

Complaint

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IN THE MATTER OF

STEPHEN F. SINGER TRADING AS
STAR-CREST RECORDING COMPANYCONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 8170. Complaint, Nov. 14, 1960—Decision, June 30, 1961*

Consent order requiring an individual in Los Angeles, Calif., engaged in soliciting contracts and fees for recording songs for writers and in the sale of records containing the songs, to cease using false royalty claims and other deception to obtain fees from song writers, in advertisements in magazines and newspapers, form letters, and otherwise, as in the order below specified.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Stephen F. Singer, individually and trading as Star-Crest Recording Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Stephen F. Singer is an individual trading and doing business as Star-Crest Recording Company, with his office and principal place of business located at 1350 North Highland Avenue, Hollywood, California.

PAR. 2. Respondent is now, and for more than one year last past has been, engaged in the solicitation of contracts and fees for the recording of songs for writers and prospective writers and in the sale and distribution of records containing, among other things, the songs of writers contracting with him. Said solicitations are made through advertisements placed in magazines, periodicals and newspapers, and through form letters and other written solicitations circulated to song writers and prospective song writers located in the various States of the United States and in the District of Columbia.

Respondent forwards contracts from his said place of business in the State of California, through the United State mail and otherwise, to song writers and prospective song writers located in the various States of the United States, other than the State of California, and in the District of Columbia. Said contracts when signed

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or executed by the song writers are forwarded from their respective locations, through the United States mail and otherwise, to respondent at his said place of business in the State of California.

Respondent causes his said records when made to be shipped from his said place of business in the State of California to customers located in various States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said records in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent's volume of business in the negotiation of contracts for the recording, sale and distribution of records for said song writers and prospective song writers is, and has been, substantial.

PAR. 3. Respondent is now, and at all times mentioned herein has been, in substantial competition, in commerce, with corporations, firms and individuals engaged in the contracting for recording of songs for song writers and prospective song writers and in the sale and distribution of records.

PAR. 4. In the course and conduct of his business as aforesaid, and for the purpose of soliciting contracts for the recording of songs of song writers and prospective song writers and for the purpose of receiving money from song writers in connection with said contracts, respondent has made many statements and representations, directly or indirectly, of which the following are typical but not all inclusive:

SONGS—POEMS

We need New Ideas

FOR RECORDING

Your Songs or Poems may

EARN MONEY FOR YOU

Songs recorded—Royalties Paid

FREE EXAMINATION

Mail to: STAR-CREST RECORDING CO.

Dept. C-8, 1350 N. Highland, Hollywood, Calif.

Our primary interest is in selling albums and earning money for our writers and ourselves.

Writer agrees to pay for the test recording session at a special 50% scale rate of \$96.20.

We have with us some of the most talented and respected singing stars in Hollywood.

Our "Music of America" series will contain well-known singing hits. Successful numbers that have already sold millions of copies and are being bought and played every day.

Publishers and record companies have found that a small group of professional writers cannot supply all of the music that the public demands.

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Star-Crest has the facilities available to manufacture and ship these albums in tremendous quantities if sales warrant.

We do not charge a writer for accepting his song or including it in one of our albums, we pay all expenses of recording and album manufacturing.

PAR. 5. By means of the above representations and statements, disseminated as aforesaid, respondent represents, and has represented, directly or by implication, that:

1. Song writers who contract with him for the recording of their songs will earn substantial amounts of money.

2. Payments in the form of royalties will be made to song writers whose songs are accepted.

3. His primary interest in making recordings is in selling the albums.

4. There is a regular scale of charges for test recording and \$96.20 is one-half of this charge.

5. He employs, for the purpose of recording the accepted songs, some of the most outstanding singing stars in Hollywood.

6. His Music of America Series, in which the songs will be recorded, will contain current song hits.

7. There is great public demand for music beyond that which can be supplied by a small group of professional writers.

8. Star-Crest has the manufacturing facilities for the production of albums in very large quantities.

9. Respondent makes no charge for including a song writer's song in an album.

PAR. 6. The aforesaid statements and representations were, and are, false, misleading and deceptive. In truth and in fact:

1. Song writers who contract with respondent for the recording of their songs and pay a fee therefor do not earn any substantial amount of money.

2. Respondent does not pay royalty to the song writers whose songs are accepted. Respondent's plan is one in which the song writers subsidize the production of the records containing their songs by paying for the entire cost of the records plus a profit to respondent. Respondent agrees to pay the song writers, whose songs are used, a certain amount for each record sold but the sales of the records are so limited that the song writers are never able to recover their investments.

3. Respondent's primary interest is not in the sale of albums but is in obtaining contracts and the payments under the contracts.

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4. There is no regular scale of charges for test recording, as recording companies make no such charge. Consequently, \$96.20 is not one-half or any other percentage of such charge.

5. The talent employed by respondent for recording the accepted songs does not include outstanding or well-known Hollywood singing stars.

6. Respondent's Music of America Series albums do not contain current successful song hits.

7. There is no shortage of songs which cannot be supplied by the professional song writers.

8. Star-Crest has no manufacturing facilities for the production of albums but, on the contrary, all of the albums sold by respondent are produced by others on contract.

9. Before accepting and including a song writer's song in respondent's album, a charge of \$96.20 is made for a test recording.

