

IN THE MATTER OF
KENNEBEC MILLS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket 7353. Complaint, Jan. 9, 1959—Decision, June 27, 1959

Consent order requiring two affiliated manufacturers with offices in Fairfield, Maine, and New York City, respectively to cease violating the Wool Products Labeling Act by tagging as "50% reprocessed wool, 50% wool," fabrics which contained a substantial quantity of fibers other than wool, and by failing to label certain wool products as required.

Mr. Garland S. Ferguson for the Commission.

Mr. Frederick E. M. Ballon, of New York, N.Y., for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated January 9, 1959, the respondents are charged with violating the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act and the Rules and Regulations made pursuant thereto.

On May 7, 1959, the respondents and their attorney entered into an agreement with counsel in support of the complaint for a consent order.

Under the foregoing agreement, the respondents admit the jurisdictional facts alleged in the complaint. The parties agree, among other things, that the cease and desist order there set forth may be entered without further notice and have the same force and effect as if entered after a full hearing and the document includes a waiver by the respondents of all rights to challenge or contest the validity of the order issuing in accordance therewith. The agreement further recites that it is for settlement purposes only and does not constitute an admission by the respondents that they have violated the law as alleged on the complaint.

The hearing examiner finds that the content of the agreement meets all of the requirements of Section 3.25(b) of the Rules of the Commission.

The hearing examiner being of the opinion that the agreement and the proposed order provide an appropriate basis for disposition of this proceeding as to all of the parties, the agreement is hereby accepted and it is ordered that the agreement shall not become a part of the official record of the proceeding

2024

Order

unless and until it becomes a part of the decision of the Commission. The following jurisdictional findings are made and the following order issued.

1. Respondent Kennebec Mills Corporation is a corporation existing and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business located at Fairfield, Maine.

Respondent R. G. Fromkin Co., Inc. is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 450 Seventh Avenue, New York, N.Y.

Respondent Robert G. Fromkin is an individual and an officer of said corporations. He formulates, directs and controls the policies and practices of the corporate respondents. The address of the individual respondent is the same as that of the corporate respondent R. G. Fromkin Co., Inc.

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 Kennebec Mills Corporation, a corporation, and its officers, and R. G. Fromkin Co., Inc., a corporation, and its officers, and Robert G. Fromkin, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act and the Wool Products Labeling Act of 1939 of woolen fabrics or other "wool products" as such products are defined in, and subject to the said Wool Products Labeling Act, do forthwith cease and desist from misbranding such products by:

1. Falsely or deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amounts of the constituent fibers contained therein.

2. Failing to securely affix to or place on each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner:

(a) The percentage of the total weight of such wool product, exclusive of ornamentation not exceeding five percentum of said

Decision

55 F.T.C.

total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool where said percentage, by weight of such fiber, is five percentum or more, and (5) the aggregate of all other fibers;

(b) The maximum percentage of the total weight of such wool product of any nonfibrous loading, filling, or adulterating matter;

(c) The name or the registered identification number of the manufacturer of such wool product or of one or more persons engaged in introducing such wool product into commerce, or in the offering for sale, sale, transportation, distribution or delivery for shipment thereof in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Kennebec Mills Corporation, a corporation, and its officers, and R. G. Fromkin Co., Inc., a corporation, and its officers, and Robert G. Fromkin, individually and as an officer of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of woolen fabrics or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the constituent fibers of which their products are composed or the percentages or amounts thereof, in sales invoices, shipping memoranda, or in any other manner.

DECISION OF THE COMMISSION AND ORDER TO FILE
REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 27th day of June 1959, become the decision of the Commission; and, accordingly:

It is 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 the order to cease and desist.

INTERLOCUTORY ORDERS, ETC.

SHEFFIELD MERCHANDISE, INC., ET AL. Docket 6627.
Order and opinion, July 7, 1958.

Order vacating hearing examiner's dismissal, based on abandonment of challenged practices prior to complaint, and remanding case for further proceedings.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner :

Complaint in this proceeding issued September 11, 1956, charging respondents with violation of the Federal Trade Commission Act in two respects. One was the deceptive use of the word "jeweled" on the faces of one-jewel watches and in advertising material, it being alleged that a jeweled watch is generally understood to be one containing at least seven jewels serving as frictional bearings. The other was misrepresentation through use of the term "guaranteed for one year" without adequate disclosure of the terms, conditions and limitations of the guarantee. The hearing examiner in an initial decision dated May 5, 1958, granted respondents' motion to dismiss and found that respondents abandoned the practices about five months prior to issuance of the complaint; that there is no likelihood that the practices will be resumed; and that everything which could be accomplished by a cease and desist order has already been accomplished by the voluntary act of respondents.

The Commission is of the opinion that the hearing examiner was in error in dismissing the complaint. The initial decision is, therefore, being vacated and the case remanded for further proceedings for the following reasons:

The Commission disagrees with the hearing examiner's application of the principles heretofore announced in the *Argus Cameras, Inc.* (D. 6199), *Wildroot Company, Inc.* (D. 5928), and *Bell & Howell Co.* (D. 6729) cases. In the *Argus Cameras* case, Chairman Gwynne, speaking for the Commission, stated:

"Dismissal of a complaint in cases of this general character is not the usual procedure. It should not be done unless there is a clear showing of unusual circumstances which in the interest of justice require it. Those circumstances exist in this case."

What are the circumstances in the instant case? Respondents admittedly engaged in the practices questioned in this proceeding and had done so over a considerable period. The practices were widespread in the industry and apparently were adopted by respondents for business and competitive reasons. Investigation of respondents was commenced in 1953 and respondents certainly were aware of the Commission's "hand upon their shoulders" and the reasons therefor. Assuming that discontinuance occurred as contended, respondents have never unequivocally receded from their position that use of the practices involved did not result in deception of confiding buyers. Furthermore, there is not present in the situation surrounding the abandonment the "unusual circumstances" which obtained in the *Argus Cameras* and other cases referred to in the initial decision upon which dismissal of the complaint here can be justified. In those cases, the Commission had definite assurances, by reason of existing industry-wide business conditions and other circumstances, that the practices involved surely would not be resumed. In the instant case, we have the promise of respondents that certain practices will not be engaged in again. That promise, though given in good faith, must be weighed in the light of attending facts, including the continued existence in the industry of the practices that led respondents initially to employ the questioned representations. In such setting, respondents for compelling competitive reasons would be free again to adopt the same or similar practices, absent some effective legal restraint. Clearly, in such a situation, the Commission would be remiss in its duty to prevent deceptive and misleading practices in their incipiency if in reliance on a mere promise not to resume questioned acts, it dismissed the complaint.¹ As the court stated in *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F. 2d 273 (C.A. 3, 1952), where discontinuance had been effected two years before issuance of the complaint:

"Petitioner's sole objection * * * is that its former practice * * * was discontinued in 1941, 2 years before the Commission's complaint was filed in this proceeding. Petitioner alleged in its answer to the complaint that it has no intention of resuming that practice but there is no specific testimony to that effect. We see no reason why even if there had been the Commission

¹ *Sears Roebuck & Co. v. Federal Trade Commission*, 258 Fed. 307 (C.A. 7, 1919); *Moir, et al. v. Federal Trade Commission*, 12 F.2d 22 (C.A. 1, 1926); *Perma-Maid, Inc. v. Federal Trade Commission*, 121 F.2d 232 (C.A. 6, 1941).

would have been bound simply by the promise of the petitioner."²

In a situation where practices were discontinued shortly before complaint issued, the Commission's cease and desist order was affirmed in *Hershey Chocolate Corp. v. Federal Trade Commission*, cited n. 2, where the Court said:

"The Commission would have no power at all if it lost jurisdiction every time a competitor halted an unfair practice just as the Commission was about to act. The practice may have been discontinued but without the Commission's order it could be immediately resumed." [at page 971]

Let it be clearly understood that we are not adjudicating here the merits of this case. The Commission, "having reason to believe" that respondents' practices were violative of the Federal Trade Commission Act, issued its complaint pursuant to that Act. Respondents answered, stating that the purchasing public understands a jeweled movement to be one that contains one or more jewels serving a functional purpose and denied that through their use of the word "jeweled" they represented, directly or by implication, that their watches contained at least seven jewels, as alleged in the complaint. There is no evidence of record to permit determination of the issue. Nor has there been any determination by the hearing examiner of the adequacy of disclosure of the terms and conditions of respondents' guarantee; and none is intended to be made here.

As indicated above, the Commission through issuance of its complaint made its administrative determination that the public-interest requires the disposition of this matter by adversary proceedings. By its order of July 23, 1957, denying respondents' motion to refer the proceeding to the Division of Stipulations, the Commission reaffirmed that decision and it is still of the opinion that the issues as to "jeweled" and the use of the term "guarantee," still remaining unlitigated, should be resolved on the basis of available evidence.

Respondents in advancing their motion to dismiss before the hearing examiner rely upon *Stokely Van Camp, Inc. v. Federal Trade Commission*, 246 F. 2d 458 (C.A. 7, 1957). We think that case is readily distinguishable from the circumstances presented

² See also *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U.S. 257, 260 (1938); *Hershey Chocolate Corp. v. Federal Trade Commission*, 121 F.2d 968, 971 (C.A. 3, 1941); *Consumer Sales Corp. v. Federal Trade Commission*, 198 F.2d 404, 407 (C.A. 2, 1952), cert. denied 344 U.S. 912 (1953); *Consolidated Royal Chemical Corp. v. Federal Trade Commission*, 191 F.2d 896, 900 (C.A. 7, 1951); *Keaseby and Mattison Co. v. Federal Trade Commission*, 159 F.2d 940, 952 (C.A. 6, 1947).

in the instant proceeding and that it applies recognized legal principles to an entirely different situation than we have here.

In the order to accompany this opinion, the initial decision will be vacated and set aside and the case remanded to the hearing examiner for further proceedings consistent with this opinion.

ORDER VACATING INITIAL DECISION AND REMANDING
CASE TO HEARING EXAMINER

It appearing that the hearing examiner filed, on May 5, 1958, an initial decision dismissing the complaint in this proceeding; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the hearing examiner was in error in dismissing the complaint:

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

It is further ordered, That this case be, and it hereby is, remanded to the hearing examiner for further proceedings.

GULF OIL CORPORATION. Docket 6689. Order and opinion, July 8, 1958.

Interlocutory order remanding respondent's motion alleging undue delay in presenting case-in-chief, transmitted by hearing examiner to Commission as raising issues beyond his authority to rule upon.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

The respondent filed a motion alleging undue delay by staff counsel in presenting the case-in-chief and requesting that the hearing examiner order that submission of proof in support of the complaint be closed, or, alternatively, that an early date for termination of evidence be fixed by him. Counsel supporting the complaint then filed their answer in opposition denying various of the motion's averments. Under the order filed by him on May 19, 1958, the hearing examiner transmitted the motion to the Commission for its disposition as one raising issues and asking relief beyond his authority to rule upon.

Section 3.8 of the Commission's Rules prescribes that during pendency of proceedings before hearing examiners, all motions, except for one category not here material, shall be addressed to and ruled upon by the hearing examiner. A companion rule, §3.15, confers authority on such officers to regulate the course of

hearings and to rule upon procedural motions. The hearing examiner, therefore, erred in concluding that he lacked power to rule upon the merits of the respondent's motion. The motion accordingly is being remanded to the hearing examiner for disposition.

We note that this proceeding has been marked by the filing of an unusually large number of requests for us to consider various aspects of the case prior to final decision. The considerations of public policy militating against piecemeal adjudications are obvious and require no further comment. The Commission's Rules accordingly contemplate that rulings within the jurisdiction of the hearing examiner be made by him and that such rulings be accepted by the parties as governing except in unusual circumstances. Illustrating this is the fact that the category of interlocutory appeals qualifying to be granted under §3.20 of the Rules is a limited one. Hence, routine recourse to the Commission by interlocutory appeal or similarly authorized procedures prior to presentation of cases for final determination departs from the spirit of the rules.

ORDER REMANDING MOTION TO HEARING EXAMINER

The Commission having determined, for reasons stated in the accompanying opinion, that the hearing examiner erred in holding that he lacked authority to rule on the motion transmitted to the Commission for its consideration under his order filed on May 19, 1958:

It is ordered, That such motion be, and it hereby is, remanded to the hearing examiner.

MYTINGER & CASSELBERRY, INC., ET AL. Docket 6962.
Order and opinion, July 15, 1958.

Interlocutory order denying respondents' appeal from hearing examiner's order granting complaint counsel's motion for modification of order directing compliance with modified subpoena duces tecum.

