

said order to cease and desist, or that the public interest so requires: *Accordingly, it is ordered,* That the motion, filed on behalf of respondents on September 3, 1959, seeking to vacate the order to cease and desist heretofore entered against respondents be, and the same hereby is, denied.

IN THE MATTER OF
GULF OIL CORPORATION

Docket 6689. Order, Sept. 30, 1959

Interlocutory order denying respondent's request for an order directing complaint counsel to serve upon it any application, etc., they might make for an economic survey under authority of Sec. 6, Federal Trade Commission Act, seeking information for possible use in this proceeding; stating that the investigative function is wholly separate and distinct from the quasi-judicial function of conducting adversary proceedings, and that respondent's appearance as a party in interest would be clearly detrimental to the public interest.

The respondent, by motion filed September 18, 1959, having requested an order directing counsel in support of the complaint to serve upon said respondent any motion, application or other written request they may make to the Commission for the conduct of an economic survey or investigation under the authority of Section 6 of the Federal Trade Commission Act seeking information for possible use in connection with this proceeding, as well as any motion, application or other request to the Bureau of the Budget in connection with any such proposed survey or investigation; and

It appearing that the ground for the motion is that the consideration by the Commission or the Bureau of the Budget of an *ex parte* application for such a survey or investigation would deprive the respondent of its lawful right to be heard on the legality, necessity and propriety thereof; and

The Commission having considered the matter and being of the opinion that any action taken by it for the purpose of obtaining information under the authority of Section 6 of the Federal Trade

Commission Act is an exercise of a function which is wholly separate and distinct from its quasi-judicial function of conducting adversary proceedings; that the decision as to when and under what circumstances such function should be exercised is a matter solely within the administrative discretion of the Commission; and that the respondent not only has no right to be heard in connection therewith, but that its appearance as a party in interest would seriously impede the Commission in the performance of its continuing duty to enforce the laws administered by it and thus be clearly detrimental to the public interest:

Accordingly, it is ordered, That the respondent's motion be, and it hereby is, denied.

NORTH AMERICAN PHILIPS COMPANY, INC.

Docket 6900. Order, Sept. 30, 1959

Order denying motion to reopen Clayton Act proceeding—disposed of by a consent order on Nov. 3, 1958, 55 F.T.C. 682—following amendment of Act to provide for more expeditious enforcement of orders and imposition of penalties for violations.

Respondent, North American Philips Company, Inc., having filed a motion requesting the Commission to set aside the orders to cease and desist entered herein on November 3, 1958; and

Said respondent having alleged in support of its motion that since the entry of the orders, Section 11 of the Clayton Act has been amended by the enactment of Public Law 86-107, approved July 23, 1959, that under the statute prior to amendment respondent had the right to a hearing before a Court of Appeals on the terms of the orders before being subjected to any penalty proceedings, and that under the amended statute it is denied this opportunity; and

It appearing that the orders to cease and desist were entered in disposition of this proceeding pursuant to and in strict conformity with voluntary agreements theretofore executed by the respondent and counsel in support of the complaint expressly providing for the entry thereof, and in which agreements the respondent, among other things, expressly waived all of the rights it may have had to challenge or contest the validity of the orders; and

The Commission being of the opinion that the changes in the procedures for the enforcement of orders to cease and desist issued under the Clayton Act brought about by the enactment of Public Law 86-107 afford no basis for the Commission to set aside a previously entered order:

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

THE GRAND UNION COMPANY

Docket 7344. Order and Opinion, Oct. 14, 1959

Interlocutory order remanding to hearing examiner for consideration and appropriate action, as clearly within the scope of his authority, joint motion to amend complaint by substituting wholly owned subsidiaries for original respondent.

OPINION OF THE COMMISSION

By the COMMISSION:

This matter is before the Commission on an interlocutory appeal filed by counsel supporting the complaint from the hearing examiner's order denying a joint motion of counsel to amend the complaint by substituting Square Deal Market Co., Inc., and Super Market Wholesalers, Inc., as parties respondent in lieu of The Grand Union Company. The reason given for the order was that "the proposed amendment is not reasonably within the scope of the proceeding initiated by the original complaint."

