his report and recommendation thereon.

ADMIRAL CORPORATION

Docket 7094. Order and Opinion, July 15, 1959

Interlocutory order upholding hearing examiner's denial of respondent's motion for issuance of subpoenas duces tecum to 26 competitors, as lacking specificity.

OPINION OF THE COMMISSION

The complaint in this proceeding, in two counts, charges respondent with violation of subsections (a) and (d) of Section 2 of the

599869—62——104

Clayton Act, as amended, in its sales as a distributor of Admiral televisions, radios and appliances to dealers who re-sell them to the general public. Counsel in support of the complaint completed their case-in-chief and thereafter respondent applied to the hearing examiner for issuance of subpoenas duces tecum which would have required 26 of its competitors in three competitive areas to produce documents assertedly relating to respondent's defenses to both counts of the complaint.

As to the 2(a) count, respondent sought this evidence with respect to the following issues:

1. The issues as to injury to competition.
2. The issues as to respondent's defense of meeting competition in good faith.
3. Issues with respect to the lack of injury to the public interest.
4. Issues raised by respondent's answer based upon the decision in Moog Industries, Inc. v. F.T.C., 355 U.S. 411.

As to the 2(d) count, respondent asserted the same reasons except for those dealing with injury to competition.

On March 3, 1959, the hearing examiner granted in part and denied in part respondent's motion for subpoenas. The part denied was that part seeking documentary material to show, in connection with the 2(d) count, that respondent was "meeting competition." Upon respondent's interlocutory appeal from that ruling, the Commission, on May 29, 1959, affirmed the hearing examiner.

In due course the subpoenas duces tecum were served upon respondent's competitors and thereafter, on April 7, 1959, the hearing examiner granted motions to quash the subpoenas on the ground that the subpoenas lacked the degree of specificity required under controlling case law. The April 7, 1959, order stated, however:

> If respondent's counsel will present new subpoenas narrowed and defined as indicated, consideration of their issuance will be given * * *.

Respondent did not appeal from the April 7, 1959, ruling and, on April 17, 1959, moved for issuance of 22 subpoenas duces tecum, advancing the same grounds in support thereof as had been relied upon in its original motion for subpoenas.

On April 27, 1959, the hearing examiner denied respondent's motion of April 17, 1959, stating in his order that it "* * * does not comply in specificity with this Hearing Examiner's order of April 7, 1959."

Respondent is entitled to the production of the documents sought if their relevance and the reasonableness of the scope of the subpoenas are established. As to respondent's 2(b) defense particularly, the hearing examiner in his order of April 7, 1959, stated in pertinent part that:

Section 2(b) reads in the singular; it is concerned with individual competitive situations, particular prices on particular sales by particular competitors at particular times on specified products—not with meeting competition in general.[1] Respondent cannot fish around in the files of nonparties to locate prices which in time, product, and source, fit or seem to fit, prices which it has been shown to have itself charged. Here the case against it has been completed. Respondent knows from the record by now and from its own files also, the prices or sales which it claims to have been "made in good faith to meet an equally low price of a competitor." I see no reason why these subpoenas should not so specify.

In his order of April 27, 1959, the subject of this appeal, the hearing examiner denied respondent's motion to issue subpoenas "because such motion does not comply in specificity" with his order of April 7, 1959, quoted above. The Commission agrees with this ruling and has determined that respondent's motion of April 17, 1959, patently failed to comply with the hearing examiner's order of April 7, 1959. The specifications therein failed to describe with reasonable particularity the documents sought. Any subpoena duces tecum based upon such specifications would be entirely unreasonable in scope in that documents sought are related to competition generally and are not identified with specific offers by respondent's competitors to customers to whom respondent gave the lower prices which are the basis for the price discrimination charges in the complaint. The Commission holds, therefore, that the hearing examiner's ruling of April 27, 1959, insofar as it went to documents sought to aid respondent to establish its asserted 2(b) defense to the charges of price discrimination under Section 2(a) of the Act, was correct; that it was made in the exercise of his sound discretion; and that there has been no showing of abuse of that discretion. In fact, the discretion of the hearing examiner as to that ruling has been unquestioned.[2]

Respondent also asserts in this appeal that the documents sought are material and relevant to the so-called "Moog Issue" of what should be the effective date of any cease and desist order that might be entered, which issue was set forth as a prayer for relief in respondent's answer in this proceeding. In effect, respondent contends that the documents sought under the subpoenas are relevant to establish the validity of its request for postponement of the effective date of any order to cease and desist that might be entered until similar orders are issued against its competitors. Such

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[1] *U.S.* v. *A. E. Staley Co.*, 324 U.S. 746, 753; *Standard Oil Co. of Indiana* v. *F.T.C.*, 340 U.S. 231; *F.T.C.* v. *C E. Niehoff*, 241 F. 2d 37; *Standard Motor Products, Inc.*, 50 F.T.C. 624.

[2] The Commission by its order of May 29, 1959, denying respondent's earlier interlocutory appeal determined that the defense afforded in Section 2(b) of the Act is not available as a defense to charges under Section 2(d) of the Act and we do not here reconsider or revise that ruling in any respect insofar as respondent's present interlocutory appeal might be intended or construed to re-raise that issue.

a contention is, of course, no defense to the charges contained in the complaint in this case, and it has no relevancy or materiality to any of the issues raised in this proceeding. It is true that the Supreme Court has held it to be within the Commission's "discretionary determination" to set the effective date of its orders to cease and desist, *Moog Industries, Inc.* v. *F.T.C.*, 355 U.S. 411. The exercise of that discretion, however, should speak as of the time of issuance of an order to cease and desist. Such an order has not yet been issued against respondent, and until a violation of law as either proved or admitted no useful purpose would be served in considering the effect of a hypothetical order upon the relationship of respondent to its competitors. At the present stage of this case, the question of the effective date of any order that might be issued against respondent is completely speculative.

For the foregoing reasons, and particularly since respondent's contention in this regard has no relevancy or materiality to the issues in this proceeding, the hearing examiner's ruling denying respondent's motion for the issuance of the subpoenas in question here was proper.

Respondent's interlocutory appeal from the hearing examiner's order of April 27, 1959, is, therefore, denied. In view of the foregoing, respondent's request for oral argument also is denied. An appropriate order will issue.

ORDER

Respondent having filed an interluctory appeal from the hearing examiner's order of April 27, 1959, denying respondent's motion for issuance of subpoenas duces tecum; and

The Commission having considered said appeal, briefs of counsel, and pertinent portions of the record herein, and being of the opinion, for the reasons appearing in the accompanying opinion, that said appeal should be denied, and being of the further opinion that the oral argument requested by respondent is unnecessary:

It is ordered, That the aforesaid interlocutory appeal and the request for oral argument be, and they hereby are, denied.

THE ATLANTIC REFINING COMPANY, INC.

Docket 7471. Order, July 15, 1959

Denial of respondent's motion to dismiss Counts I and II of the complaint, stating that it should have been directed to the hearing examiner.

Respondent having, on June 30, 1959, filed with the Commission a motion to dismiss Counts I and II of the complaint in this proceeding for lack of jurisdiction and having requested oral argument