determination of the question above referred to.

ORDER REMANDING CASE TO HEARING EXAMINER

This matter having been heard on briefs and oral arguments of counsel in support of and in opposition to a proposal for alteration of the outstanding order to cease and desist by a modification of paragraph 1 thereof in the manner designated in a notice and opportunity for hearing issued February 6, 1958; and

The Commission, for reasons set forth in its accompanying opinion, having determined that further consideration should be given to the question of whether conditions of law or fact have so changed as to require such action or if the public interest so requires:

It is ordered, That this case be, and it hereby is, remanded to Hearing Examiner Abner E. Lipscomb for the purpose of receiving such evidence as may be offered with respect to said question.

It is further ordered, That the hearings shall be conducted in accordance with the Commission's rules of practice for adjudicative proceedings insofar as such rules are applicable; that the hearing examiner shall have all the powers and duties as provided for in section 3.15 of said rules, except that of making and filing an initial decision; and that the respondent shall have the usual rights of due notice, cross-examination and the presentation of evidence in rebuttal.

It is further ordered, That the hearings shall be held at such times and at such places as the hearing examiner may designate, the initial hearing to be held on a day at least thirty (30) days after service of notice thereof on the respondent.