In so ruling the hearing examiner was in error. Square Deal Market Co., Inc., it appears, is a wholly owned subsidiary of the respondent, The Grand Union Company, and Super Market Wholesalers, Inc., is in turn a wholly owned subsidiary of Square Deal Market Co., Inc. The acts and practices alleged in the complaint to have been unlawful, instead of having been engaged in by The Grand Union Company, as alleged, were actually engaged in by Square Deal Market Co., Inc., acting through Super Market Wholesalers, Inc. In such circumstances, as the Commission recognized in Docket No. 6486, *The Goodyear Tire and Rubber Company et al.* (Order Affirming Hearing Examiner's Order Amending Complaint—issued October 26, 1956), an order amending the complaint by a substitution of the parties is clearly within the scope of the hearing examiner's authority. See also the Commission's opinion of June 4, 1958, in Docket No. 6961, *Hafner Coffee Company*, in disposition of a motion for amendment certified to the Commission by the hearing examiner.

The motion for amendment will be remanded to the hearing examiner for consideration and appropriate action in conformity with the foregoing.

ORDER

Counsel supporting the complaint having filed an interlocutory appeal from the hearing examiner's order of September 21, 1959, denying a joint motion of counsel supporting the complaint and counsel for the respondent for an amendment of the complaint herein; and

The Commission, for the reasons set forth in the accompanying opinion, having determined that the ruling appealed from was erroneous:

It is ordered, That the appeal of counsel supporting the complaint be granted.

It is further ordered, That the aforesaid motion for amendment of the complaint be, and it hereby is, remanded to the hearing examiner for appropriate action in conformity with the Commission's opinion.

ALLCHEM MANUFACTURING CO., INC., ET AL.

Docket 7502. Order, Oct. 22, 1959

Order denying request to reopen proceeding for reception of evidence, by individual respondent who had defaulted in filing answer to complaint and failed to appear at hearing.

It appearing that respondent Charles Goldberg, named as an individual respondent in this proceeding, filed a request on September 28, 1959, seeking in effect to have the matter reopened for the reception of evidence submitted with said request; and

It appearing further that Charles Goldberg defaulted in filing answer to the complaint herein and that he failed to appear at the time and place fixed for hearing; and

It appearing further that the hearing examiner's initial decision herein was duly served upon said Charles Goldberg on August 26, 1959, and that he did not file notice of intention to appeal or otherwise perfect an appeal from said initial decision within the time required by the Commission's Rules of Practice; and

The Commission having concluded that said respondent has made no showing justifying his default in the respects noted and further that the evidence he proposes to submit, viewed in its most favorable light, would not materially affect the final result in the case:

It is ordered, That the request of respondent Charles Goldberg that this proceeding be reopened be, and it hereby is, denied.

OUTDOOR SUPPLY CO., INC.

Docket 7482. Order and Opinion, Oct. 27, 1959

Order vacating initial decision and remanding case for lack of evidence in the record to support complaint charging a manufacturer of outdoor supply equipment in Long Island City, N.Y., with misrepresenting the size of sleeping bags by giving as "cut size" or "full cut size" on attached labels, sizes larger than the actual dimensions of the sleeping bags.

OPINION OF THE COMMISSION

By the Commission:

This matter is before the Commission upon its review of the hearing examiner's initial decision. The complaint charges that respondent has misrepresented the finished size of sleeping bags which it manufactures by setting forth on labels attached thereto certain dimensions, designated as "cut size" and "full cut size," which are greater than the actual dimensions of the finished product.

The record shows that the measurements which respondent places on the label are in fact the dimensions of the fabric from which the sleeping bag is made and are not the true dimensions of the bag itself. The record also contains an admission by respondent that the measurements of the fabric, known in the trade as the "cut size," are invariably larger than the finished size of the sleeping bag.