PAR. 7. Respondent, for the purpose of procuring the signing of contracts, as hereinabove referred to, also has sent telegrams to song writers, who have submitted songs to him, as follows:

Song approved for test recording session. Rogers scheduled on vocal. I am attending to production details. Letter and contract in mail.

Respondent thereby represents that the well-known recording star Jimmy Rogers will sing the song writer's songs, whereas, in truth and in fact, after the contract is signed and the fee paid by the song writer, the test recording will not be made by Jimmy Rogers but by Tony Rogers, who is not as well known as a recording artist.

PAR. 8. The use by respondent of the foregoing false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statements are true, and to enter into contracts for respondent's services because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been, and is now being, unfairly diverted to respondent from his competitors, and substantial injury has been, and is now being, done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. John W. Brookfield, Jr., for the Commission.
Bryant, Campbell, McCormick & Danielson, by *Mr. Walter M. Campbell*, of Los Angeles, Calif., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on November 14, 1960, issued its complaint herein, charging the above-named respondent with having violated the provisions of the Federal Trade Commission Act in certain particulars, and respondent was duly served with process.

On April 17, 1961, there was submitted to the undersigned hearing examiner of the Commission, for his consideration and approval, an "Agreement Containing Consent Order To Cease And Desist", which had been entered into by and between respondent and counsel for both parties, under date of April 14, 1961, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in accord with §3.25 of the Commission's Rules of Practice for Adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondent Stephen F. Singer is an individual trading and doing business as Star-Crest Recording Company, with his office and principal place of business located at 1350 North Highland Avenue, Los Angeles, California.

2. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

3. This agreement disposes of all of this proceeding as to all parties.

4. Respondent waives:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All of the rights he may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

6. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

7. This agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," the hearing examiner approves and accepts this agreement; finds that the Commission has jurisdiction of the subject matter of this proceeding and of the respondent herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act against the respondent, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the order proposed in said agreement is appropriate for the just disposition of all the issues in this proceeding as to all parties hereto; and that said order therefore should be, and hereby is, entered as follows:

It is ordered, That respondent Stephen F. Singer, an individual trading as Star-Crest Recording Company, or under any other name or names, and respondent's agents, representatives, and employees, directly or through any corporate or other device, in connection with the solicitation of contracts or fees for the recording of songs for writers or prospective writers, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Song writers who contract with respondent will receive substantial sums of money;

2. Any payment received by song writers who contract with respondent, arising out of the sale of records, is a "royalty," unless and until the amount paid to respondent has been fully repaid;

3. Respondent's primary interest in the recording of song writers' songs is in the sale of records of said songs;

4. There is a regular scale of charges for test recording or that the charge of \$96.20, or any other amount charged by respondent, is any percent of such a charge;

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5. The songs for which respondent contracts will be recorded on an album with current song hits, unless current song hits are actually recorded therein;
6. The songs for which respondent contracts will be sung by outstanding Hollywood stars;
7. The demand for songs is greater than can be supplied by the professional song writers;
8. Respondent owns facilities for the manufacture of albums;
9. Respondent does not make a charge for including a song writer's song in an album.

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 30th day of June, 1961, become the decision of the Commission; and, accordingly:

It is ordered, That respondent Stephen F. Singer, individually and trading as Star-Crest Recording Company, shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist.

INTERLOCUTORY ORDERS, ETC.

TRACTOR TRAINING SERVICE ET AL.

Docket 5943. Order, Jan. 19, 1961

Order denying, for lack of material changes of fact or law, petition for modification of desist order of Mar. 3, 1954, 50 F.T.C. 762.

Respondents, Tractor Training Service, Inc., an Illinois corporation, and Tractor Training Service, an Oregon corporation, by petition filed on November 21, 1960, having requested the Commission to modify the order to cease and desist heretofore entered in disposition of this proceeding, by deleting paragraph 5 thereof, which paragraph prohibits the respondents, in connection with the sale in commerce of their course of study and instruction in diesel training and training in heavy equipment, from representing that the individuals to whom such course is sold are selected on any basis other than their ability to make the required down payment; and

It appearing that the ground for the request is that the respondents have developed and now utilize a standard procedure for the selection of prospective purchasers of their course, which is in addition to and ahead of the requirement that the individuals be able to pay for such course; and

It further appearing, however, that the standards and procedures described in the respondents' petition and in their reply to the answer filed by counsel in support of the order are not materially different from the standards and procedures described in a similar petition requesting the same relief which the same respondents filed on March 14, 1957, and which the Commission, for the reasons set forth in its opinion rendered on May 10, 1957, denied by order entered on the same date (53 Federal Trade Commission Decisions 1292); and

The Commission having considered the matter anew and having concluded that the current petition, like the previous petition, and for the same reasons, fails to establish a reasonable probability that material changes have occurred in conditions of fact or of law since the order to cease and desist was entered or to demonstrate a probability that the public interest requires the modification requested:

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

GOJER, INC.

Docket 7851. Order, Jan. 19, 1961

Order denying motion to reopen price discrimination proceeding in which consent order to cease and desist was entered Dec. 1, 1960 (57 F.T.C. 1228), possible trade practice rules imposing no legal injunction and no facts being presented to indicate need for industry-wide conference.