ON INTERLOCUTORY APPEAL

By the COMMISSION:

Counsel for respondents have appealed from the hearing examiner's order of May 22, 1958, granting the motion of counsel supporting the complaint for reconsideration and modification of an order directing compliance by respondents with a modified subpoena duces tecum. Counsel supporting the complaint answered and respondent filed a reply thereto. The order appealed from directs compliance with a previously modified subpoena

duces tecum and substitutes two paragraphs for three items of the original subpoena which have been quashed. The two substitute paragraphs require respondents to produce the originals, or copies, of statements of policy and instructions and correspondence which the corporate respondent has issued, or received, during 1954 to 1957 with regard to implementation and enforcement of its alleged policy of exclusive dealing. The scope of time coverage is two years shorter than in other items of the modified subpoena which respondents do not now contend to be unreasonable and from which no appeal has been taken.

Respondents argue that the two substitute paragraphs are vague, ambiguous, oppressive, burdensome and unreasonable, and constitute an improper attempt to use a subpoena for purposes of discovery.

The hearing examiner's ruling recognizes that compliance with the substitute paragraphs will impose a burden upon the respondents, but concludes that the modified requests are clearer and less burdensome than the quashed items of the original subpoena and expresses the view that the records sought are sufficiently relevant and material to the issues herein to justify the difficulties involved in producing them. The examiner was of the further opinion that such records should facilitate a just adjudication of this proceeding.

Under Section 9 of the Federal Trade Commission Act¹, the Commission has clear statutory authority to require by subpoena the production of documentary evidence of any corporation being investigated or proceeded against. This authority extends to proceedings initiated under that Act and under the Clayton Act, as amended.² *John T. Menzies v. Federal Trade Commission*, 242 F. 2d 81 (C.A. 4, 1957). The complaint in this proceeding is in three counts. Count I charges violation of Section 3 of the Clayton Act. Count II charges violation of Section 5 of the Federal Trade Commission Act. Both Count I and Count II involve alleged exclusive dealing. Count III charges violation of Section 5 of the Federal Trade Commission Act through misrepresentation of the effect of a consent decree of injunction issued by the United States District Court for the Southern District of California. The specifications of the modified subpoena with which we are concerned here relate only to Counts I and II of the complaint.

Clearly, the documents sought under the contested items of

¹ 15 U.S.C.A. 49.

² 15 U.S.C.A. 12-27.

the subpoena are sought for a lawful purpose and are relevant and material to the issues of respondents' alleged policy of exclusive dealing and the enforcement of that policy. The period of time covered is reasonable, and the documents are specified with reasonable particularity. This is apparent both on the face of the subpoena and from the allegations of the complaint. Under such circumstances, respondents' contentions must be rejected. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943); *Oklahoma Press Publishing Company v. Walling*, 327 U.S. 186 (1946); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

Like the examiner, the Commission is aware of the fact that compliance with the modified subpoena may be burdensome to some extent, but does not believe it will be oppressively so. Compliance therewith is but a concomitant of adjudicatory proceedings of the nature here involved.

Respondents' appeal from the hearing examiner's order of May 22, 1958, should be denied. The Commission having further concluded that no good purpose would be served by oral argument, respondents' request therefor will also be denied. An appropriate order will be entered.

ORDER DENYING INTERLOCUTORY APPEAL

The respondents having filed an interlocutory appeal from the hearing examiner's order of May 22, 1958, granting the motion of counsel supporting the complaint for reconsideration and modification of an order directing compliance by respondents with a modified subpoena duces tecum; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the ruling appealed from is not erroneous:

It is ordered, That respondents' appeal and their request for oral argument thereon be, and they hereby are, denied.

NATIONAL DAIRY PRODUCTS CORP. Docket 7018. Order, July 17, 1958.

Interlocutory order sustaining hearing examiner's denial of respondent's motion for leave to amend answer to protest against Commission's entry of desist order without issuing like orders simultaneously against its competitors.

The respondent having filed an interlocutory appeal from the hearing examiner's ruling of June 18, 1958, denying respondent's motion for leave to amend its answer to the complaint; and

It appearing that the proposed amendment consists of allegations that practices similar to those set forth in the complaint are widely employed by respondent's competitors and that respondent would be seriously injured if the Commission should enter a cease and desist order requiring it to discontinue such practices without issuing like orders simultaneously against its competitors; and

It further appearing that such allegations even if established by proof would not constitute a defense to the charges of the complaint; and

The Commission being of the opinion that the respondent's appeal, being directed to the Commission's administrative discretion, is not one to be granted under §3.20 of the Rules of Practice:

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

THE TEXAS CO. Docket 6898. Order, July 29, 1958.

Interlocutory order sustaining denial of motion to quash subpoena duces tecum on ground that counsel had stipulated that production of documents in question would not be required.

Counsel for respondent having filed an interlocutory appeal from the hearing examiner's refusal to quash a subpoena duces tecum calling for production of certain documents in respondent's possession upon the principal ground that counsel had stipulated in writing that production of such documents would not be required; and

The Commission having examined the exchange of correspondence between counsel, purporting to embody the aforesaid stipulation, and the pertinent portions of the transcript of record relative thereto, and having concluded that said stipulation was not intended to, and by its terms does not, preclude counsel supporting the complaint, at the proper time and through appropriate process, from seeking production of the documents included in the specifications of the subpoena duces tecum:

It is ordered, That respondent's appeal from the hearing examiner's ruling denying respondent's motion to quash the subpoena duces tecum be, and it hereby is, denied.

LURIA BROTHERS & COMPANY, INC., ET AL. Docket 6156. Order and opinion, July 30, 1958.

Interlocutory order denying complaint counsel's appeal from hearing examiner's rulings closing case before disposing of motions to strike evidence and requiring complaint counsel's findings to be filed before respondents'.

OPINION OF THE COMMISSION

By the COMMISSION:

When closing the record for the reception of evidence, the hearing examiner allotted counsel supporting the complaint four months' time within which to file their proposed findings and conclusions. The hearing examiner accorded the respondents six months' time for that purpose and additionally granted the respondents leave within that period to make or renew motions to strike certain evidence which had been received into the record over their objections. The appeal asks reversal of the action closing the case without disposing of all motions to strike evidence and of the action requiring that suggested findings be filed by counsel supporting the complaint prior to the date when respondents' proposals and motions are due to be submitted. These rulings, the appeal contends, violate basic concepts of orderly procedure and due process.

Orderly trial procedure ordinarily entails timely rulings on motions to strike prior to submission of the case for decision on its merits. At any stage of proceedings pending before them, however, hearing examiners may duly entertain requests for reconsideration of prior evidentiary rulings when warranted by the circumstances. Here, the examiner decided to defer the filing of motions to strike and to decline to rule thereon until after the case was closed. He attempted to eliminate cause for a renewal and reargument of respondents' prior exceptions to rulings on the reception of evidence. Throughout his rulings the hearing examiner laid stress upon the unusual number of severable allegations set forth in the Commission's complaint and the resulting complexity of the issues. He emphasized the need of having the evidence adduced during course of trial, and to be relied upon by counsel in support of the complaint, directed to and connected up with the issues to which it may be deemed relevant. The hearing examiner considered that the course taken by him in these circumstances would expedite the proceeding and be of material aid in rendering a sound decision on the merits.

It is true, as argued by counsel supporting the complaint, that if subsequently filed motions to strike are ruled upon adversely to them, the record for decision will differ from that existing when the proceeding was closed and submitted for decision. In such case, however, counsel would not be foreclosed on appeal from pressing exceptions to those rulings, irrespective of the manner of disposition by the hearing examiner of any motion to

reopen filed in recognition of rulings striking evidence. We do not believe, in the circumstances here presented, that the ruling closing the record and permitting filing of motions to strike contemporaneously with submission of respondents' proposed findings affected counsel's substantial rights or prejudicially departed from orderly procedure. This aspect of the appeal, accordingly, is denied.

Under the companion ruling to which the appeal likewise excepts, the hearing examiner, as previously noted, accorded the respondents six months' time for filing of their proposed findings; and, to counsel supporting the complaint, who had suggested at the outset that three months be allotted, the hearing examiner granted four months. Parties are authorized under §3.19 of the Commission's Rules to file their respective proposed findings at the close of the reception of evidence or "within a reasonable time thereafter" as fixed by the hearing examiner. Both periods fixed under the ruling exceed those customarily granted in Commission proceedings. However, the appeal's exceptions center on the time disparity feature. Inasmuch as the ruling is not attacked as according an unreasonable time for the submissions, the question of whether it essentially serves to prolong the proceeding unduly is not before us for review and not decided.

The appeal contends that the failure to fix the same expiration date for filing of proposals by all parties contravenes the Commission's rule and that the time afforded respondents handicaps counsel supporting the complaint in the presentation of their case. The fact that the respondents may be enabled to prepare their proposals in the form of counter-findings does not, however, deny counsel supporting the complaint opportunity to fully present their case. The rule itself does not require that the time fixed permit simultaneous filings by parties. It is, however, equitable and proper that parties be afforded equal time, running concurrently, for the submission of suggested findings. This has been the customary practice in Commission proceedings and it is one to be departed from only in unusual circumstances. While recognizing this, the hearing examiner deemed another course warranted by exigencies of the case and his statement in that regard included the following:

"The complaint is very involved. * * *

"* * * My impression at this time is that with respect to some of the allegations there is either no evidence or very, very marginal evidence. * * *

"I think that we can proceed more expeditiously in the long

run if we have counsel supporting the complaint file their proposals and have counsel for respondents file their answering or reply proposals—counter proposals. * * *

“* * * if I were to require you both to file your proposals at the same time, insofar as respondents are concerned they would be shooting somewhat in the dark and having to anticipate what your proposals would be—that is counsel supporting the complaint’s proposals—and I would feel obligated to permit an additional time thereafter for answering proposals. I think under all circumstances that I am going to fix a time for the filing of the proposals by counsel supporting the complaint, fix an additional time thereafter within which counsel for respondents shall file their counter proposals.”

The ruling clearly related to matters committed to the sound discretion of the hearing examiner. We cannot say that his action constituted an abuse of any discretionary limitations. This aspect of the interlocutory appeal accordingly is denied.

The appeal additionally excepts to the hearing examiner’s order of May 7, 1958, denying the motion of counsel supporting the complaint to reconsider a prior ruling concerning Commission Exhibit 985. In the original ruling, the hearing examiner indicated he would grant a motion by respondents to strike such exhibit unless its underlying records were made available to respondents; and it appears from the appeal and respondents’ answers that those data were duly made available for consideration. Hence, the hearing examiner has not stricken the exhibit and the contingency apparently is foreclosed which he stated would warrant its striking. Because the ruling nowise involves substantial rights affecting final decision, this part of the appeal also is denied.

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

ORDER DENYING INTERLOCUTORY APPEAL

This matter having come on for hearing upon the interlocutory appeal filed by counsel supporting the complaint from rulings contained in two orders filed by the hearing examiner on May 7, 1958, and upon the answers of respondents in opposition to the appeal; and

The Commission having determined, for reasons stated in the accompanying opinion, that the appeal should not be granted.

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

Commissioner Kern not participating.

EXQUISITE FORM BRASSIERE, INC. Docket 6966. Order, Aug. 1, 1958.

Order granting motion of complaint counsel, certified by the hearing examiner, and ordering complaint amended and supplemented by adding charges of violation of Section 2(e) of the Clayton Act.

This matter having come on to be heard upon the motion certified by the hearing examiner to the Commission for its determination, which motion was filed by counsel supporting the complaint and requested, among other things, that the Commission amend and supplement its complaint in this proceeding by adding allegations charging that the respondent has violated subsection (e) of Section 2 of the Clayton Act, as amended; and

The Commission having duly considered the motion and the respondent's answer in opposition thereto, and it appearing that the record contains information constituting adequate grounds for preliminary administrative determinations or "reason to believe" that the respondent has furnished the services of special personnel, known as "stylists," to some of its purchasers and has not accorded such services or facilities to other purchasers upon proportionally equal terms, in violation of the public policy expressed in subsection (e) of Section 2 of the Clayton Act, as amended; and

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

It is ordered, That the motion be, and it hereby is, granted.

It is further ordered, That the amended and supplemental complaint of the Commission issue herewith and be served upon the respondent Exquisite Form Brassiere, Inc.

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

INDIANA FUR CO., INC. Docket 6585. Order, Aug. 15, 1958.

Order denying, as untimely, petition requesting modification of desist order in fur products case to conform to Seventh Circuit's decision in *Mandel Brothers, Inc.*, case pending in the Supreme Court on review.