The hearing examiner concluded from this evidence that the buying public, being unaware of the significance of the terms "cut size" and "full cut size," would be led to believe that the dimensions set forth on labels attached to respondent's sleeping bags are the finished sizes of such products. He held, therefore, that respondent's practice of disclosing the "cut size" of sleeping bags on labels and in advertising has the tendency and capacity to mislead and deceive purchasers of such products. The record, however, does not support these conclusions. There is no evidence that the public is unaware of the significance of the terms "cut size" and "full cut size" or that the public believes that the dimensions shown on respondent's labels as "cut sizes" are the actual dimensions of its sleeping bags.

Since evidence adduced thus far in the proceeding is not adequate to sustain the allegation that respondent's practice of marking sleeping bags to show the cut sizes thereof has the tendency and capacity to mislead the public into believing that these dimensions are the actual dimensions of the finished product, the initial decision will be vacated and the case remanded to the hearing examiner for the purpose of receiving such evidence as may be available on this point.

ORDER

This matter having been considered by the Commission upon its review of the hearing examiner's initial decision, filed September 16, 1959; and

The Commission, for the reasons stated in the accompanying opinion, having determined that said initial decision should be vacated and the case remanded to the hearing examiner:

It was ordered, On the 27th day of October, 1959, that the aforesaid initial decision be vacated and set aside.

It was further ordered, That this case be remanded to the hearing examiner for further proceedings in conformity with the views expressed in the aforesaid opinion.

It was further ordered, That after such proceedings have been terminated the hearing examiner shall forthwith make and file, in accordance with the provisions of §3.21 of the Commission's Rules of Practice, a new initial decision based on the record as then constituted.

GEORGE McKIBBIN & SON ET AL.

Docket 7245. Order and Opinion, Oct. 29, 1959

Interlocutory order denying motion for trial de novo following death of hearing examiner, for lack of showing of any conflict in the testimony—principally that of expert witnesses—which needed to be resolved on the basis of the witnesses' credibility as evidenced by their demeanor or conduct while testifying.

OPINION OF THE COMMISSION

By the COMMISSION:

This is an interlocutory appeal by the respondents from the hearing examiner's denial of their motion for a trial *de novo*.

The complaint charges respondents with making false, misleading and deceptive representations in connection with the offering for sale and sale of an encyclopedic dictionary in violation of Section 5 of the Federal Trade Commission Act. Hearings presided over by the hearing examiner originally appointed to take testimony in this proceeding were held in New York, New York, and Washington, D.C., at which time testimony and other evidence in support of and in opposition to the allegations of the complaint was introduced. After counsel supporting the complaint had rested his case but prior to the completion of the respondents' defense, the hearing examiner, before whom the testimony had been taken, died. Thereafter, a substitute hearing examiner was designated to preside in the proceeding. By motion filed July 20, 1959, respondents requested that the testimony taken and the record made before the original hearing examiner be stricken and that all evidence be received *de novo* before the substitute hearing examiner. Respondents argued in support of this motion that a determination of material questions of fact which had arisen or which might possibly arise, would depend upon an evaluation of the credibility of the witnesses and that the substitute hearing examiner should, therefore, have an opportunity to see and hear all witnesses in order to make this evaluation. The hearing examiner denied the motion and respondents have now filed an appeal from this denial.

The argument on appeal is based primarily on the court's interpretation of Section 5(c) of the Administrative Procedure Act in *Gamble-Skogmo, Inc., et al. v. Federal Trade Commission*, 211 F. 2d 106. This section provides that "The same officers who preside at the reception of evidence * * * shall make the recommended decision or initial decision * * * except where such officers become unavailable to the agency." As interpreted in the aforementioned decision, the primary purpose of this provision was to set forth a procedural guaranty that the hearing examiner who presides at the hearings and receives the testimony of the witnesses will prepare the recommended or initial decision as a means of insuring that the parties will be afforded the benefit of proper credibility evaluation. The court held, therefore, that even in the event of examiner unavailability, the substitute hearing examiner must engage in a *de novo* receiving of evidence in those cases where, as a result of conflicting testimony, the evaluation of the credibility of witnesses constitutes a material factor in the reaching of a recommended or initial decision.