The respondent, by motion filed January 6, 1961, having requested the Commission to reopen this proceeding and, in effect, hold in abeyance the order to cease and desist contained in the hearing examiner's initial decision adopted by the Commission on December 1, 1960, it being the respondent's contention that such action would be justified because (1) the respondent wishes to file an application for a trade practice conference for its industry which it hopes will contribute to a better understanding on the part of the industry members of what constitutes fair trade practices, and (2) the respondent was the first company in its industry to be formally charged with a violation of the Clayton Act, as amended, and a stay of the order would obviate a disadvantage which the respondent allegedly will suffer if prohibited from engaging in practices open to its competitors; and

The Commission having considered the petition and having concluded that the showing made fails to demonstrate that granting the relief requested would be in the public interest for the reasons (1) that trade practice rules, even if ultimately approved for the respondent's industry, and even if they should cover the practices prohibited by the order to cease and desist, would be in the nature of advisory opinions for the guidance of businessmen acting on a voluntary basis and would not impose upon the industry members, including the respondent, any legal injunction to refrain from the activities to which they would relate, and (2) that the respondent has presented no facts from which the Commission might conclude that the respondent's competitors actually engage in the practices prohibited to the respondent or, if so, whether such practices may or should be dealt with through the medium of a voluntary and industry-wide conference or in separate adjudicative proceedings, and has provided the Commission with no basis for appraising the adverse effect on competition which might result from postponing the order prohibiting the respondent from continuing pricing practices long recognized as inimical to competition; and

The Commission being unaware of any other facts or circumstances which might justify a stay of the order to cease and desist:

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

AMERICAN METAL PRODUCTS COMPANY ET AL.

Docket 7365. Order and Opinion, Jan. 23, 1961

Interlocutory order remanding case to hearing examiner for modification and to provide for simultaneous filing by both parties of proposed findings instead of successive filing.

OPINION OF THE COMMISSION

By the COMMISSION :

In his order of November 15, 1960, closing this proceeding for the reception of evidence, the hearing examiner fixed February 3, 1961, as the date for filing of proposed findings and conclusions by counsel supporting the complaint, and designated March 6, 1961, for filing of such proposals by the respondents. The order additionally granted counsel supporting the complaint leave to file reply to respondents' suggested findings within a time to be subsequently designated. Counsel supporting the complaint seasonably filed interlocutory appeal and contends that the order's provision for successive instead of simultaneous filings of those proposals is inequitable and constitutes an improper departure from established procedure in Commission cases. Since the question thus raised involves an interpretation of a rule of practice having general applicability to all of the Commission's adjudicative proceedings, the Commission feels that an expression of its views on this subject will be of material assistance to both counsel and hearing examiners in future proceedings and, consequently, the appeal is being treated as one to be entertained and decided.

Section 3.19 of the Commission's Rules accords parties the right to file proposed findings and conclusions at the close of the reception of evidence or "within a reasonable time thereafter" as fixed by the hearing examiner. Counsel supporting the complaint does not contend, however, that the time allotted for preparation of the suggested findings which are to be initially filed by him is insufficient, and disposition of the appeal accordingly does not turn on this aspect of the time disparities. Furthermore, although the periods of time accorded under the hearing examiner's ruling exceed those usually granted in Commission proceedings, the appeal's exceptions relate only to the successive filing provision. Thus, no question of whether the order serves to delay the proceeding unduly is presented to us, nor is it being decided.

The above-mentioned rule does not expressly prescribe that the time fixed by hearing examiners provide for simultaneous filing of proposed findings; and a rigid requirement in that respect would foreclose hearing examiners from meeting the exigencies of unusual

situations warranting another course. It is, however, equitable and proper that parties be afforded equal time, running concurrently, for the submission of their suggested findings. This has been the customary practice in Commission proceedings, and as we have previously held in a prior interpretation* of that rule, such course should be departed from only in unusual circumstances. The order appealed from here, however, contains no showing of special circumstances or exigencies impelling a departure from the customary practice and other facets of the case clearly suggest their absence.

The rule as above interpreted is conducive to informed and expeditious decision of cases on their merits. In the Commission's view, simultaneous submissions of proposed findings better engender full discussion of all alternative factual and legal theories available, including arguments in favor of those proposed for adoption and against those anticipated to be advanced by the adversary, and, when thus prepared, proposed findings constitute informative briefs on the evidence. Successive submissions in Commission proceedings, however, envision narrowing of the issues to those advocated by the respective parties, with respondents' counter findings and staff counsel's rebuttal submissions serving primarily as memoranda of points and authorities in support of their exceptions to their opponents' contentions. Hence, simultaneous filing of suggested findings encourages more comprehensive coverage of the facts. Furthermore, such filing practice obviously is attended by less likelihood of delaying proceedings unduly.

In view of the foregoing, the Commission is of the opinion that the hearing examiner erred in failing to accord the parties equal time, running concurrently, for preparation and submission of their proposed findings and conclusions. The appeal is granted and the case is being remanded for further proceedings in regular course, including appropriate modification of the order of November 15, 1960.

Chairman Kintner dissented to the decision herein.

ORDER REMANDING CASE

This matter having come on to be heard upon the interlocutory appeal filed by counsel supporting the complaint from the hearing examiner's order of November 15, 1960, and upon the respondents' answers in opposition to such appeal; and the Commission, for reasons stated in the accompanying opinion, having granted the appeal:

It is ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for appropriate modification of said order.