Respondents having filed a petition requesting the Commission to reopen this proceeding and modify the cease and desist order contained in the initial decision, which was adopted as the decision of the Commission on December 27, 1957, so as to conform the order to the judgment of the United States Court of Appeal for the Seventh Circuit, entered in the case of *Mandel Brothers, Inc. v. Federal Trade Commission* on April 1, 1958 (254 F. 2d 18); and

It appearing that the case of *Mandel Brothers, Inc. v. Federal Trade Commission* is now pending in the United States Supreme Court on a petition for a writ of certiorari to review the afore-said judgment; and

The Commission being of the opinion that respondents' petition is untimely:

It is ordered, That said petition be, and it hereby is, denied, without prejudice, however, to respondents' right to renew it if and when the judgment of the Court of Appeals for the Seventh Circuit in the *Mandel Brothers* case becomes final.

GLICKMAN BROTHERS. Docket 6713. Order, Aug. 15, 1958.

Order denying, as untimely, petition requesting modification of desist order in fur products case to conform to Seventh Circuit's decision in *Mandel Brothers, Inc.*, case pending in the Supreme Court on review.

Respondents having filed a petition requesting the Commission to reopen this proceeding and modify the cease and desist order contained in the initial decision, which was adopted as the decision of the Commission on December 27, 1957, so as to conform the order to the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the case of *Mandel Brothers, Inc. v. Federal Trade Commission* on April 1, 1958 (254 F. 2d 18); and

It appearing that the case of *Mandel Brothers, Inc. v. Federal Trade Commission* is now pending in the United States Supreme Court on a petition for a writ of certiorari to review the afore-said judgment; and

The Commission being of the opinion that respondents' petition is untimely:

It is ordered, That said petition be, and it hereby is, denied, without prejudice, however, to respondents' right to renew it if and when the judgment of the Court of Appeals for the Seventh Circuit in the *Mandel Brothers* case becomes final.

REYNOLDS METALS CO. Docket 7009. Order, Aug. 21, 1958.

Interlocutory order sustaining hearing examiner's denial of respondent's motion to dismiss.

This matter having come on for hearing upon the interlocutory appeal filed by the respondent from the hearing examiner's ruling denying its motion to dismiss the complaint for alleged failure to establish a *prima facie* case; and

It appearing that the hearing examiner's ruling is not a final decision on the merits of the proceeding and nowise affects the respondent's substantial rights and there being no showing that a determination of the correctness of such ruling before the conclusion of the trial would better serve the interests of justice; and

The Commission having determined that the respondent's appeal does not come within the category of those to be granted under §3.20 of the Commission's Rules of Practice and that the respondent's request to present oral argument in support of the appeal should be denied:

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

FREEMAN & FREEMAN. Docket 4735. Order, Aug. 27, 1958.

Order granting respondents' motion to reopen proceeding¹ and designating a hearing examiner to receive evidence.

Respondents, pursuant to Section 5(b) of the Federal Trade Commission Act and §3.27 of the Commission's Rules of Practice, having filed a motion to reopen this proceeding seeking to modify the order to cease and desist; and counsel supporting the complaint having filed answer in opposition thereto; and

The Commission being of the opinion that reasons set forth in respondents' motion constitute a sufficient showing to warrant reopening the proceeding to determine whether conditions of law

¹ Cease and desist order, prohibiting representations that "Porcelainize" product was not an automobile polish, dated May 2, 1945, 40 F.T.C. 512.

or fact have so changed as to require modification of the order or if the public interest so requires:

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

It is further ordered, That a hearing examiner be designated for the purpose of receiving such evidence as may be offered by respondents with respect to the aforesaid 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 §3.15 of said Rules, except that of making and filing an initial decision; and that counsel in support of the complaint shall have the usual rights of due notice, cross-examination and the presentation of evidence in rebuttal.

It is further ordered, That upon completion of the hearings the hearing examiner shall certify the record to the Commission with his report and recommendation thereon.

FOREMOST DAIRIES, INC. Docket 6495. Order and opinion, Sept. 10, 1958.

Interlocutory order in merger proceeding vacating—as precluding any final decision on the eliminated acquisitions short of a remand—hearing examiner's ruling that respondent need not put in a defense as to challenged acquisitions of corporations not engaged in interstate commerce and those involving proprietorships.

ON INTERLOCUTORY APPEAL

By the COMMISSION:

The complaint in this proceeding (as amended on the record) charges respondent with violations of both Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act in connection with the making of a series of acquisitions of dairy products concerns.

The question raised in this interlocutory appeal by counsel supporting the complaint is whether the hearing examiner properly ruled that respondent need not put in a defense as to certain acquisitions challenged by the Commission's complaint, including those acquisitions of corporations not engaged in interstate commerce and those involving proprietorships.

The examiner, it is noted, has not ruled that counsel supporting the complaint has failed to make a prima facie case as to the allegations in the complaint.

The effect of the ruling is to preclude any final decision on the

acquisitions so eliminated, short of a remand, since respondent may rightfully claim hereafter that it had no opportunity to defend as to these. The Section 5 charge presents questions of law and fact which the Commission prefers to determine upon a complete record. This includes as to such charge any proper defense of the acquisitions concerned which the respondent may wish to offer.

We hold, therefore, that it was error for the examiner to rule that the acquisitions other than those he listed need not be defended. Accordingly, the appeal of counsel supporting the complaint is granted and appropriate order vacating the examiner's ruling will be entered.

ORDER DISPOSING OF INTERLOCUTORY APPEAL OF COUNSEL
SUPPORTING THE COMPLAINT

This matter having come on to be heard upon the interlocutory appeal of counsel supporting the complaint from the hearing examiner's ruling of July 10, 1958, limiting the record in this proceeding; and

The Commission, for the reasons stated in the accompanying opinion, having granted the appeal and having determined that the ruling of the examiner should be vacated:

It is ordered, That the hearing examiner's ruling of July 10, 1958, limiting the record in this proceeding be, and it hereby is, vacated and set aside.

SANDURA CO. Docket 7042. Order, Sept. 15, 1958.

Interlocutory order sustaining hearing examiner's denial of motion to strike testimony of witnesses shown Commission investigator's report of prior interview.

The respondent having filed an interlocutory appeal from the hearing examiner's ruling of July 30, 1958, denying the respondent's motion to strike from the record the testimony of a witness to whom counsel in support of the complaint allegedly had exhibited the written report of an interview with said witness, theretofore prepared by a Commission investigator, and to dismiss other proposed witnesses to whom such reports had likewise been exhibited; and

It appearing that no showing has been made that said ruling will materially affect the final decision in this proceeding or that a determination of the correctness thereof before the conclusion of the trial would better serve the interests of justice; and

The Commission being of the opinion that the appeal is not one to be granted under the provisions of §3.20 of the Rules of Practice:

It is ordered, That the aforesaid appeal be, and it hereby is, denied.

HUTCHINSON CHEMICAL CORP. Docket 7140. Order, Sept. 15, 1958.

Interlocutory order sustaining hearing examiner's denial of respondents' motion to dismiss complaint.

This matter having been heard on the respondents' interlocutory appeal from the hearing examiner's ruling denying their motion, made at the close of the case in chief, for dismissal of the complaint; and

It appearing that the ruling appealed from, in effect that a *prima facie* case has been established, will not affect the final decision in the proceeding, and there being no showing that such ruling involves the respondents' substantial rights or that a determination of the correctness thereof before the conclusion of the trial would better serve the interests of justice; and

The Commission being of the opinion that the appeal does not come within the category of those to be granted under §3.20 of the Rules of Practice.

It is ordered that said appeal be, and it hereby is, denied.

FRED BONNER CORP., ET AL. Docket 7068. Order, Sept. 17, 1958.

Interlocutory order sustaining hearing examiner's denial of motion to dismiss complaint and ruling that factual issues may not properly be disposed of on the basis of ex parte affidavits prior to introduction of evidence.

Respondents having filed on August 15, 1958, an interlocutory appeal from the hearing examiner's ruling of August 1, 1958, denying their motion to dismiss the complaint, and having included therein a motion requesting the Commission to dismiss the complaint; and

It appearing that the ruling appealed from, in effect that factual issues raised by the pleadings may not properly be disposed of on the basis of ex parte affidavits prior to the introduction of evidence, will not under any circumstances materially affect the final decision of the case, and no showing having been made that a determination of the correctness of said ruling before the conclusion of the trial would better serve the interests of

justice within the meaning of §3.20 of the Commission's Rules of Practice; and

The Commission having separately considered the motion to dismiss the complaint and being of the opinion that the issues presented can best be resolved after the development of a complete factual record:

It is ordered, That the respondents' appeal from the hearing examiner's ruling be, and it hereby is, denied.

It is further ordered, That the accompanying motion to dismiss the complaint be, and it hereby is, also denied.

SUNSHINE BISCUITS, INC. Docket 6597. Order, Sept. 24, 1958.

Order denying motion to reopen proceeding and modify desist order for lack of showing which would require reconsideration of the issues.

This matter having come on to be heard by the Commission upon respondent's motion to reopen this proceeding for the purpose of modifying the order to cease and desist contained in the initial decision, as adopted by the Commission on May 7, 1958 [54 F.T.C. 1514], and upon answer in opposition to said motion filed by counsel supporting the complaint; and

It appearing that the grounds for the motion are (1) that respondent upon service of the complaint discontinued the practice alleged therein to be violative of Section 2(d) of the Clayton Act, as amended, and (2) that the scope of the order sought to be modified is so broad and general in nature as to render it difficult for respondent to conduct its business in compliance therewith; and

It further appearing that respondent's motion raises issues which heretofore have been considered by the Commission and disposed of in its decision rendered May 7, 1958, which was based on the entire record herein, including identical contentions by respondent's counsel presented in oral argument before the full Commission on such issues; and

The Commission having concluded that no showing has been made which would now require reconsideration of such issues:

It is ordered, That respondent's motion to reopen this proceeding for the purpose of modifying the Commission's order issued May 7, 1958, be, and it hereby is, denied.

SHEFFIELD MERCHANDISE, INC., ET AL. Docket 6627.
Order, Oct. 2, 1958.

Order denying motion for reconsideration of Commission's review of initial decision which resulted in vacating hearing examiner's dismissal of complaint and remanding case for further proceedings.

This matter having come on to be heard upon respondents' motion for an order setting down for reconsideration and hearing the Commission's review of the hearing examiner's initial decision dismissing the complaint, resulting in the order of July 7, 1958, vacating the initial decision and remanding to the hearing examiner for further proceedings; and

It appearing that the principal grounds for the motion are that the Commission's action allegedly conflicts with ruling case law and is without support in the record, and that the Commission allegedly has failed to comply with the Administrative Procedure Act as to certain of its provisions which require an opportunity to be heard prior to decisions; and

The Commission having determined that respondents, pursuant to the Commission's Rules of Practice, have had such opportunity for hearing in this proceeding as would fully meet the requirements of the Administrative Procedure Act, and having further determined that respondents have shown no sufficient grounds otherwise for their request:

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

GUARANTEE RESERVE LIFE INSURANCE CO. OF
HAMMOND, ET AL. Docket 6243. Order, Oct. 3, 1958.

Order denying, for lack of showing that the instant case falls within the doctrine of the Supreme Court decision in the *National Casualty Co.* case, motion to dismiss complaint in insurance proceeding.

Respondents, on January 27, 1958, having filed their appeal from the hearing examiner's initial decision, and thereafter having filed, on September 18, 1958, a motion to dismiss the complaint in this proceeding upon the authority of the United States Supreme Court's ruling in *Federal Trade Commission v. National Casualty Company*, 357 U.S. 560 (1958), which motion further asserts that such dismissal would be in accord with the Commission's action in dismissing the complaint in the matter of *North American Accident Insurance Company*, Docket No. 6456; and

The Commission having concluded that respondents have made no showing that the instant case falls within the doctrine of the

aforesaid Supreme Court decision, or that granting of respondents' motion would be in accord with the Commission's action in dismissing the complaint against said North American Accident Insurance Company:

It is ordered, That respondents' motion to dismiss the complaint in this proceeding, filed September 18, 1958, be, and it hereby is, denied.

PRUVO PHARMACAL CO., ET AL. Docket 5778. Order, Oct. 9, 1958.

Order denying—for lack of adequate preliminary showing of any change in therapeutic value of preparation concerned—petition for revision of desist order.

