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 respond-

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.