This case cannot be considered as authority for respondents' broad position that a trial *de novo* must be granted whenever the credibility of witnesses who have testified before the original hearing examiner is in issue. The court's ruling was merely to the effect that when a substitute hearing examiner must make a choice between the testimony of conflicting witnesses and such choice may affect his decision, he must see and hear these particular witnesses testify in order that he may be able to evaluate their truthfulness. Since the only reason for recalling such witnesses is to afford the substitute hearing examiner an opportunity to observe their demeanor while testifying, it is believed that in most instances the parties' procedural rights would be fully protected if the witnesses who have given conflicting testimony are recalled solely for the purpose of cross-examination.

The evidence received before the original hearing examiner in this proceeding consists primarily of the testimony of expert witnesses. The respondents have failed to show, and the record does not disclose, any conflict in this testimony which should properly be resolved on the basis of the witnesses' credibility as evidenced by their demeanor or conduct while testifying. The argument that there should be a *de novo* receiving of evidence at this time is, therefore, without merit.

Respondents also argue that in subsequent hearings they will produce witnesses whose testimony may be at variance with that of the witnesses who appeared in support of the complaint. We think, however, that a satisfactory solution to such a situation,

should it occur, is set forth in the order from which this appeal was taken. The hearing examiner has advised therein that if it should appear that the credibility of witnesses who had previously testified is in issue, these witnesses would be recalled for further examination.

The respondents' appeal will be denied and an appropriate order will be entered.

ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's ruling denying respondents' motion for a trial *de novo*; and

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

It is ordered, That respondents' 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.

PURE OIL COMPANY

Docket 6640. Order, Oct. 30, 1959

Order broadening scope of remand to include reception of evidence in defense of charges of geographical price discriminations and rebuttal.

The Commission, by order issued September 25, 1959, having remanded this proceeding to the hearing examiner for the reception of additional evidence as to prices charged by the respondent to customers located in areas other than Birmingham, Alabama, during the period of time covered by the allegations of Count I of the complaint; and

The respondent on October 6, 1959, having filed a motion and affidavit stating that by reason of the remand it has reconsidered its prior decision to rest its case and not offer evidence in opposition to the aforesaid allegations and requesting the Commission to now permit it to introduce evidence in defense of certain of such charges, which motion is opposed by counsel supporting the complaint; and

The Commission having determined that in the circumstances the respondent's request for leave to present its defense should be granted, but that further direction to the hearing examiner as to the form of decision or report to be submitted by him after receipt of the additional evidence, as suggested by the parties, is not necessary:

It is ordered, That the scope of the Commission's remand of this case to the hearing examiner under its order of September 25, 1959, be, and it hereby is, broadened to include the reception of any relevant evidence which may be offered by the respondent in defense

of the charges of geographical price discriminations together with such relevant rebuttal evidence as may be offered by counsel supporting the complaint.

LIFETIME CUTLERY CORP. ET AL.

Docket 7292. Order and Opinion, Oct. 30, 1959

Order remanding case for additional evidence on the merits of the charge challenging use of the expression "24 karat gold plated" to describe products surfaced with gold by the electrolytic process, and for a finding of violation of the Federal Trade Commission Act by failure of respondents to disclose the foreign origin of the carving fork heads of their cutlery.

OPINION OF THE COMMISSION

By KINTNER, *Chairman*:

Should the Commission's order to cease and desist include a prohibition against respondents' use of the term "gold-plated" to describe cutlery which has been surfaced with gold by an electrolytic rather than a mechanical process? The hearing examiner found that there was no evidence that respondents' use of this term was false or deceptive and refused, despite the urging of counsel supporting the complaint to the contrary, to include any reference to this matter in the order to cease and desist contained in his initial decision. We have concluded that the matter should be remanded for the receipt of further evidence, inasmuch as the Commission cannot, upon the present record, make an informed determination on the merits of the question raised by this appeal.

Paragraph 10 of the complaint alleged that respondents represented parts of their products as "24 karat gold plated." The complaint further alleged that "in truth and in fact, such parts are not 24 karat gold plated since the gold deposited thereon is not a substantial surface plating of gold alloy applied by a mechanical process but is an electrolytic application." There is now no dispute that respondents have referred to their products as "24-Karat Gold-Plated"; there is also now no dispute that these products were surfaced with gold by an electrolytic application; but the conclusion assumed in Paragraph Ten of the complaint that these products are not in truth and in fact 24 karat gold plated has not been shown.