This matter having come on for hearing upon the petition filed by respondents under §3.27(b) of the Commission's Rules of Practice, which petition requests that the order to cease and desist contained in the Commission's decision of May 15, 1953 [49 F.T.C. 1365], be modified so as to permit the respondents to state in advertising that their preparation contains vitamin C and that such vitamin is "essential for maintaining stability of elasticity in connecting tissues in joints and body generally"; and

It appearing that when this proceeding was instituted the respondents were offering their product, called Pruvo, for the treatment and complete relief of arthritis and related pathological conditions and their symptoms, and the Commission having determined on the basis of the record that the therapeutic value of Pruvo, as then constituted, was that supplied by its salicylate content as an analgesic and antipyretic, and the Commission having thereupon issued its decision, including its order forbidding the respondents from representing, among other things, that Pruvo will have any therapeutic effect in arthritic or rheumatic conditions in excess of that afforded by an analgesic and antipyretic for temporarily relieving minor aches, pains or fever; and

It appearing to the Commission that nothing contained in its order, which has become final by operation of law, prohibits the respondents from truthfully and nondeceptively setting forth in their advertising the ingredients contained in the preparation, including the vitamin C supplied under the revised formula, but it further appearing, however, that respondents' petition includes no showing or offer of proof that arthritis or the other conditions

named in the order are caused by or associated with deficiencies of vitamin C, and the Commission having accordingly determined that such petition makes no adequate preliminary showing of any change in therapeutic value being afforded when the preparation is used for the diseases and conditions to which the order refers; and

The Commission having additionally determined, therefore, that the petition fails to establish a reasonable probability that changes in conditions of fact or law have occurred since entry of order herein or to demonstrate a probability that the public interest requires the modification requested:

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

AMERICAN PACKING CO., ET AL. Docket 6904. Order, Oct. 15, 1958.

Order denying motion to stay effective date of desist order until conclusion of all similar proceedings involving industrywide violations of Sec. 2(c). Clayton Act.

This matter having come on to be heard upon respondents' motion requesting a stay in the effective date of the order to cease and desist issued herein until such time as all similar proceedings involving certain industrywide practices have been concluded, stating in effect that equity requires the simultaneous disposition of these cases; and

The Commission having determined that respondents' motion presents no adequate basis for the relief requested:

It is ordered, That respondents' motion to stay the effective date of the order be, and it hereby is, denied.

BENEFICIAL STANDARD LIFE INSURANCE CO. Docket 6309. Order, Oct. 16, 1958.

Order denying, for lack of showing that the instant case falls within the doctrine of the Supreme Court decision in the *National Casualty Co.* case, motion to dismiss complaint in insurance proceeding.

The respondent, on October 3, 1958, having filed a motion requesting that this proceeding be reopened and that the Commission's decision of September 23, 1955, be vacated, on the authority of the United States Supreme Court's ruling in *Federal Trade Commission v. The American Hospital and Life Insurance Company*, 357 U.S. 560 (1958); and

It appearing that the respondent has made no showing that this case falls within the doctrine of the aforesaid Supreme Court decision, and there being no record herein on the basis of which the necessary determinations could be made:

It is ordered, That the respondent's motion be, and it hereby is, denied, without prejudice, however, to the respondent's right to file a new motion setting forth such facts as it may care to present in support thereof.

GULF OIL CORP. Docket 6689. Order, Dec. 14, 1958.

Interlocutory order sustaining appeal from hearing examiner's ruling limiting to two months the period for completion of presentation of evidence in support of complaint.

This matter having been heard on an interlocutory appeal, filed by counsel in support of the complaint, from the hearing examiner's ruling of October 30, 1958, fixing December 31, 1958, as the date on or before which presentation of evidence in support of the complaint shall be completed; and

It appearing that the examiner based his ruling, in part, at least, on the opinion that "* * * by the energetic and efficient use of the two months remaining between now and the end of the year all evidence available and necessary to be adduced in support of the allegations of the complaint can be presented"; and

Counsel in support of the complaint having shown that, contrary to the examiner's impression, the preparation and submission on or before December 31 of certain additional evidence, the presence of which in the record is, or may be, essential for an informed decision of the case, is physically impossible; and

The Commission noting its displeasure concerning the lack of progress in the trial of this case:

It is ordered, That the hearing examiner's ruling of October 30, fixing December 31, 1958, as the date on or before which presentation of evidence in support of the complaint shall be completed be, and it hereby is, vacated.

It is further ordered, That counsel in support of the complaint shall, with all possible dispatch, proceed to prepare and submit their evidence to the end that the case-in-chief may be concluded at the earliest practicable date.

AMERICAN CYANAMID CO., ET AL. Docket 7211. Order, Dec. 19, 1958.

Interlocutory order sustaining, as in the public interest, hearing examiner's denial of motions to quash certain specifications of subpoenas duces tecum.

This matter having come on for hearing upon the interlocutory appeals filed by all respondents, save respondent The Upjohn Company, from the hearing examiner's rulings denying appellants' motions to quash certain specifications of the subpoenas duces tecum which issued herein; and

It appearing that the challenged specifications direct the respondents to produce, among other matters, data and documents relating to their respective production and selling costs for designated antibiotic preparations, and that the respondents oppose such requirements on grounds, among others, that the information is irrelevant and constitutes valuable trade secrets which, if disclosed to their co-respondents or the public, would irreparably injure their businesses; and

The Commission having determined that the hearing examiner correctly ruled that the information and data called for under all of the specifications objected to are relevant and that, in the circumstances presented, disclosure of such information for study by staff counsel and their accountant advisors will serve the public interest, and the Commission having further determined that the rulings appealed from should be affirmed; and

The Commission having additionally noted the alternative requests of the appealing respondents that the subpoenas be quashed or limited on condition that the respondents furnish designated information relating to their respective total costs for each dosage form of certain antibiotics pursuant to the procedures, conditions and restrictions specified in the appendices to the briefs, but it appearing that such proposals were not presented to the hearing examiner and that he has had no opportunity to consider them; and the Commission having accordingly determined that it should decline to pass upon or hear oral argument on those substitute proposals:

It is ordered, That the interlocutory appeals of the respondents be, and the same hereby are, denied.

It is further ordered, That the respondents' substitute proposals with respect to compliance with the subpoenas be, and they hereby are, referred to the hearing examiner for ruling thereon in the exercise of his sound discretion.

SCOTT PAPER COMPANY. Docket 6559. Order and opinion, Jan. 5, 1959.

Order vacating initial decision and remanding merger case for further proceedings, on appeal of complaint counsel from hearing examiner's dismissal of complaint for want of proof.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

This matter is not before the Commission for final adjudication on the merits. It is presented on appeal by counsel in support of the complaint from the initial decision of the hearing examiner which granted respondent's motion, made at close of the case in chief, to dismiss the complaint for want of proof. In such circumstances the sole question for decision at this time is whether a prima facie showing of the complained violations has been made.

The proper standard for determining the existence or non-existence of a prima facie showing has been set forth in previous Commission opinions.¹ Not only is it apparent that the hearing examiner failed to apply such standard here but also that he, in effect, adjudicated the merits of the case rather than the issue raised by respondent's motion. The test to be applied was explained in our *Vulcanized Rubber* opinion:²

"The ruling of a hearing examiner denying a motion to dismiss a complaint for failure of proof, made at the conclusion of the case in chief, obviously is not a decision on the merits of the case. Such a ruling 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.

"A hearing examiner in ruling on a motion to dismiss for

¹ *Vulcanized Rubber and Plastics Company*, Docket No. 6222 (Nov. 29, 1955); *The Timken Roller Bearing Company*, Docket No. 6504 (May 27, 1958).

² *Supra*.

failure of proof, made at the close of the case in chief, like a Federal district court in ruling on a similar motion in a nonjury trial, views the evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint."

From the foregoing it can be seen that situations may arise where several reasonable but rebuttable inferences may be drawn from the record—some unfavorable, others favorable, to the complaint. In establishing a *prima facie* case we view the evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint. Of course a respondent also has the further opportunity, at later stages of the proceeding, to rebut, dispel, or explain away the inferences in support of the allegations. Here the Examiner gave but little if any recognition to favorable inferences and, moreover, emphasized those inferences against the complaint's allegations.

The complaint charges Scott Paper Company (Scott), a corporation, with violating Section 7 of the Clayton Act (15 U.S.C. Sec. 18) and also Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45) by the acquisition of three other corporations: Soundview Pulp Company, Everett, Washington (Soundview); Detroit Sulphite Pulp & Paper Company, Detroit, Michigan (Detroit); and Hollingsworth & Whitney Company, Boston, Massachusetts (Hollingsworth).

Scott is a leading producer and seller of toilet tissue, facial tissue, paper napkins, paper towels and household waxed paper. In 1955 Scott's sales of all products, including those enumerated, amounted to approximately \$245 million. Its sales of the listed products, herein referred to as "sanitary paper products," approximated some \$189 million. Scott sells these sanitary paper products to numerous firms for resale, including grocery chains. Although it also sells to industrial users, by far the greater share of its business is from sales for resale purposes.

The complaint, as noted above, specifically challenges three acquisitions. The first is Soundview which was merged into Scott in November 1951. At the time of the acquisition Soundview was engaged in producing and selling bleached sulphite pulp, some of which was purchased by Scott. Soundview had no paper making machines and did not produce sanitary paper products or any other kind of paper product. Detroit was acquired September 2, 1954. Detroit produced base paper stock, including wax base stock, which it sold to other manufacturers for further processing. Most, if not all, of Detroit's production of wax base stock was purchased by Scott. The third acquisition, Hol-

lingsworth, occurred October 27, 1954. Hollingsworth produced special industrial and converting papers. Neither Detroit nor Hollingsworth produced or sold sanitary paper products. Each of the three acquired corporations had pulp mills and, in the case of Soundview and Hollingsworth, substantial timber holdings. The acquisitions constituted so-called "backward vertical integrations" and initially provided Scott with additional facilities for producing its own raw materials. Scott is widely engaged in interstate commerce as were the three acquired firms.

Since acquiring these firms Scott has spent large sums of money in expanding and improving the facilities of each. The stock issued to acquire the companies was valued at approximately \$109 million. Through June 1956 Scott had spent for new construction and improvements an amount in excess of \$70 million.

In the posture of this proceeding where the inquiry concerns only prima facie aspects, we agree with the hearing examiner that the existence of the lines of commerce as alleged in the complaint appears to have been established. These lines are comprised of the sanitary paper products listed. Each of the several products involved might be considered a product market, but it is sufficient, at least for this determination, to view the sanitary paper products industry as a relevant market. The industry involved will be hereinafter referred to as the sanitary paper products industry.

The "section of the country" alleged is the entire United States. The hearing examiner found that in this industry there is no effective nationwide area of competition, but he appears to have overlooked the fact that only a prima facie showing is required. Scott is doing business throughout the entire United States, and so are its leading competitors. There is but little question that one of the acquisitions (Soundview) was made, in part, to put Scott on a more secure national footing. Also Scott's advertising appeal is directed to the whole nation and its resulting success appears to be inextricably tied to national merchandising efforts. We recognize, of course, that freight barriers and other competitive factors alluded to by respondent's counsel may confine many competitors to specific regions of the country; but whether this means that the nation, geographically, cannot be an effective area of competition does not now have to be finally determined. In our opinion, a prima facie showing of the nation as a section of the country has been made.

The sanitary paper products industry is substantial. Shipments in 1955 of all the products for the industry amounted to 1,123,616 tons in the resale market alone. Scott's share of such market was substantial. Its shipments of industry products in 1955 total 504,216 tons, having a dollar value of approximately \$189,700,000. In resale products, Scott's shipments in 1955 amounted to 452,668 tons.

The statutory test for determining illegality under amended Section 7 is whether the effect of the acquisitions (1) may be substantially to lessen competition or (2) may be to tend to create a monopoly. Thus the section is violated whether or not actual monopoly, or a substantial lessening of competition, has in fact occurred or is intended. Section 7 is designed to arrest in their incipency the potential effects noted; absolute proof of neither is required. Reasonable probabilities are the criteria. Cf. *United States v. E. I. duPont de Nemours & Co.*, 353 U.S. 586 (1957).

As we have indicated heretofore, there is no slide rule guide in the making of the necessary determinations. Competitive factors must be examined.³ Of significance, for example, is the size and market share of the acquiring company, *Brillo Manufacturing Company, Inc.*, Docket No. 6557 (May 23, 1958), as well as prices and conditions of entry into the market, *American Crystal Sugar Company v. The Cuban-American Sugar Company*, 259 F. 2d 524 (2d Cir., 1958). Foreclosure of competitors from the market, if present, such as shown in the *duPont* case, *supra*, is also highly significant. However, the presence or absence of any one competitive factor may not be determinative of the lawfulness or unlawfulness of an acquisition.