Chairman Kintner dissenting.

* *Luria Brothers & Company, Inc.*, Docket 6156 (Decision on interlocutory appeal, July 30, 1958).

SCOTT PAPER COMPANY

Docket 6559. Order, Feb. 21, 1961

Order, with memorandum, denying motion requesting 60-day stay and reconsideration of divestiture order of Dec. 16, 1960, 57 F.T.C. 1415.

The respondent, on January 16, 1961, filed a motion requesting that the order contained in the Commission's decision entered December 16, 1960, be stayed for sixty days; that the respondent be orally heard on the motion; and that the order be reconsidered by the Commission. In support of the motion, respondent contends, among other things, that the requirement in the order for divestiture is unnecessarily harsh; that respondent has had no opportunity to present its views as to the provisions of the order; and that the order is unenforceable because of lack of specificity.

When rendering its decision in this proceeding, the Commission determined that divestiture of the assets of the named corporations acquired and thereafter held by the respondent in violation of Section 7 of the Clayton Act, as amended, was the appropriate remedy for correcting those violations. In directing such divestiture, the order also prescribes guideposts for its conduct in good faith, including restoration of the acquired properties as competitive entities in substantially the same operating form and of substantially equivalent productive capacity as existed at or about the time of acquisition; and the order additionally directs the respondent to submit within sixty days a plan for compliance with the order, with time for compliance to be fixed thereafter. The challenged order accordingly contemplates full opportunity for the respondent to submit in writing its recommendations and suggestions relating to the order's requirements for good faith divestiture of the acquired assets, with opportunity for counsel supporting the complaint to respond in writing. Furthermore, it is implicit in the Commission's prior action that an additional order specifying the manner of divestiture within the purview of Section 11 of the aforesaid Act, as well as the time within which it must be accomplished, will follow.

ORDER

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

It is further ordered, However, that the time within which the respondent may submit its plan for compliance with the order for divestiture be, and it hereby is, extended to include thirty (30) days from the service upon the respondent of this order.

Commissioner Mills not participating.

MOORE BUSINESS FORMS, INC.

Docket 7086. Order, Mar. 1, 1961

Interlocutory order reversing hearing examiner's rulings which quashed specifications regarding respondent's sales from subpoena duces tecum in price discrimination case.

Counsel supporting the complaint having filed an appeal from the hearing examiner's rulings of November 15, 1960, whereby he granted the respondent's motion to quash specifications 2, 3, 4, 6, 7, 8 and 9 of the subpoena duces tecum which issued on October 11, 1960, and limited specifications 1, 5 and 10 in certain respects; and

It appearing that the information excluded from the specifications' requirements under such rulings includes, among other things, data relating to annual and monthly net sales of respondent's business forms products for certain years, classified by customers, sales divisions and products, together with information respecting total sales by the respondent at prices below its list prices; and

It appearing that such excluded information pertains, among other things, to the conduct and scope of the respondent's business and its capacity to compete, and thus is relevant to the issues raised by the complaint in this proceeding which charges discriminations in price resulting or likely to result in injury to competition in the line of commerce in which the respondent is engaged; and

The Commission having determined that counsel supporting the complaint are entitled to production of all of the information specified in the subpoena duces tecum and that the appeal should be granted:

It is ordered, That the rulings of the hearing examiner which quashed or limited the specifications of said subpoena be, and they hereby are, reversed.

UARCO, INC.

Docket 7087. Order, Mar. 1, 1961

Interlocutory order reversing hearing examiner's exclusion of exhibits including tabulations of respondent's sales, and denying appeal from rejection of other documents in price discrimination case.

Counsel supporting the complaint having filed an interlocutory appeal from certain rulings by the hearing examiner which counsel contend erroneously rejected three series of documentary exhibits offered in evidence; and

It appearing that one series of the documents include tabulations by the respondent of its net sales for certain years classified by customers and by types of forms and data as to sales by it at prices

below list prices and that counsel supporting the complaint contend that those documents show, among other things, increasing annual sales, together with disproportionately increased sales by the respondent at prices below its list prices and enhanced ability to compete; and

The hearing examiner having stated that such information will be of no assistance in resolving whether competitive injury has or likely may result from any price discriminations proved and having ruled that such documents would not be received unless like sales data for some of the respondent's competitors are also to be offered; and

It appearing to the Commission that in situations involving alleged discriminations in price and alleged primary line injury the scope of the seller's marketing activities and his sales and financial progress or decline necessarily are relevant factors in the over-all competitive situation and are relevant and material to determinations here of past or probable future competitive effects; and

The Commission having therefore determined that the rulings excluding the first series of documents, namely, Commission Exhibits for Identification 397 through 403(b), should be reversed as contravening §3.14(b) of the Commission's Rules of Practice which prescribes that relevant, material and reliable evidence shall be received in its adjudicative proceedings; and

It further appearing as to a second series of documents containing statements of the respondent's earnings for certain years that the hearing examiner deferred final rulings, and the Commission, though regarding its above ruling as also controlling to the admissibility of this series of documents, having determined that this aspect of the appeal should be denied as premature; and

The hearing examiner having rejected the third series of documents as too remote for the reason that the industry sales data therein relate primarily to sales of machines or office equipment other than the business forms products relevant here, and there being no showing in the appeal that the hearing examiner's analysis is erroneous; and

Counsel supporting the complaint having further contended that the hearing examiner erroneously ruled that certain exhibits which were received in evidence constituted a complete response to specification 10 of the subpoena duces tecum which issued in this proceeding, but it appearing that the specific rulings cited by counsel do not relate to the question of whether the subpoena has been complied with; and

The Commission having further determined that the memoranda filed in support of and in opposition to the appeal suffice for in-

formed decision of the appeal and that the respondent's request for oral argument should be denied:

It is ordered, That hearing examiner's rulings excluding Commission Exhibits for Identification 397 through 403(b) be, and they hereby are, reversed.