As the Commission stated in *Silf Skin, Inc.*, Docket 6772, decided June 19, 1959, "The manufacturing process by machine methods is not a static but a growing and constantly changing art. To require a term or terms which give prestige to a product to be restricted in their use to products manufactured on a particular type of machine is a matter of serious concern. In all the circumstances, we are aware of the opinion that the allegations of the complaint

in this connection have not been supported by substantial evidence." The same reasoning is equally applicable here. Restriction of the use of the words "24 karat gold plated" to gold alloy applied by a mechanical process should only be adopted as a result of facts and evidence of record.

On the basis of this record, we cannot distinguish between mechanically plated and electrolytically plated products. One witness testified briefly and ambiguously on the subject. Although he stated that in the industry "gold plate or gold filled * * * typically * * * mean * * * rolled gold plate," (a mechanical process), he also stated that "gold electro-plated" and "gold-plated" are "synonymous," and "no one in the electro-plating industry will ever be misunderstood by saying 'plated,' in contrast to 'electro-plated.'"

Counsel supporting the complaint urges us to decide this question adversely to the respondents on the basis of trade practice rules adopted by the Commission for the jewelry, watchcase, and fountain pen and mechanical pencil industries. We believe that the hearing examiner correctly disposed of this contention when he stated that "* * * the Commission's trade practice rules were designed to be helpful guides to the various industries for which they have been promulgated, and were not intended to be regarded and recognized as substantive rules of law, or as factual conclusions which might be cited or accepted in an adjudicative proceeding as a substitute for evidence."

In view of the foregoing, the appeal of counsel supporting the complaint will be denied, but the matter will be remanded for the taking of further evidence on this point. We have noticed, also, that in one respect not mentioned in this appeal the initial decision is incomplete. One of the facts of which the hearing examiner in his order of February 19, 1959, took official notice, but of which no mention is made in the initial decision, is that a substantial portion of the purchasing public maintains a preference for products of domestic manufacture. This is a material fact in support of the finding that the respondents have violated the Federal Trade Commission Act by failing to disclose the foreign origin of the carving-fork heads of their cutlery. Since, as provided in Sec. 7(d) of the Administrative Procedure Act, respondents were afforded an opportunity to present evidence controverting this material fact but presented no such evidence and made no request to do so, paragraph 3 of the findings should be amended to make appropriate reference to this fact.

ORDER

This matter having come on to be heard upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner; and

The Commission having determined, for reasons stated in the accompanying opinion, that the record in this proceeding does not afford adequate basis for informed decision on the merits of the charge challenging respondents' use of the expression "24 karat gold plated" to designate and describe products surfaced with gold by the electrolytic process, and the Commission having further determined that the proceeding should be reopened for the reception of additional evidence with respect to such charge:

It is ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for the reception of such evidence as may be offered in support of and in opposition to such charge.

It is further ordered, That after receipt of such additional evidence, the hearing examiner indicate any changes he may wish to make in the initial decision in the light thereof.

ELLIOT KNITWEAR, INC., ET AL.¹

Docket 6637. Order, Nov. 6, 1959

Order reopening proceeding—following remand by Court of Appeals for the Second Circuit for additional evidence in support of finding of deceptive labeling of "Cashmora" sweaters and on choice of remedy.

Counsel in support of the complaint, by motion filed on October 20, 1959, having requested that this proceeding be remanded to the hearing examiner for the reception of additional evidence; and

It appearing that the United States Court of Appeals for the Second Circuit, on June 11, 1950, entered its decree in the case of *Elliot Knitwear, Inc., a corporation, et al. v. Federal Trade Commission, Respondent*, Docket No. 25239, setting aside the Commission's order to cease and desist issued on April 25, 1958, and remanding the case to the Commission for further proceedings not inconsistent with the opinion of the Court rendered on May 6, 1959; and

It further appearing from the Court's opinion that the reason for such action was that the record as presently constituted does not contain substantial evidence in support of the Commission's finding that the label appended to sweaters sold by the respondents is deceptive; and

The Court having indicated that the record may be supplemented by the introduction of additional evidence bearing on the aforesaid question, as well as on the choice of remedy to be applied in the event deceptiveness of the label is established:

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

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

¹ Order to cease and desist reported in 54 F.T.C. 1398.

manded to the hearing examiner for the receipt of such additional relevant, material and reliable evidence as may be offered on the two questions above-mentioned.