The hearing examiner, although holding that counsel in support of the complaint need only produce substantial evidence showing reasonable probabilities that the challenged acquisitions will have one or both of the prohibited effects, failed to apply any such standard in his evaluation of the evidence. The examiner, in essence, looked for market control as such. There need be no showing that Scott had the power to fix prices or the power to control entry of new competitors; or that Scott had control of raw materials or the channels of distribution. Such power and control would amount to monopoly condemned by the Sherman Act. Applying the appropriate test we conclude that

³ *Pillsbury Mills, Inc.*, Docket No. 6000 (Dec. 21, 1953); *Crown Zellerbach Corporation*, Docket No. 6180 (Dec. 26, 1957).

counsel in support of the complaint has made a prima facie showing of the effects proscribed by Section 7 of the Clayton Act.

Scott is a principal factor in the sanitary paper products industry. In point of sales, as the examiner found, Scott might properly be called the leader. Scott's share of the market for all sanitary paper products was 26.76% in 1950 and 32.72% in 1955. It is the number one ranking company in the industry. As to resale industry products alone, in which field Scott did approximately 88% of its business in 1955, its share of such market was about 32% in 1950 and about 40% in 1955. Just how much of this increment may have resulted from the acquisitions we do not know with certainty. The record does not contain statistics for the intervening years 1951, 1952, 1953 and 1954 which would be of considerable benefit to a decision on the merits. We recognize that Soundview was acquired in 1951, and that apparently it did not enter into Scott's production and distribution picture until 1954; and that Detroit and Hollingsworth were not acquired until the fall of 1954, with production and distribution entry in the Scott picture in the latter part of that year or in early 1955. Here, however, we are dealing only with rebuttable inferences, and in the absence of rebuttal, one of several reasonable inferences is that the acquisitions may have been significant factors in bringing about Scott's increased share of the relevant market as well as its market position.

Market concentration in the sanitary paper products industry is high. The four largest companies, including Scott, had two-thirds of all of such business among them in 1955. The inference is that the probability of the entry of any substantial new competitors is remote. The high cost of breaking into the market with a new product and the problems of opening channels of distribution contribute to this difficulty of entry.

The challenged acquisitions considered together constituted a major step for Scott in the completion of backward integration. Soundview was operating an efficient modern pulp mill with a rated capacity of 200,000 tons a year. This amount was a substantial portion of Scott's pulp requirements for the period. Soundview also had timber resources sufficient to provide enough raw material to sustain its then production capacity for the foreseeable future and remain as an independent source of supply to its various customers. Although Scott may have needed a paper mill site on the Pacific Coast to construct a modern paper mill to take care of the expanding sanitary paper products market in the area, the acquisition of Soundview did much more. This

merger resulted in a major change in the nature and size of Scott's business. Scott thereby became a substantial seller of pulp on the open market.

The succeeding mergers likewise contributed to this change. Detroit added pulp production and paper production facilities. Hollingsworth added a going business which, among other facilities, included: an integrated pulp and paper plant at Winslow, Maine, with six paper machines and capacity for producing 275 tons of sulphite pulp per day; an integrated pulp and paper mill at Mobile, Ala., with three large paper machines and capacity for producing 420 tons of sulphite pulp per day, and approximately one million acres of timber land.

Comparing before and after the mergers, Scott's total sales which were \$97,724,407 in 1950 increased to \$246,684,301 in 1955; its assets which were about \$50 million in 1950 increased to \$225 million in 1955; and its pulp production went from about 139,000 tons in 1950 to approximately 775,000 tons in 1955. Again it is possible to infer that several factors entirely apart from the mergers may have contributed significantly to these increases. Efficiency of operation, production methods, management skills and general business conditions, for example, cannot be disregarded. But in the absence of rebuttal evidence it is reasonable to infer that the mergers have also played an important part.

The challenged mergers also appear to have rounded out the organization of Scott as a national concern. Pulp plants and sites for paper production were obtained in strategic locations on the West Coast, in the Middle West, in the South and in the East. In particular, the acquisition of Soundview gave to Scott the springboard from which to develop an integrated West Coast operation. In this connection we do not lose sight of the fact that Scott has been over the years a substantial purchaser of paper pulp in the open market. In 1950, 53% of its requirements were supplied by firms competing for this business, among them Soundview and Detroit. This competition has been reduced.

Soundview prior to its being merged into Scott was a substantial paper pulp supplier. Its pulp was shipped to approximately 100 various purchasers for use in the manufacture of high grade paper and paper products. The record does not clearly disclose whether any of these numerous purchasers were competitors of Scott. But since Soundview was a substantial pulp producer in the West, the acquisition thereof affected at least an important alternative or potential source of supply. Scott has

apparently continued to supply the former customers of Soundview but it now holds the power to eliminate an important supplier. While the foregoing will support inferences that, as a result of the acquisitions, competition in the production and sale of pulp may also be adversely affected, it does not appear that this particular phase of the record has been sufficiently developed. In order that the record may be clarified, the examiner should permit the receipt of such probative evidence as may be offered regarding the identification of paper manufacturers which relied upon the acquired firms as a source of pulp supply, whether they were competitors of the respondent, and other pertinent information as to this industry.

At the risk of being repetitious we say in final analysis that the question is not whether these acquisitions have resulted in monopoly or have actually substantially lessened competition; rather, it is whether there is a reasonable probability of a tendency toward monopoly or of the substantial lessening of competition. As was said in the *Vulcanized Rubber* case, *supra*, we must "view the evidence and inferences reasonably to be drawn therefrom in the light most favorable to the complaint." Giving consideration to all the factors, including favorable inferences which now stand un rebutted, we are unable to conclude that the necessary *prima facie* showing has not been made.

There is one further matter to be considered. The complaint additionally alleges that a substantial portion of Scott's growth has been accomplished through mergers or acquisitions and that the constant and continuous acquisition of companies engaged in the pulp and paper manufacturing industry and the conversion of such companies to the manufacture of Scott's paper products, as alleged, constitute a violation of Section 5 of the Federal Trade Commission Act. Under this charge, it may be important whether Scott attained its present position in the market substantially by acquisitions. The hearing examiner's refusal of offers of proof on this point by counsel in support of the complaint was error. The available evidence in support of counsel's contention in this connection is to be received and considered by the Hearing Examiner upon remand.

The appeal of counsel in support of the complaint is granted. We direct that an appropriate order be entered vacating the initial decision and remanding the case for further proceedings in accordance with the views herein expressed.

ORDER VACATING INITIAL DECISION AND REMANDING CASE
TO HEARING EXAMINER

This matter having come on to be heard by the Commission upon the appeal of counsel in support of the complaint from the hearing examiner's initial decision dismissing the complaint at the close of the case in chief; and

The Commission, for the reasons appearing in the accompanying opinion, having granted the aforesaid appeal, and having directed that an order be entered vacating the initial decision and remanding the case for further proceedings in accordance with the views therein expressed:

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

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

BEARINGS, INC. (Delaware), ET AL. Docket 7134. Order, Jan. 29, 1959.

Interlocutory order denying appeal of complaint counsel from rulings sustaining respondents' objections to receipt of certain exhibits in evidence.

Counsel in support of the complaint having filed an interlocutory appeal from certain rulings of the hearing examiner sustaining the respondents' objections to the receipt in evidence of a number of exhibits offering as memoranda or records of occurrences made in the regular course of business within the meaning of the Federal Shop Book Rule (Title 28, U.S.C.A., §1732); and

It appearing that no showing has been made that the effect of said rulings is more serious than to require counsel to prove by other available evidence the facts sought to be established by said exhibits; and

Counsel having thus failed to demonstrate that the rulings involve substantial rights or will materially affect the final decision of the case, or that a determination of the correctness of said rulings before conclusion of the trial would better serve the interests of justice, as required by §3.20 of the Commission's Rules of Practice:

It is ordered, That the aforesaid appeal be, and it hereby is, denied.

GIANT FOOD SHOPPING CENTER, INC. Docket 6459.
Order and opinion, Feb. 10, 1959.

Order vacating and setting aside initial decision—which dismissed as subject only to jurisdiction of the Secretary of Agriculture under the Packers and Stockyards Act, complaint charging operator of a chain of supermarkets in Washington, D.C., with inducing discriminatory advertising allowances from its suppliers—and remanding the case for further proceedings.

OPINION OF THE COMMISSION

By KERN, Commissioner:

The complaint, as amended, charged violations by the respondent of the Federal Trade Commission Act. During the hearings, the respondent moved for dismissal on grounds that it is a packer within the meaning of the Packers and Stockyards Act, 1921,¹ and that the acts and practices charged as violative of law are matters committed to the exclusive jurisdiction of the Secretary of Agriculture. The motion was granted by the hearing examiner and counsel supporting the complaint have appealed from the hearing examiner's initial decision which provides for dismissal of this proceeding for lack of jurisdiction.

The respondent operates a chain of supermarkets for retailing food—including meat, poultry and dairy products—and household articles. On March 28, 1958, which date was after this proceeding began, the respondent purchased 100 shares of the common stock of Armour & Company. The latter is a meat packer and distributes its products on a national scale.

As effective when this action began, the Packers and Stockyards Act provided, among other things, that it shall be unlawful for a packer or other designated persons to engage in acts and practices there enumerated and duly conferred jurisdiction on the Secretary of Agriculture to institute proceedings against violators of its proscriptions. Under Section 201,² a packer is defined as any person engaged in the business (a) of buying live-

¹ 42 Stat. 159; 7 U.S.C. 181, *et seq.*

² "When used in this act—

The term 'packer' means any person engaged in the business (a) of buying livestock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing livestock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, livestock products, dairy products, poultry, poultry products, or eggs in commerce; but no person engaged in such business of manufacturing or preparing livestock products or in such marketing business shall be considered a packer unless—

(1) Such person is also engaged in any business referred to in clause (a) or (b) above, or unless

(2) Such person owns or controls, directly or indirectly, through stock ownership or control

stock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment therein; and additionally included in such definition are persons engaged in the business of marketing meats, dairy, poultry or other enumerated products in the event they also engage in meat packing or have the packer relationships specified in subparagraphs 2, 3 and 4. Of these, subparagraph 2 recites that such a marketer shall be deemed a packer within the meaning of the Act if he owns "any interest" in any business in categories (a) and (b) above. Section 406(b), as effective when the hearing examiner filed his initial decision, further provided that the Commission shall have no jurisdiction relating to matters subject to the Secretary's jurisdiction. The amended and supplemental complaint in this proceeding charges the respondent with violating Section 5 of the Federal Trade Commission Act through, among other things, inducing payments of discriminatory advertising allowances by suppliers of its groceries, including meat and dairy products, which allowances it knew or should have known were discriminatory. Counsel's appeal accordingly presents the question of whether the respondent's acquisition of stock in Armour & Company has served to divest the Commission of jurisdiction over practices by the respondent charged as violative of the Federal Trade Commission Act.

Since filing of initial decision by the hearing examiner, the United States Court of Appeals for the Fourth Circuit has rendered its decision in the case of *Crosse & Blackwell Company v. Federal Trade Commission*,³ which construes the Packers and Stockyards Act as effective prior to the recent amendment of September 2, 1958. The Court there noted that the Act, together with the exclusions of Section 406(b)⁴ and additional exclu-

or otherwise, by himself or through his agents, servants, or employees, any interest in any business referred to in clause (a) or (b) above, or unless

(3) Any interest in such business of manufacturing or preparing livestock products, or in such marketing business is owned or controlled, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees by any person engaged in any business referred to in clause (a) or (b) above; or unless

(4) Any person or persons jointly or severally, directly or indirectly, through stock ownership or control or otherwise, by themselves or through their agents, servants, or employees, own or control in the aggregate 20 per centum or more of the voting power or control in such business of manufacturing or preparing livestock products, or in such marketing business and also 20 per centum or more of such power or control in any business referred to in clause (a) or (b) above."

³ 262 F.2d 600 (decided January 5, 1959).

⁴ "On and after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in which, before the enactment of this Act, complaint has been served under section 5 of the Act entitled 'An Act

sionary language contained in Section 5(a)(6)⁵ of the Federal Trade Commission Act, was susceptible to a construction that a processor of meats is subject to regulation by the Secretary of Agriculture as a packer under the Packers and Stockyards Act, but that jurisdiction over the activities of persons within the Act was not removed from the Commission except for commercial activities integral to the conduct of their packing or stockyard businesses and operations. In this connection, the Court further stated:

"* * * Harmonious reconciliation of the several statutory provisions can be achieved in the light of the apparent statutory scheme to subject the business of the packer and the stockyard operator to the regulatory control of the Secretary of Agriculture, whose department was particularly concerned with the problem and who had the means of effectively discharging the responsibility, while enforcement of the general antitrust laws, as they applied to other businesses than that of packers and stockyard operators, was left to the Federal Trade Commission, each exercising its particular functions in its own special field where a single corporation was engaged in activities, some of which were and some of which were not subject to regulation under the Packers and Stockyards Act."