It is further ordered, That the interlocutory appeal be, and it hereby is, otherwise denied.

CAPITOL RECORDS DISTRIBUTING CORPORATION

Docket 8029. Order and opinion, Mar. 1, 1961

Interlocutory order remanding motion to amend complaint for determination of the hearing examiner.

OPINION OF THE COMMISSION

By the COMMISSION:

Counsel in support of the complaint, by motion filed December 5, 1960, requested the Commission to amend the complaint in this proceeding. By order entered January 9, 1961, the Commission, after noting that the motion should have been addressed to and ruled on by the hearing examiner, referred the matter to the examiner "for appropriate disposition." The substitute hearing examiner, apparently misunderstanding the purport of the referral, has now certified the motion back to the Commission, having observed that in his opinion the authority to grant or deny the motion resides only in the Commission. In an effort to set at rest some of the confusion and uncertainty which seems to exist among the hearing examiners and counsel appearing before them concerning the authority of hearing examiners to amend complaints, the Commission is here expressing its views on this subject for the benefit of all concerned.

The rule providing for the allowance of amendments to pleadings by hearing examiners (§3.9, Rules of Practice) is relatively new in the Commission's practice. It was included for the first time in the Rules published in the Federal Register on May 6, 1955, and made effective May 21, 1955. Prior to that time, all amendments of complaints of whatever nature were made by the Commission itself. It was the Commission's position, based on the language of Section 5(b) of the Federal Trade Commission Act,¹ that this was mandatory for the reasons that the authority to issue complaints was vested solely

¹ "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint."

in the Commission; that a substantive amendment was tantamount to the issuance of a new complaint; and that, consequently, amendment power must be exercised by the Commission and was nondelegable.

In 1954 and 1955, however, this question was reconsidered. In this connection, it was noted that the legislative history of the Federal Trade Commission Act indicated no intention to set up Section 5 as a legal strait jacket. When introduced in the House, for example, the measure provided simply for notice of hearing. The Senate changed this to "complaint," and in the Senate version of the bill there was no mention of the public interest. In the closing days of the debate, Senator Lane expressed the fear that the Commission would while away its time in minor channels among small traders and that it would solemnly sit in judgment "in the effort to ascertain whether a man had taken an unfair advantage of his competitor by crossing his honey bees with lightening bugs in order that they might gather honey at night while those of the competitor were asleep" without ever "reaching the larger and more dangerous combinations which have secured a strangle hold on the food lockers of every poor family in the country."² Subsequently, the reference to the public interest was added in joint conference. This, apparently, was simply an additional guiding yardstick for the Commission, and there is no evidence that it was intended as a prohibition against reasonable delegation of authority by the Commission, for, as Section 3 of the Act expressly provides, "The Commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States."

The Commission was also convinced that the Supreme Court's decision in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197 (1938), while not dispositive of the question insofar as the practice in this agency was concerned, did throw some light on the general subject. The original complaint in that case related to an employer's discharge of five employees and alleged unfair labor practices in the employment of industrial spies and undercover operatives and in a number of particulars. During the course of the hearing the hearing examiner allowed amendments of the complaint to add another employee to those alleged to have been wrongfully discharged and to supply an omitted allegation that the other unfair labor practices had affected commerce. At the close of the evidence, the examiner also granted a motion to conform the pleadings to the proof. The Supreme Court held that the amendments "were discretionary rulings which afford no ground for challenging the validity of the hearing." This holding, we think, is significant, even though the statute under which the Labor Board

² *Trust Debates*, Volume 2, p. 1135.

operates expressly provides for delegation of the Board's authority to issue complaints and to make amendments, for the Court in its decision made no mention of the statute and may well have intended its language to be applicable to administrative proceedings generally.

That the Congress in enacting the Administrative Procedure Act must have entertained the same view is shown by the legislative history of that Act. In Section 7, broad powers of delegation to hearing officers are provided, which, however, do not expressly include the power to amend complaints. However, when the bill, S. 7, was before the Congress, the Attorney General addressed the following comment to the Chairmen of the House and Senate Judiciary Committees, to which no objection was made:

Section 7(b): The agency may delegate to a hearing officer any of the enumerated powers with which it is invested. The enumeration of the powers of hearing officers is not intended to be exclusive.³

And the Senate Judiciary Committee, in reporting the bill, had previously indicated an intent to follow the recommendations of the Attorney General's Committee on Administrative Procedure, which had criticized the Commission for its failure to delegate its powers.⁴ Furthermore, Section 7(b) of the Act expressly provides, *inter alia*, that hearing officers shall have authority, subject to the published rules of the agency and within its powers, "to * * * (9) take any other action authorized by agency rule consistent with the Act." Thus, under the terms of the Act, the limitations on an agency's power to delegate are: (1) The power delegated must be within the power of the agency; (2) The delegation must be by agency rule; and (3) The action must be consistent with the terms of the Administrative Procedure Act.