It is further ordered, That after the receipt of such additional evidence the hearing examiner shall forthwith make and file, in accordance with the provisions of §3.21 of the Commission's Rules of Practice, a new initial decision based on the record as then constituted.

THOMASVILLE CHAIR COMPANY

Docket 7273. Order and Opinion, Nov. 6, 1959

Interlocutory order upholding denial of motion for subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information from Commission files and alternative application for release of confidential information.

OPINION OF THE COMMISSION

By the Commission:

This is an interlocutory appeal by the respondent from the hearing examiner's denial of its motion for issuance of a subpoena.

In the presentation of its defense to a complaint charging violation of Section 2(c) of the Clayton Act, respondent attempted to introduce in evidence certain documents which it claimed would show the practices and customs in the furniture industry regarding the granting of quantity discounts and the payment of commissions by furniture manufacturers to their sales representatives at or about the time respondent's pricing policy was initiated and subsequent thereto. It was apparently respondent's position that it could be established through these documents that the majority of furniture manufacturers, including respondent, have employed quantity pricing systems and that such a showing would tend to rebut any inference which could be drawn from the evidence adduced in support of the complaint that respondent is passing on to favored customers a discount in lieu of brokerage. These documents consisted of a copy of a report on the House Furnishings Industries (Vol. I, Household Furniture) made in 1923 by the Federal Trade Commission, a copy of a Department of Commerce monograph entitled "The Manufacturers Agent as a Marketing Institution," published in 1952, and copies of excerpts from Department of Commerce publications "Furniture Distribution in the West Mid-Continent" and "Furniture Distribution in the Midwest," published in 1932. The hearing examiner refused to receive these documents on the ground that they were not relevant or material to any of the issues presented and on the additional ground that

they were hearsay. Respondent thereafter moved the hearing examiner to issue a subpoena duces tecum directing the Secretary of the Commission to produce field reports, work papers, questionnaires and other documents underlying the aforementioned Commission report on the House Furnishings Industries. The hearing examiner denied this request and respondent has now filed an appeal from the denial and, in the alternative, has made application for the release of the same information under §1.134 of the Commission's Rules of Practice. Respondent has also appealed from the hearing examiner's ruling as to the admissibility of the Commission report and Department of Commerce publications.

Respondent's request for issuance of a subpoena duces tecum directing the Secretary to produce certain documents, classified as confidential under the Commission's Rules of Practice, falls within our ruling denying a similar appeal in the matter of *Postal Life and Casualty Insurance Company*, Docket No. 6276. The proper procedure to be used by respondent in requesting the release of the documents specified in its application for a subpoena is set forth in §1.134 of the Rules of Practice. The hearing examiner was without authority to require the production of such information by compulsory process and he properly refused, therefore, to issue the subpoena requested by respondent. The appeal on this point is denied.

As an alternative to its request for a subpoena, respondent seeks to obtain the same documents by making application for release of information pursuant to §1.134 of the Rules of Practice. As we stated in *Postal Life and Casualty Insurance Company*, *supra*, the Commission in determining the action to take upon such a request will consider not only the confidential or privileged nature of the information or material sought, but also the purpose for which the applicant intends to use such information or material. The Commission has a public duty not to disclose certain information which it has obtained in the performance of its official duties, and it will not release information which it considers to be confidential in the absence of some good reason for doing so. Respondent's purpose in requesting the information under the aforementioned section, according to its brief, is to establish a defense to the charge that it has violated Section 2(c) of the Clayton Act. It is necessary, therefore, to determine whether the information requested may successfully be used to accomplish this purpose.