It thus is clear that jurisdiction to proceed against practices violative of the national policy expressed in the antitrust laws which may be used by persons subject to the Act for carrying on businesses and commercial pursuits in fields outside or additional to the packing and stockyards industry remains in the Commission. In the instant proceeding, the practices to which the charges of the amended and supplemental complaint pertain are not limited to activities engaged in for carrying on that portion of the business concerned with respondent's over-the-counter sale of meats and dairy and poultry products. They instead relate primarily to practices used for effectuating distribution of the company's products in general. Hence, the Commission has jurisdiction to act in this proceeding.

to create a Federal Trade Commission, to define its power and duties, and for other purposes,' approved September 26, 1914, or under section 11 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case."

⁵ "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except * * * persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406(b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Even though a contrary interpretation of the statutory language were adopted, it would not follow that the stock purchase here considered has served to confer packer status upon respondent and to divest the Commission of jurisdiction as held by the hearing examiner. It is evident that Congress intended not only to regulate the meat packer in all phases of his activities in such field, but also wished to exclude from the operation of the Act all marketers of the packing industry's products who were not packer affiliates. In the event of integrated operations being engaged in, subparagraph 2 and its companion subparagraphs impose joint liability on packers and affiliated marketers for practices violative of the Act. We think the language of subparagraph 2 contemplates that the nature of the marketer's holding or interest in the packer present at least a potential for his exercise of a role of responsibility or participation in the packer's practices or possibilities for sharing more than trivially in the fruits of the packing enterprise.

No such integration of commercial activities on the part of two corporations appears here, however. On November 2, 1957, there were outstanding 4,677,410.5 shares of Armour & Company common stock,⁶ the class of security acquired by Giant. On the day of Giant's 100-share purchase, the price of Armour common ranged from $14\frac{1}{4}$ to $14\frac{5}{8}$ on the New York Stock Exchange.⁷ We think that Giant's interest in Armour through stock ownership is so infinitesimal as to fall far short of constituting "any interest" whatever in the contemplation of the Packers and Stockyards Act. In the *Crosse & Blackwell* case just cited, the Court declared:

"A literal interpretation of the exemption of §5(a)(6) of the Federal Trade Commission Act must be laid aside for it is 'plainly at variance with the policy of the legislation as a whole,' *Ozawa v. United States*, 260 U.S. 178; *United States v. Rosenblum Truck Lines*, 315 U.S. 50; *United States v. American Trucking Associations*, 310 U.S. 534, and if held to grant a more extensive exemption than the Secretary's regulatory power would produce an absurd result. *United States v. American Trucking Associations*, *supra*; *Sorrells v. United States*, 287 U.S. 435; *United States v. Edward Ryan*, 284 U.S. 167; *The Church of the Holy Trinity v. United States*, 143 U.S. 457."

It would be equally absurd, we believe, for Giant to gain immunity from the jurisdiction of the Federal Trade Commission

⁶ Moody's Industrial Manual, 1958, p. 1349.

⁷ Wall Street Journal, March 31, 1958.

by purchasing a paltry .002137 of one percent of the outstanding Armour common stock for the meager sum of about \$1,450. We therefore hold that the hearing examiner erred in his determination that respondent's acquisition of Armour & Company shares conferred an interest in that packing business within the intent and meaning of the Packers and Stockyards Act.

On September 2, 1958, Public Law 85-909 amending both the Packers and Stockyards Act and the Federal Trade Commission Act became effective. For reasons stated in our opinion in the matter of *Renaire Corporation (Pennsylvania), et al.*, Docket No. 6555 -(decided February 3, 1959), we construe that amendment to be retrospective in its operation and, hence, applicable to proceedings pending before the Commission at the time it became effective. This legislation confers jurisdiction on the Commission over unfair trade practices in commerce in connection with all transactions by packers involving (1) commodities other than livestock, meats, meat food products, livestock products in unmanufactured form, poultry and poultry products, and (2) with exceptions not here material, retail sales by packers of all products. Our conclusion that Public Law 85-909 is retrospective in its operation likewise requires reversal of the initial decision's holding that the Commission lacks authority to proceed in this matter.

The appeal is being granted accordingly. The initial decision will be vacated and the case remanded for further proceedings.

ORDER VACATING INITIAL DECISION AND REMANDING CASE
TO HEARING EXAMINER

This cause having come on to be heard upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision granting the motion of the respondent to dismiss the complaint for lack of jurisdiction; and

The Commission, for reasons stated in the accompanying opinion, having determined that the hearing examiner erred in granting said motion:

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

It is further ordered, That this case be remanded to the hearing examiner for further proceedings in accordance with the Commission's opinion.

FOREMOST DAIRIES, INC. Docket 6495. Order and opinion, Feb. 11, 1959.

Interlocutory order granting appeal of Attorney General of California from hearing examiner's denial of motion to quash subpoena duces tecum issued at instance of Foremost Dairies, Inc., and quashing said subpoena.

OPINION OF THE COMMISSION

The Attorney General of the State of California, on behalf of the Director of Agriculture of that State, has appealed from a ruling by the hearing examiner in this proceeding denying a motion filed by the Attorney General to quash or limit a subpoena duces tecum, issued by the examiner at the instance of respondent Foremost Dairies, Inc. The subpoena would require the Director of Agriculture to produce documents, or verified summaries thereof, disclosing sales of fluid milk, by plants, in certain market areas for the years 1953, 1955 and 1957.

Before the hearing examiner it was argued on behalf of the director substantially as follows: (1) that the material required to be produced by the subpoena is privileged and confidential under the laws of the State of California; (2) that the subpoena is invalid since it fails to describe adequately the documents sought, or their relevancy; (3) that the subpoena is invalid since it was issued by a hearing examiner rather than by a Commissioner of the Federal Trade Commission; (4) that the information and documents sought are available from the corporations or firms who process fluid milk in the designated market areas and recourse should first be made to these sources; and (5) that, in the alternative, the subpoena should be limited in its terms to official publications of the State Department of Agriculture which show total sales of fluid milk by marketing areas for the years in question.

The hearing examiner held that the confidential nature of the material covered by it is not sufficient grounds for quashing the subpoena since similar information furnished by the director is in evidence in this proceeding and that this evidence is being held *in camera* to preserve its confidential nature. He further held that the documents sought are relevant to the issues in the proceeding and that he, the examiner, is duly authorized by law by the Administrative Procedure Act to issue said subpoena. Finally, he ruled that it is not necessary to make recourse to other sources a prerequisite to requiring the Director of Agriculture to supply the information and material sought under the subpoena. In denying, as he did, the motion to quash or limit the subpoena,

the examiner made no specific determination as to whether or not the information covered by it is available in official publications of the California Department of Agriculture and that point is not before us for decision on this interlocutory appeal.

Contrary to contentions made on behalf of the Director of Agriculture, the hearing examiner does have the power to issue subpoenas *duces tecum*. Section 6(g) of the organic Federal Trade Commission Act, 15 U.S.C.A. 46(g), grants to the Commission power to make rules and regulations. Furthermore, Section 7(b) of the Administrative Procedure Act, 5 U.S.C.A. 1006 (b), provides that "Officers presiding at hearings shall have authority, subject to published rules of the agency and within its powers, to * * * issue subpoenas authorized by law." And the Commission has adopted and promulgated its Rules of Practice for Adjudicative Proceedings, Section 3.15(c) of which specifically grants hearing examiners authority to issue subpoenas.¹ In a situation analogous to that before us now it was held that the National Labor Relations Board was authorized to formulate rules pursuant to which authority was delegated to its examiners to issue subpoenas and to rule upon motions to quash so long as the Board itself was given such powers by statute, *N.L.R.B. v. International Typographical Union*, 76 F. Supp. 895 (S.D.N.Y. 1948). In view of the similarity of the statute involved in that case with pertinent provisions of the Federal Trade Commission Act, the Commission is of the opinion that no further discussion of hearing examiners' authority with regard to subpoenas is warranted here.

As to the issues of the adequacy of the description of the documents sought and the general relevancy of the information contained therein, those are matters initially to be determined by the hearing examiner. And, in view of the disposition herein made of the interlocutory appeal presently before us, the Commission finds it unnecessary to rule finally upon the correctness of the hearing examiner's ruling in these respects.

Two points remain to be considered. They involve, respectively, the asserted privileged and confidential nature of matters covered by the subpoena in question and the availability of the information sought from sources other than the Director of Agriculture.

¹ The complaint in this proceeding alleges violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C.A. 45, as well as violation of Section 7 of the Clayton Act, as amended, 15 U.S.C.A. 18. The Commission's subpoena powers under the Federal Trade Commission Act equally are available to it in proceedings under Section 7 of the Clayton Act, as amended, *Federal Trade Commission v. Tuttle*, 244 F.2d 605 (C.A. 9, 1957), *cert. den.* 354 U.S. 925 (1957).

The Attorney General for the State of California forcefully contends it to be the public policy of the State, as set forth in designated provisions of the California Code, to preserve the asserted privileged and confidential character of the documents and information sought. Counsel for respondent Foremost Dairies, Inc., vigorously opposes the claim of privilege. The hearing examiner's ruling adverse to the contentions of the Attorney General in this respect is predicated on the fact that similar information had been produced by the Director of Agriculture and is now in evidence in this proceeding, being held *in camera* by the examiner to preserve its confidential nature. That similar information was furnished to Commission attorneys by the Director of Agriculture may well be. If so, however, it appears to have been in connection with proceedings other than the one now before us, and the record discloses nothing to indicate that the request for such information was resisted in any manner. In other words, that information does not appear to have been forthcoming in response to a contested subpoena such as we have here.

In the exercise of its subpoena powers the Commission is invested with broad quasi-judicial discretion, *Independent Directory Corp. v. Federal Trade Commission*, 188 F. 2d 468 (C.A. 2, 1951), and cases there cited. An exercise of that discretion involves, among other things, consideration of the overall public interest. Aside from the question of whether the information sought by the instant subpoena is in fact privileged or confidential under the California statutes it does seem likely, as contended by the Attorney General, that its production would seriously impair the operations of the State Department of Agriculture. Such impairment is not to be regarded lightly. The Commission is not convinced that the pertinent data is not available to respondent from other sources, including corporations and firms processing fluid milk in the market areas listed in the subpoena.

Accordingly, the interlocutory appeal of the Director of Agriculture will be granted. Order to that effect will be entered.

Chairman Gwynne and Commissioner Kern dissented.

ORDER GRANTING INTERLOCUTORY APPEAL FROM
EXAMINER'S DENIAL OF MOTION TO QUASH SUBPOENA

This matter having come on to be heard upon the interlocutory appeal filed by the Attorney General of California on behalf of the Director of Agriculture of that State from the hearing examiner's order dated November 14, 1958, denying a motion to quash

or limit a subpoena duces tecum issued by the examiner at the instance of respondent Foremost Dairies, Inc.; and

The Commission, for the reasons stated in the accompanying opinion, having concluded that said interlocutory appeal should be granted:

It is ordered, That the aforesaid interlocutory appeal of the Director of Agriculture, State of California, be, and it hereby is, granted.

It is further ordered, That the said subpoena duces tecum issued by the hearing examiner be, and it hereby is, quashed.

Chairman Gwynne and Commissioner Kern dissenting.

FEDERATED DEPARTMENT STORES, INC. Docket 6836.
Order, Mar. 4, 1959.

Denial of motion to stay effective date of order in fur products case until 60 days after Supreme Court's decision in the *Mandel Brothers, Inc.*, case.

This matter having come on to be heard upon respondent's motion requesting a stay of the effective date of the order to cease and desist issued herein until sixty days following the decision of the Supreme Court in *Federal Trade Commission v. Mandel Brothers, Inc.*, No. 234; and

It appearing that the reason for such request is that certain rulings made by the Court of Appeals for the Seventh Circuit with respect to two issues involved in the *Mandel* case are alleged to be contrary to rulings made by the Commission with respect to identical issues involved in this matter; and

It further appearing that the order herein embraces a number of practices not involved in the Supreme Court's review of the *Mandel* case and that insofar as these practices are concerned, at least, no valid reason exists for the postponement of the effective date of the order; and

The Commission, therefore, being of the opinion that respondent's motion presents no adequate basis for the relief requested:

It is ordered, That respondent's motion to stay the effective date of the order be, and it hereby is, denied, it being understood, however, that this shall not be construed as preventing respondent from negotiating with the Office of General Counsel of the Commission for the purpose of showing any inequity which may result from the operation of the order to cease and desist and to obtain such appropriate administrative relief as may be warranted by the circumstances.