Acting under this authority, the Commission, in 1955, amended its Rules of Practice to expressly empower its hearing examiners, "upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties," to "allow appropriate amendments to pleadings." The only limitation was and is that an amendment of a complaint must be "reasonably within the scope of the proceeding initiated by the original complaint." Whether or not, in view of other provisions of the Administrative Procedure Act, the Commission might have extended this delegation to the *issuance* of complaints is not here material. This the Commission, in any event, has not chosen to do. (See §3.3, Rules of Practice, providing for the commencement of an adjudicative proceeding by the issuance and service of a complaint "by the Commission.") Thus,

³ Administrative Procedure Act, Legislative History, 79th Congress, 2nd Session, Senate Document No. 248 (1946), pp. 228 and 410.

⁴ "The statement of the powers of administrative hearing officers is designed to secure that responsibility and status which the Attorney General's Committee stressed as essential (Final Report, pp. 43-53, particularly at pp. 45-46 and 50)." *Id.*, p. 29.

under the Commission's present practice, the *issuance* of a complaint, or even an amended or supplemental complaint, is regarded as an administrative function to be exercised by the Commission itself. On the other hand, the allowance of *amendments* to complaints already issued is viewed as a quasi-judicial function, the performance of which, subject only to the limitation noted, is vested in the hearing examiner. In this case, therefore, as in all similar cases, the question for decision is whether the requested amendment is or is not "reasonably within the scope of the proceeding initiated by the original complaint."

The extremities of the concept enunciated by this statement of limitation have never been specifically stated. Certainly there are many proposed amendments, such as those intended to merely clarify the allegations of a complaint, or to add examples of practices alleged to be unlawful, or to correct typographical errors or omissions, or to specify dates, which are not excluded from those to be ruled on by the examiner. It is doubtful, however, that the formulation of any inflexible standard applicable to all types of amendments is possible. Subject to the principle that the Commission reserves to itself the discretionary determination of when there is reason to believe the law has been violated and when the public interest requires the institution of a proceeding, as well the authority to frame the charges, the question of whether requests for material amendments are within the intendment of the rule delegating authority to hearing examiners must, of necessity, depend on the particular circumstances of each case.⁵

In the case now before the Commission, the complaint alleges, in part, that Capitol Records Distributing Corporation, a Delaware corporation, is engaged in the sale and distribution of phonograph records. It further alleges that in the course and conduct of this

⁵ For examples of prior treatments of this subject, see Docket 6486, *The Goodyear Tire and Rubber Company*, Order Affirming Hearing Examiner's Order Amending Complaint, issued October 26, 1956, recognizing the examiner's authority to amend a complaint by adding as a party respondent a subsidiary of the original respondent; Docket 7344, *The Grand Union Company*, Order Granting Interlocutory Appeal, and accompanying opinion, issued October 14, 1957, remanding a proceeding to the examiner to entertain a motion to substitute as parties respondent subsidiaries of the original respondent; Docket 6961, *Hafner Coffee Company*, Order Remanding Motion for Amendment to Hearing Examiner, issued June 4, 1958, directing the examiner to rule on a motion to substitute an individual for a nonexistent corporation erroneously named in the original complaint; Docket 7207, *Forster Mfg. Co., Inc.*, Order Denying Respondents' Interlocutory Appeal, issued September 10, 1959, affirming the examiner's authority to amend a complaint so as to clarify the allegations. And for examples of situations in which the Commission in the exercise of its administrative responsibility has itself directed the issuance of amended and supplemental complaints, see Docket 6458, *Food Fair Stores, Inc.*, Order Disposing of Interlocutory Appeal, issued March 12, 1957; Docket 6459, *Giant Food Shopping Center*, Order Disposing of Interlocutory Appeal, issued May 8, 1957; Docket 6914, *Waltham Watch Company*, Order in Disposition of Motion Certified by Hearing Examiner, issued March 26, 1958; and Docket 7195, *Hoving Corporation*, Order Disposing of Motion Certified by Hearing Examiner, issued March 9, 1959.

business, the company has indulged in certain acts and practices which are charged to be unlawful. In essence and aside from the unnecessary and redundant facts alleged to be the history of the shift from live to recorded performances, the increase of sales of records through "exposure," etc., the acts and practices so characterized consist of a course of conduct in which the respondent secretly induces or influences disc jockeys and others to enhance the popularity of records in which the respondent has a financial interest by "exposing" or playing such records on programs broadcast over radio and television stations. The means or method by which this is alleged to be accomplished is the negotiation for and disbursement of "payola," defined as, among other things, "the payment of money or other valuable consideration to disc jockeys," etc. The amendments requested are (1) the addition of Capitol Records, Inc., a California corporation, as a party respondent, which company, it is alleged, owns all the capital stock of the present respondent and participates in the control of its activities, and (2) a redefinition of "payola" to include without qualification the practice of influencing or attempting to influence disc jockeys and others to broadcast records on any basis other than on their own independent choice, and a restatement of the theory on which such practice is alleged to be deceptive to the public and therefore unlawful.