The complaint herein alleges in effect that part of the sales commission paid by respondent on sales made to certain customers, designated as "carload" customers, reaches other customers, designated as "jobber" customers, in the form of a reduced price. The

hearing examiner ruled at the conclusion of the case-in-chief that a prima facie case had been established and this ruling was upheld on appeal to the Commission. Respondent now wishes to introduce evidence which it claims will show that at the time it began selling chairs, furniture manufacturers were generally employing quantity discount pricing systems and that respondent had adopted a similar pricing system. Its argument seems to be that if it had been using a quantity discount system 35 to 40 years ago, its lower prices at that time would not have reflected a discount in lieu of a sales commission or brokerage.

This argument must be rejected. Even assuming that the documents in question would show that respondent instituted its pricing policy to conform with industry practice and custom, such a showing of conditions existing 35 to 40 years ago would have no bearing on the legality of respondent's present pricing practices, nor would a showing that respondent employed a quantity discount pricing system 35 to 40 years ago negate the possibility that it was at that time passing on to favored customers a discount in lieu of a commission or brokerage. We cannot assume that respondent's pricing practices, or those generally prevailing in the industry at that time, complied with the provisions of a law which had not yet been enacted. We are of the opinion, therefore, that the documents specified in respondent's application would not be relevant or material to any issue in this proceeding and thus would not be helpful to respondent in establishing a defense to the violation with which it is charged. Respondent has shown no real or actual need for the disclosures requested and its application for release of this information, therefore, is denied.

Respondent has also appealed from the hearing examiner's refusal to admit the aforementioned Federal Trade Commission report and Department of Commerce publications. This appeal was not made within the time prescribed by §3.20 of the Rules of Practice and is being considered at this time only because the issue raised thereby is similar to that involved in respondent's application for release of confidential information. Our comments with respect to the relevance and materiality of the documents specified in respondent's request for release of information are, for the most part, applicable to the documents referred to in this appeal. No showing has been made to satisfy the requirements of §3.20(b)(2) of the Rules of Practice. The appeal from these rulings is also denied.

An appropriate order will be entered.

ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's ruling denying respondent's

ent's motion for issuance of a subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information from the Commission's files and, in the alternative, application for release of confidential information, upon respondent's appeal from the hearing examiner's refusal to receive in evidence certain other documents offered by respondent, and upon the answer of counsel supporting the complaint in opposition thereto; and

The Commission having concluded that the appeals and application for release of information should be disposed of in the manner indicated in the accompanying opinion of the Commission:

It is ordered, That respondent's appeal from the hearing examiner's ruling denying its motion for a subpoena duces tecum directing the Secretary of the Commission to produce certain documents or information and respondent's appeal from the hearing examiner's rulings excluding certain other documents offered by respondent be, and they hereby are, denied.

It is further ordered, That respondent's application for release of confidential information be, and it hereby is, denied.

BAKERS FRANCHISE CORP. ET AL.

Docket 7472. Order, Nov. 6, 1959

Interlocutory order upholding the hearing examiner's denial of application for confidential documents in F.T.C. files already denied by Commission.

The respondents having filed an interlocutory appeal from the hearing examiner's ruling of September 2, 1959, denying their application for a subpoena duces tecum directing the Secretary of the Commission to appear at a designated hearing and produce certain documents allegedly contained in the files of the Commission; and

Said respondents, acting under §1.134 of the Commission's Rules of Practice, having previously filed with the Commission an application requesting the release of the same documents or, in the alternative, requesting the Commission to declare that any such documents do not constitute or contain confidential materials; and

The Commission, on September 14, 1959, having entered its order denying said application, which order was supported by an accompanying opinion setting forth the reasons therefor and clearly recognizing the confidential status of the requested documents; and

The hearing examiner being without authority to require the production of confidential information or material from the Commission's files, and it thus appearing that his ruling denying the respondents' application for subpoena was the only ruling he could have made:

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

BERGER WATCH COMPANY ET AL.

Docket 6894. Order, Dec. 7, 1959

Order denying, as untimely, application to intervene by respondent in a similar proceeding, currently pending (p. 991 herein).