HOVING CORP. Docket 7195. Order, Mar. 9, 1959.

Order granting motion certified by the hearing examiner, and directing issuance of amended and supplemental complaint in fur products case.

This matter having come on to be heard upon the motion certified by the hearing examiner to the Commission for its determination prior to any hearings having been convened for the reception of testimony, which motion was filed by counsel supporting the complaint and requests that the Commission amend and supplement the complaint in this proceeding in respects there designated; and

The Commission having considered such motion and the answers filed by respondent in opposition to the requested amendment and certification and it appearing that the complaint charges misbranding and false and deceptive invoicing in violation of the Fur Products Labeling Act and rules promulgated thereunder and false and deceptive advertising in violation of subparagraphs 1, 5 and 6 of Section 5(a) of that Act and that the motion requests that the Commission amend and supplement its complaint by adding allegations that the respondent has violated subparagraphs 3 and 4 thereof and Rule 20 of the rules and regulations; and

It further appearing that the matters cited by movant, including the documentary material filed for the record, constitute adequate grounds for preliminary administrative determinations by the Commission or "reason to believe" that the respondent has caused the dissemination in commerce of advertisements which failed to disclose the true facts respecting products which were artificially colored or composed in substantial part of waste fur or other statutorily designated types of fur as required by said subparagraphs 3 and 4 and rule; and

The Commission having determined that exercise of its administrative responsibility to issue an amended and supplemental complaint is required in the public interest:

It is ordered, That the motion be, and it hereby is, granted.

It is further ordered, That the amended and supplemental complaint of the Commission issue herewith and be served upon the respondent Hoving Corporation.

STACEY-WARNER CORP., ET AL. Docket 7305. Order, Mar. 11, 1959.

Interlocutory order sustaining hearing examiner's denial of motion to dismiss complaint as to 13 of 16 respondents upon grounds of discontinuance of

practices alleged, and denying request of respondents' counsel for leave to file reply brief.

Counsel for respondents in this proceeding having filed an interlocutory appeal from the hearing examiner's order of January 27, 1959, denying a motion to dismiss the complaint as to thirteen of sixteen named respondents upon grounds of discontinuance of the practices alleged prior to issuance of the complaint; and counsel supporting the complaint having filed answer in opposition to said interlocutory appeal; and

The Commission being of the opinion that the interlocutory appeal, and answer in opposition thereto, provide an adequate basis for disposition of said interlocutory appeal and that the reply brief sought to be filed on behalf of said respondents is not necessary; and

The Commission being of the further opinion that the ruling appealed from is not a decision on the merits of the case, that no showing has been made that the ruling involves substantial rights or that it will materially affect the final decision in this proceeding and, hence, that the appeal is not one to be granted under §3.20 of the Commission's Rules of Practice:

It is ordered, That the request of counsel for respondents for leave to file a brief in reply to the answer of counsel supporting the complaint opposing said interlocutory appeal be, and it hereby is, denied.

It is further ordered, That the interlocutory appeal from the hearing examiner's order of January 27, 1959, be, and it hereby is, denied.

GOV-MART, a/k/a GOVERNMENT EMPLOYEES' MERCHANDISE MART, INC., ET AL. Docket 7049. Order, Mar. 13, 1959.

Interlocutory order sustaining hearing examiner's denial of motion to dismiss complaint.

This matter having been heard by the Commission upon the interlocutory appeal of respondents Mission Supply Company, Charles E. Klock and Harry Mallen from the hearing examiner's ruling denying said respondents' motion to dismiss the complaint, upon said respondents' request for a hearing on the appeal and upon the answer of counsel supporting the complaint in opposition to the appeal; and

It appearing that said respondents have made no showing that the hearing examiner's ruling involves any substantial rights or

will materially affect the final decision in this matter or that a determination of its correctness before the conclusion of the trial would better serve the interests of justice; and

The Commission, therefore, being of the opinion that said respondents' appeal is not one to be granted under §3.20 of the Commission's Rules of Practice, and that, under the circumstances, the hearing on the appeal, which was requested, is not necessary and would serve no useful purpose:

It is ordered, That said respondents' interlocutory appeal from the aforesaid ruling of the hearing examiner and their request for a hearing on the appeal be, and they hereby are, denied.

BELTONE HEARING AID CO., ET AL. Docket 7359.
Order, Mar. 16, 1959.

Order denying respondents' petition to refer issues to Bureau of Consultation and to stay proceeding pending determination thereby.

The respondents, by a petition filed February 24, 1959, having requested the Commission for an order directing that the issues presented by the complaint in this proceeding be referred to the Bureau of Consultation for settlement and that the proceeding be stayed for a period of six weeks pending a determination by such Bureau, contending, in part, that the matter is one peculiarly suited to disposition through consultation procedures; and

It appearing that the Commission has made its administrative determination to the effect that the public interest requires the disposition of this matter by adversary proceedings, and there having been no showing that this determination was incorrect; and

Respondents having also requested oral argument on their petition if there should be any doubt on their position, and the Commission being of the opinion that it is fully advised as to the issues by respondents' petition and memorandum in support thereof and the reply of counsel in support of the complaint:

It is ordered, That respondents' petition requesting an order directing that the issues presented by the complaint be referred to the Bureau of Consultation for settlement and directing a stay in the proceeding, and the request for oral argument, be, and they hereby are, denied.

NATIONAL DAIRY PRODUCTS CORP. Docket 6651.
THE BORDEN COMPANY. Docket 6652. BEATRICE FOODS CO. Docket 6653. Order, Mar. 23, 1959.

Interlocutory order sustaining hearing examiner's denial of motions to quash

or limit subpoenas duces tecum requiring production of retained copies of reports to Census Bureau.

Respondents, National Dairy Products Corporation, The Borden Company, Beatrice Foods Company, and nonrespondent, Pet Milk Company, having appealed from the hearing examiner's January 27, 1959, ruling, on the record, denying motions to quash or limit subpoenas duces tecum, returnable in each of the above-captioned cases, which subpoenas, among other things, require production of retained copies of reports (MC-20C) made to the United States Department of Commerce, Bureau of the Census, asserting as grounds for such motions that Sections 8 and 9 of Title 13, United States Code, create in the named appellants express statutory privileges as to said schedules; that disclosure to competitors of certain information contained in said reports will result in irreparable injury; and that the information sought is not material or relevant to the issues in this proceeding; and

The Commission being of the opinion that Sections 8 and 9 of Title 13 prohibit disclosure of the Census reports only by the Secretary of Commerce and employees under his jurisdiction and that the asserted privilege does not extend to copies of the aforesaid reports retained by the named appellants, particularly since the basic data contained therein is not otherwise privileged; and

The Commission being of the further opinion that to the extent disclosure of information contained in the reports may be shown to be harmful to a reporting firm, the hearing examiner can, and should, require that such reports be produced under appropriate protective orders and impounded, or retained under seal, so far as practicable in discharge of the Commission's responsibilities under the law; or, if practicable, that the hearing examiner may permit the desired information to be furnished under an agreement between counsel for all interested parties providing for production of the required information in usable form without disclosure of the basic data with reference to any specific plant; and

The Commission having concluded that the ruling of the hearing examiner was correct in that the information sought under the subpoenas is material and relevant to the issues framed in these proceedings:

It is ordered, That the interlocutory appeals of respondents, National Dairy Products Corporation, The Borden Company, Beatrice Foods Company, and of nonrespondent, Pet Milk Company, be, and they hereby are, denied.

It is further ordered, That the requests of Beatrice Foods Company and of The Borden Company for oral argument be, and they hereby are, denied.

SUN OIL CO. Docket 6934. Order, Apr. 7, 1959.

Order granting complaint counsel's motion certified by hearing examiner and directing issuance of amended and supplemental complaint.

This matter having come on to be heard upon the motion certified by the hearing examiner to the Commission for its determination, which motion was filed by counsel supporting the complaint and requests that the Commission amend and supplement its complaint in this proceeding in respects there designated; and

The Commission having considered such motion and the answer filed by the respondent in opposition to the requested certification and amendment, and it appearing that the complaint charges an unlawful planned common course of action and agreement by respondent acting in combination with its contract dealers to fix and maintain the prices at which gasoline supplied by the respondent is to be sold at retail stations by such dealers to the purchasing public; and

It further appearing that the motion requests that the Commission amend and supplement its complaint by adding allegations to the effect that the respondent, through and together with its dealers, has adopted and followed a predatory and oppressive pricing policy of posting prices uniformly and consistently within one cent of those posted by competing dealers who market unbranded or private brands of gasoline and further charging the effects of such policy to be, among others, a dangerous tendency to unduly restrain and eliminate competition between respondent's retailer dealers and retailers of unbranded or private brands of gasoline; and

It further appearing that the testimony and evidentiary material submitted for the record constitute adequate grounds for preliminary administrative determinations by the Commission or "reason to believe" that the respondent's pricing policies have been so motivated and have unduly suppressed and restrained competition in violation of law, and the Commission having determined that exercise of its administrative responsibility to issue an amended and supplemental complaint is required in the public interest:

It is ordered, That the motion be, and it hereby is, granted.

It is further ordered, That the amended and supplemental com-

plaint of the Commission issue herewith and be served upon the respondent Sun Oil Company.

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

AMERICAN CYANAMID CO., ET AL. Docket 7211. Order, May 8, 1959.

Interlocutory order sustaining hearing examiner's ruling quashing a number of specifications of subpoenas duces tecum based on his determination that cost reports submitted by respondents constituted adequate substitutes.

Counsel in support of the complaint having filed an interlocutory appeal from the hearing examiner's ruling of March 24, 1959, quashing a number of specifications of certain subpoenas duces tecum theretofore issued and served on the respondents, which ruling was based on the hearing examiner's determination that cost reports submitted by each of the respondents, except The Upjohn Company, constitute adequate substitutes for the cost data subpoenaed; and

The Commission, in disposing of prior interlocutory appeals from the examiner's rulings denying the respondents' motions to quash said specifications, having referred the respondents' substitute proposals with respect to compliance with the subpoenas to the hearing examiner for ruling thereon in the exercise of his sound discretion; and

It appearing that counsel in support of the complaint has not demonstrated to the satisfaction of the Commission that the hearing examiner in ruling that the cost reports submitted were adequate substitutes for the cost data subpoenaed has abused the discretion so vested in him; and

It further appearing that no showing has been made that said ruling will materially affect the final decision in this proceeding or that a determination of the correctness thereof before conclusion of the trial would better serve the interests of justice; and

The Commission being of the opinion that the appeal is not

one to be granted under the provisions of §3.20 of the Rules of Practice:

It is ordered, That the aforesaid appeal be, and it hereby is, denied.

THE ROBERTS CO., ET AL. Docket 6943. Order, May 11, 1959.

Order disposing of respondent's request to place case on Commission's docket for review and extending time for filing appeal brief.

Respondent United States Tackless, Inc., having requested the Commission to enter an order placing this case on its own docket for review and a further order staying the proceeding pending a ruling on the aforesaid request; and

It appearing from the record that notices of intention to appeal from the hearing examiner's initial decision have been duly filed by counsel supporting the complaint and by certain of the respondents, including respondent United States Tackless, Inc., thus rendering unnecessary the entry of an order placing the case on the Commission's docket for review or an order staying the proceeding:

It is ordered, That the requests for such orders be, and they hereby are, denied.

It is further ordered, however, That the time within which respondent United States Tackless, Inc., may file its brief on appeal be, and it hereby is, extended to and including June 1, 1959.

TRI-VALLEY PACKING ASSOCIATION, INC., and FLO-TILL PRODUCTS, INC., ET AL. Dockets 7225 and 7226. Orders and opinion, May 11, 1959.

Interlocutory orders refusing respondents' appeals from hearing examiner's denial of motions to quash and limit subpoenas duces tecum, directing compliance and remanding matters to hearing examiner for further proceedings.

ON INTERLOCUTORY APPEAL

By the COMMISSION:

This opinion disposes of interlocutory appeals in two cases which raise similar issues.