Such amendments, it seems to us, obviously relate only to details. The subject matter of the action and therefore "the scope of the proceeding" is the alleged practice of deceiving the public by secretly contriving to have records in which the respondent has a financial interest selected and played on broadcast programs on a basis other than their own merits. Clearly, the requested amendments, involving only the addition of a party respondent whose financial interest in the records and whose participation in the practices are alleged to be the same as those of the original respondent, and a restatement of the method employed in effectuating the practice alleged to be unlawful, are so related to the subject matter of the proceeding as to be well within its "scope." The fact that they are not strictly within the original complaint is immaterial, for if they were, no amendment would be needed. They do not, however, purport to cover any new or different practices. No changes are alleged in any of the circumstances which led the Commission to issue the complaint. No different determinations are necessary with respect to the belief that a violation of law has occurred or that the public interest required the initiation of the proceeding. The Commission's prior action on these questions will remain unchanged. The motion for the amendments, while seeking the addition of a respondent and clarification of the pleading, actually is only an attempt on the part of counsel to describe more accurately the situation the

Commission itself intended to deal with when it issued the complaint originally. As such, it is a procedural step looking to a ruling by the trier of the facts in the exercise of his quasi-judicial function, and, thus, falls within the category of actions which the Commission has delegated to its hearing examiners.

This matter will be remanded to the examiner for an exercise of his sound discretion in determining whether in the circumstances the motion should be granted or denied.

ORDER REMANDING RECORD TO HEARING EXAMINER

The hearing examiner, by order entered January 24, 1961, having certified the record herein to the Commission for such action as the Commission may deem appropriate with respect to a motion to amend the complaint, filed by counsel in support of the complaint; and

The Commission, for the reasons set forth in the accompanying opinion, being of the view that the motion is one which should be ruled upon by the examiner:

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

H. P. HOOD & SONS, INC., ET AL.

Docket 8273. Order, Mar. 2, 1961

Order denying motion to disqualify hearing examiner currently presiding in factually related case.

This matter having been considered by the Commission upon the motion and affidavit of counsel for respondent The Great Atlantic & Pacific Tea Company, Inc., requesting that the hearing examiner duly assigned to this proceeding be disqualified and removed by reason of the fact that he had previously been assigned to and is currently engaged in presiding over adjudicative hearings in a factually related case; and

It appearing that pursuant to §3.15(f)(2) of the Commission's Rules of Practice the hearing examiner was served with a copy of the motion and that he has not elected to disqualify himself; and

It further appearing that respondent's motion and affidavit make no claim that the hearing examiner is biased or prejudiced or that he is not fully capable of conducting the duties of a presiding officer in this case, but, on the other hand, said motion and affidavit contain only speculation and conjecture that the hearing examiner will be unable to keep separate in his mind the facts adduced in the two factually related cases, thus depriving respondent of a fair hearing; and

The Commission having concluded that the hearing examiner's judgment of his own ability to afford due justice and a fair hearing to the movant is persuasive and in these premises should be confidently supported by the Commission; therefore

It is ordered. That the motion to disqualify the hearing examiner from presiding in this proceeding be, and it hereby is, denied.

THE B. F. GOODRICH COMPANY ET AL.

Docket 6485. Order and opinion, Mar. 9, 1961

Order remanding case for reception of additional market data to determine the competitive effects of the sales commission method of distributing TBA products.

OPINION OF THE COMMISSION

By KINTNER, *Chairman*:

This proceeding commenced with the issuance of a complaint on January 11, 1956, charging The B. F. Goodrich Company and The Texas Company with acts, practices and agreements constituting a violation of Section 5 of the Federal Trade Commission Act. 15 U.S.C. §45 (1958). Respondents answered in due course, admitting in part the allegations of the complaint but denying that Section 5 has been contravened.

The principal issue framed by the pleadings is the legality of a contract between these respondents calling for the payment by Goodrich of a sales commission to The Texas Company (hereinafter referred to as Texaco) in return for sales assistance in promoting automotive tires, batteries and accessories (hereinafter referred to as "TBA" or "TBA products") of Goodrich to retail and wholesale petroleum outlets of Texaco. In addition, Texaco is charged with having entered into a substantially identical agreement with The Firestone Tire & Rubber Company, and Goodrich is charged with having entered into such agreements with five other oil companies in addition to Texaco.¹ Although Goodrich and Texaco are the only respondents in this proceeding, Firestone and Shell Oil Company are joined as respondents in a companion case, Docket 6487, and in another companion case, Docket 6486, The Goodyear Tire & Rubber Company and The Atlantic Refining Company are paired as respondents.