Counsel for Sheffield Merchandise, Inc., by letter dated November 13, 1959, having made application for leave to intervene in this proceeding and, in the alternative having requested that the Commission defer its ruling on one of the charges in this proceeding until such time as it has rendered its decision in the matter of Sheffield Merchandise, Inc., Docket 6627; and

It appearing that petitioner has stated as grounds for such application and request that the same issue is involved in both cases and that a decision on the merits thereof could more appropriately be made in the matter of Sheffield Merchandise, Inc.; and

It further appearing that both cases are now before the Commission for decision and that petitioner's application for leave to intervene is, therefore, untimely; and

The Commission being of the opinion that since each of these cases will be decided on its own record, the request for deferment is inappropriate:

It is ordered, That the application for leave to intervene in this proceeding be, and it hereby is, denied.

It is further ordered, That the request for a deferment of the Commission's ruling on one of the charges in this proceeding be, and it hereby is, also denied.

MORRIS LOBER & ASSOCIATES, INC., ET AL.

Docket 7003. Order, Dec. 11, 1959

Order denying request to reopen case on the ground that the hearing examiner erred, in the early stages of the hearings, in denying respondents' demand of the right to examine a Commission investigator's report.

The Commission, on August 14, 1958, having adopted as its own decision the hearing examiner's initial decision wherein the hearing examiner made his findings of fact and entered his order to cease and desist in disposition of this proceeding, which decision of the Commission became final by reason of expiration of the statutory period for court review on October 11, 1958; and

Counsel for the respondents, by letter dated November 6, 1959, having requested the Commission to reopen the proceeding on the ground that the hearing examiner, during the course of the trial, erred in denying the respondents' demand of the right to examine a Commission investigator's report, which report, it is said, was desired for use in the cross-examination of the investigator who had testified in support of the complaint; and

It appearing from the record that the ruling referred to occurred during the early stages of the hearings and that the respondents made no attempt to obtain a review thereof either by way of an interlocutory appeal to the Commission under the provisions of §3.20 of the Rules of Practice or by way of an appeal from the initial decision under the provisions of §3.22 of said rules, but, on the contrary, permitted said ruling to remain unchallenged until the present time; and

It further appearing that the respondents have made no showing of changed conditions of fact or of law which would or might require a modification of the Commission's decision and have made no showing that the public interest would or might require such action; and

The Commission being of the opinion that, in the circumstances, no further consideration of the respondents' request for reopening of the proceeding is warranted:

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

IN THE MATTER OF

MODERN METHODS, INC., ET AL.

Docket 7568. Order, Dec. 31, 1959

Interlocutory order upholding hearing examiner's denial of motion to dismiss, holding the prior dismissal by the Solicitor of the Post Office Department, primarily because of inadequacy of the record, could not bar proceeding under the principles of *res judicata*.

The Commission having considered the respondents' appeal from the hearing examiner's order of November 18, 1959, denying the respondents' motion to dismiss the complaint or, in the alternative, to strike therefrom paragraphs five through eight, inclusive; and

It appearing that the question for determination is whether this proceeding is barred under the principles of *res judicata* by an order of the Solicitor of the Post Office Department, dated July 18, 1958; and

It further appearing that the Solicitor of the Post Office Department by the aforesaid order reversed an initial decision of a hearing examiner and dismissed "without prejudice" a proceeding against the corporate respondent, allegedly instituted in connection with the sale of the same correspondence courses of instruction as those involved herein, in which proceeding the respondent was charged with having conducted a scheme for obtaining money through the mails by means of false and fraudulent pretenses, representations and promises in violation of Title 39, U.S. Code, §§259 and 732; and

It appearing from the record that the ruling referred to occurred during the early stages of the hearings and that the respondents made no attempt to obtain a review thereof either by way of an interlocutory appeal to the Commission under the provisions of §3.20 of the Rules of Practice or by way of an appeal from the initial decision under the provisions of §3.22 of said rules, but, on the contrary, permitted said ruling to remain unchallenged until the present time; and

It further appearing that the respondents have made no showing of changed conditions of fact or of law which would or might require a modification of the Commission's decision and have made no showing that the public interest would or might require such action; and

The Commission being of the opinion that, in the circumstances, no further consideration of the respondents' request for reopening of the proceeding is warranted:

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