In Tri-Valley Packing Association, Inc., Docket No. 7225, respondent has appealed from the hearing examiner's order of February 2, 1959, which, among other things, denies, in part, respondent's motion filed January 22, 1959, to quash and limit a

subpoena duces tecum served upon it January 12, 1959, and directs respondent to comply with the subpoena as limited by the aforesaid order. The contentions of this respondent on its appeal are generally that the examiner erred in deciding that the proceeding was of an investigatory nature and thus applied too liberal standards for determining relevancy and reasonable scope; that the examiner erred in calling for some evidence which has no relevance, such as that part of the demand which calls for the names and addresses of all customers sold in a three-year period regardless of whether particular transactions may be relevant; that it was error to require the production of evidence regarding intrastate commerce; and that the application for the subpoena was insufficient because it allegedly did not show the relevance and reasonable scope of the material requested.

In *Flotill Products, Inc., et al.*, Docket No. 7226, respondent, Flotill Products, Inc., appealed from the hearing examiner's order of February 2, 1959, denying, in part, the motion of this respondent filed January 22, 1959, to quash and limit a subpoena duces tecum served upon it January 13, 1959, and directing compliance with the aforesaid subpoena as limited by such order. The contentions of this respondent are that in an adjudicatory proceeding the Commission cannot issue a broad investigatory type of subpoena; that the application for the subpoena was legally insufficient; and that the Commission does not have the power or jurisdiction to call for evidence relating to intrastate commerce, lacking a showing that particular intrastate transactions are relevant.

The complaint in Tri-Valley Packing Association, Inc., charges respondent therein with violating Section 2(a) of the Clayton Act, as amended. The contested specifications of the subpoena involved in the appeal read as follows:

"4. Such books, records, and documents, or certified tabulations thereof, as will disclose:

(a) The names and addresses of each customer of respondent during each of the years 1956, 1957, and 1958;

(b) The method of sale ('direct' or 'indirect') to each customer listed in (a) and the name of the broker, if 'indirect';

(c) The total volume of sales to each customer listed under (a), per year;

(d) The total amount of all rebates, discounts, or allowances, if any, paid or allowed per year to each customer listed in (a), indicating the type for each sum.

"5. All invoices and credit memoranda for all sales during

1956, 1957, and 1958 for all customers in the trade areas of Boston, Mass.; Waterbury, Conn.; Denver-Pueblo, Colo. area; Portland, Maine; Peoria, Ill.; Philadelphia, Pa., and Pittsburgh, Pa.; and Portland, Oreg.

"For the purposes of this specification the words 'trade area' shall be given their commonly accepted definition as including not only the area of the cities named but also contiguous suburbs which are included in that normal trading area."

The complaint in Flotill Products, Inc., charges respondents therein with violating Sections 2(c) and 2(d) of the Clayton Act, as amended. The contested specifications of the subpoena involved in the appeal read as follows:

"3. Such books, records, and documents, or certified tabulations thereof, as will disclose:

(a) The names and addresses of each customer of respondents during each of the years 1956, 1957, and 1958;

(b) The method of sale ('direct' or 'indirect') to each customer listed in (a) and the name of the broker, if 'indirect';

(c) The total volume of sales to each customer listed under (a), per year;

(d) The total amount of all advertising funds, promotional allowances, etc., paid or allowed per year during 1956, 1957, and 1958 to each customer listed under (a).

"4. Regarding all customers in the trade area of Boston, Mass., all invoices and credit memoranda for all sales during 1956, 1957, and 1958.

"For the purposes of this specification the words 'trade area' shall be given their commonly accepted definition as including not only the area of the cities named but also contiguous suburbs which are included in that normal trading area."

The hearing examiner limited the subpoena in each case to the extent of confining the demands to transactions within the continental limits of the United States, including Alaska. He otherwise ruled that the subpoenas were reasonable in scope. He held that the proceedings, while not purely investigatory in nature, were nevertheless an extension of the power of Congress to investigate matters of public concern, and that the Commission is not limited solely to the results of its original investigation.

We do not believe that the hearing examiner abused his quasi-judicial discretion in ruling that the documents called for were relevant to the issues in these cases nor does it appear that compliance with these requests will be unduly burdensome on respondents or that the time covered thereby is unreasonable. Ac-

cordingly, we are denying respondents' appeals and an order will be entered in each case remanding the matter to the hearing examiner for further proceedings.

ORDERS REMANDING MATTERS TO HEARING EXAMINER

Respondents, Tri-Valley Packing Association, Inc. and Flotill Products, Inc., having filed interlocutory appeals from the hearing examiner's orders of February 2, 1959, denying, in part, respondents' motion to quash and limit subpoenas duces tecum served upon them January 12 and 13, 1959, respectively, and directing compliance with the aforesaid subpoenas as limited by such orders; and

The Commission, for the reasons stated in the accompanying opinion, having denied the aforesaid appeals:

It is ordered, That these matters be, and they hereby are, remanded to the hearing examiner for further proceedings.

THOMASVILLE CHAIR COMPANY. Docket 7273. Order and opinion, May 11, 1959.

Interlocutory order denying respondent's appeal from hearing examiner's ruling denying motion to dismiss complaint and remanding matter to afford respondent opportunity to present evidence refuting inferences of violation of Sec. 2(c), Clayton Act.

OPINION OF THE COMMISSION

By the COMMISSION:

This is an interlocutory appeal by the respondent from the hearing examiner's denial of the respondent's motion to dismiss the complaint.

The complaint charges respondent with violating Section 2(c) of the Clayton Act by passing on or granting to some of its retail furniture dealer customers a discount in lieu of a commission or brokerage. After counsel supporting the complaint had rested his case, respondent moved the hearing examiner to dismiss the complaint. The principal ground seems to have been that a *prima facie* case had not been established. Respondent also argued that the hearing examiner had erred in refusing to admit certain cost data proffered by respondent for the purpose of establishing a cost justification defense to the complaint and to negate any inference that part of a sales or brokerage commission had been passed on in the form of a discount to certain customers. The hearing examiner ruled that a *prima facie* case had been made and, in his order denying respondent's motion

to dismiss, reaffirmed the exclusionary rulings to which respondent had taken exception. Respondent has now filed an appeal from the denial of its motion.

The ruling from which respondent has appealed involves, first of all, a determination that a *prima facie* case has been established. As we have previously explained on similar appeals, such a ruling is not a decision on the merits of the case. It does not affect substantial rights of the respondent, nor will it have a material effect on the final decision of the case. *Vulcanized Rubber and Plastics Company*, Docket No. 6222 (November 29, 1955). Consequently, the appeal based on the alleged failure to establish a *prima facie* case is not one to be granted under §3.20 of the Commission's Rules of Practice.

The evidentiary rulings cited by respondent were made by the hearing examiner after respondent had attempted to introduce evidence concerning cost studies during cross-examination of a witness called by counsel supporting the complaint. As we construe the record, the hearing examiner ruled, in effect, that such evidence was admissible only if the underlying records were produced for use by opposing counsel in cross-examination; that, in any event, such evidence was not admissible to establish a cost justification defense to a Section 2(c) charge; and that, in the posture of the case and in the form offered, the evidence was not then admissible even to rebut the inference that part of the price differential granted by respondent represented a discount or allowance in lieu of brokerage.

We are of the opinion that these rulings were correct. The hearing examiner's refusal to allow testimony concerning cost studies unless the records of these studies were made available for inspection and use by counsel supporting the complaint was a proper application of an established rule of evidence. The ruling that respondent could not as a matter of law cost justify a discount or allowance granted to a buyer in lieu of brokerage is in accord with all of the decisions on this point. The cases have consistently held that a respondent charged with violation of Section 2(c) of the Clayton Act may not avail itself of the affirmative defenses afforded by Sections 2(a) and 2(b) of the Act. *The Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667; *Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687; *Oliver Bros, Inc., et al. v. Federal Trade Commission*, 102 F. 2d 763.

We do not construe the hearing examiner's rulings as prohibiting respondent from properly introducing evidence for the pur-

pose of refuting any inferences which may be legitimately drawn from the evidence of record, that it had passed on to buyers a discount or allowance in lieu of brokerage; nor do we think that such evidence, when offered for this purpose, should be excluded. The *prima facie* case here rests largely upon an inference rather than upon direct evidence that part of the sales commission normally paid by respondent reaches certain buyers in the form of a reduced price. Consequently, all facts which would tend to rebut this inference, including evidence to show that the lower prices charged certain buyers actually did not result from a passing on of a part of salesmen's commissions but was in fact due to some other cost difference, would be relevant to the point in issue and should be received.

The respondent's appeal will be denied and the matter will be remanded to afford respondent an opportunity to present its case in conformity with the views expressed herein. An appropriate order will be entered.

ORDER DENYING RESPONDENT'S INTERLOCUTORY APPEAL

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's ruling denying respondent's motion to dismiss the complaint; and

The Commission, for the reasons stated in the accompanying opinion, having concluded that this appeal should be denied:

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

It is further ordered, That this case be, and it hereby is, remanded to the hearing examiner for further proceedings.

ADMIRAL CORP. Docket 7094. Order, May 29, 1959.

Interlocutory order sustaining hearing examiner's denial of respondent's motion for issuance of certain subpoenas duces tecum in Sec. 2(d), Clayton Act case.

This matter having come on to be heard upon the appeal of the respondent from that part of the hearing examiner's order of March 3, 1959, which denied the respondent's motion for issuance of subpoenas duces tecum requiring the production of documentary material by distributors of merchandise showing any payments by them for services or facilities furnished by certain retailers who also were customers of the respondent; and

The Commission having determined that the hearing examiner's challenged ruling has sound legal basis and is consistent with the

Commission's interpretation of the Clayton Act, as amended, as expressed in its decision of June 21, 1956, in the matter of *Henry Rosenfeld, Inc., et al.*, Docket No. 6212, namely, that the defense afforded in subsection (b) of Section 2 to the proceedings there designated does not extend to other proceedings involving proved charges of violation of Section 2(d) :

It is ordered, That the respondent's appeal be, and the same hereby is, denied.

ALLIED MERCHANDISING, INC., ET AL. Docket 7399.
Order, June 16, 1959.

Denial of respondents' motion requesting the Commission to vacate hearing examiner's order scheduling hearings.

This case having come on to be heard upon the motion filed on June 8, 1959, by certain of the respondents, which motion requests that the Commission vacate the hearing examiner's order of May 21, 1959, scheduling hearings to be had in five cities and that it designate St. Louis, Mo., as the sole place of hearings; and

It appearing that such motion is not addressed to the hearing examiner as required by §3.8(a) of the Commission's published Rules and that there is no showing in the motion of abuse of discretion by the hearing examiner in appointing the places of hearings:

It is therefore ordered, That said motion be, and the same hereby is, denied.

GULF OIL CORP. Docket 6689. Order, June 18, 1959.

Interlocutory order upholding hearing examiner's ruling sustaining objection to reception in evidence of tabulations based on industry surveys.

Counsel in support of the complaint having filed an interlocutory appeal from the hearing examiner's ruling of April 17, 1959, sustaining objections to the reception in evidence of certain exhibits (CX 402-473 for identification), offered for the purpose of showing the ranking of companies in the petroleum industry according to production, sales and total availability of natural gasoline for the year 1955; and

It appearing that the ruling appealed from is of such importance and is likely to have such an impact on the future course of this proceeding that a determination of the correctness thereof before conclusion of the trial is warranted; and

The Commission having considered the matter in the light of the generally accepted principles governing the admissibility in evidence of compilations or tabulations made from scientifically conducted surveys as discussed in its opinion rendered May 16, 1955, in the matter of *Crown Zellerbach Corporation*, Docket No. 6180 (51 F.T.C. Decisions 1105), and having in mind the methods and procedures employed in the collection and compilation of the data here involved and the apparent possibilities of errors of interpretation, assumption, calculation and conclusion inherent therein; and

The Commission being of the opinion that the hearing examiner's ruling was in all material respects correct:

It is ordered, That the appeal from said ruling be, and it hereby is, denied.

CONTINENTAL WAX CORP. Docket 7351. Order, June 24 1959.

Interlocutory order sustaining hearing examiner's granting of motion to amend complaint.

Respondents having filed an interlocutory appeal from the hearing examiner's order of May 5, 1959, granting a motion of counsel supporting the complaint to amend the complaint in this proceeding; and

It appearing that the amendment is, in effect, the addition of an allegation of the particular respects in which it is claimed that respondents' advertising representations attacked in the original complaint are false and deceptive; and

It further appearing that under the provisions of §3.9 of the Commission's Rules of Practice the allowance of such an amendment is a matter clearly within the authority of the hearing examiner to be exercised in his sound discretion; and

The Commission being of the opinion that no showing has been made that the hearing examiner in this instance abused that discretion:

It is ordered, That respondents' appeal, including their request for oral argument thereon, be, and it hereby is, denied.