The complaint charges, in substance, that the success enjoyed by Goodrich and Firestone in selling to Texaco outlets has been purchased at the expense of competing TBA suppliers at the manufacturing and wholesale levels. Counsel supporting the complaint

¹ Other oil companies having sales commission agreements with Goodrich are Continental Oil Company, Jenney Manufacturing Company, Shell American Petroleum Company, The Ohio Oil Company and Emblem Oil Company.

allege that the Texaco-Goodrich and Texaco-Firestone sales commission contracts are unlawful because, *in conjunction with Texaco's economic power over its ostensibly independent wholesale and retail petroleum outlets*, these contracts operate to stifle the free choice of Texaco's retail and wholesale dealers insofar as their TBA purchases are concerned. Among the unlawful competitive effects stemming from Texaco's sales commission contracts charged by the complaint are these: 1) That suppliers of TBA competing with Goodrich and Firestone at the wholesale level have been foreclosed from access to Texaco's retail outlets on the same competitive terms as have been made available to Goodrich and Firestone; 2) That competing manufacturers of tires and other TBA items have been foreclosed from access to Texaco's wholesale distributors on the same competitive terms as have been made available to Goodrich and Firestone; 3) That competition between Goodrich and Firestone in selling to wholesale and retail outlets of Texaco has been destroyed; 4) That a substantial number of Texaco's petroleum distributors and service station operators have been denied their right to act as independent businessmen in exercising freedom of choice as to the TBA products which they may purchase and stock for resale; and 5) That the consuming public has been deprived of the benefits of free competition at the wholesale and retail levels insofar as TBA distribution through service station outlets under the sales commission plan is concerned.

Respondents deny these allegations and assert that their sales commission contract has strengthened competition in the distribution of TBA. Texaco, moreover, denies that it has power to control the TBA buying habits of its wholesale and retail outlets and denies that its sales efforts on behalf of Goodrich and Firestone are in any respect improper or coercive.

After hearings extending from September 1956, into December 1958, the hearing examiner filed his initial decision on October 23, 1959, dismissing the complaint as to Goodrich but holding that Texaco, by forcing a substantial number of its dealers to purchase sponsored TBA through use of threats of lease cancellation or other retaliatory action, has engaged in unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act. He further held that the charges of the complaint are sufficiently broad to sustain an order prohibiting overt acts of coercion on the part of Texaco even though he concluded the sales commission contracts themselves are not illegal. The initial decision contained an order against Texaco prohibiting future acts of coercion or intimidation designed to force Texaco dealers to purchase TBA products sponsored by Texaco.

Both sides have appealed from the initial decision. Counsel supporting the complaint contend that, while the order entered by the hearing examiner is well supported by the evidence of record, it will not be an effective means of remedying the unlawful effects on competition caused by the sales commission plan. They seek an order restraining respondents from continuing with their present sales commission agreements and enjoining them from entering into similar agreements in the future. They also contend that Texaco should be enjoined from purchasing TBA products from any manufacturer or other vendor of such products for resale to any wholesalers or retailers of Texaco petroleum products, ". . . or for distribution in any other manner, directly or indirectly, to any of the aforesaid wholesalers or retailers of Texaco petroleum products."

Texaco appeals claiming, among other things, that the hearing examiner erred as a matter of fact in finding that Texaco has coerced its dealers to purchase substantial amounts of sponsored TBA and as a matter of law in concluding that such action by Texaco constitutes an unfair method of competition and an unfair act or practice in commerce within the meaning of Section 5 of the Federal Trade Commission Act.

Reply briefs were filed by Texaco and Goodrich to the appeal brief of counsel supporting the complaint, and by counsel supporting the complaint to the appeal brief of Texaco. Oral argument was heard by the Commission on June 20, 1960, and the matter is now before the Commission for decision. Although there is evidence in the record tending to show that Texaco has in fact coerced its dealers to purchase sponsored TBA through use of threats of lease cancellation or other retaliatory action, we find that Texaco has sufficient economic power over its wholesale and retail petroleum distributors to cause them to purchase substantial amounts of sponsored TBA even without the use of overt coercive tactics. The determination of whether Texaco's exercise of such economic power in favor of Firestone and Goodyear under the oil company's sales commission contracts with these rubber companies constitutes an unfair method of competition depends, therefore, upon *the competitive effects* of these sales commission contracts; not upon whether Texaco has exercised its power to implement such contracts through the use of overt coercive tactics, or by more subtle, but equally effective, means.

At issue in this litigation, then, is the legality of a particular method of distributing TBA used by respondents. A key fact in evaluating the competitive effects of respondents' use of the sales commission method of distributing TBA is the fact that Texaco has sufficient economic power with respect to its retail and wholesale petroleum distributors to cause them to purchase substantial quan-

titles of the brand of TBA sponsored or sold by Texaco. But such economic power is a fact existing independently of any particular method of distributing TBA which Texaco may use. Whether the sales commission agreements between Firestone and Texaco and Goodrich and Texaco are unlawful must depend, therefore, upon the characteristics and the competitive effects of these sales commission agreements. For reasons set forth hereinafter, we conclude that this case must be remanded in order that market data may be introduced to show the competitive effects of Texaco's sales commission agreements with Goodrich and Firestone upon competing suppliers of tires, batteries and accessories at the manufacturing, wholesale and retail levels.

CHARACTERISTICS OF THE SALES COMMISSION PLAN

Motorists may purchase replacement TBA items from several major classes of distributors. Manufacturers of these items, for example Goodrich, maintain either company-owned or franchised wholesale and retail distribution outlets in all of the marketing areas for TBA products considered in the course of the hearings in this case. Gasoline service stations constitute a second major class of outlets for TBA products.

The complaint alleges that "Service stations, by the nature of their business, are particularly well adapted to be outlets for the sale of TBA products to the motorist consumer. They constitute a large and increasingly important market for TBA products." Goodrich admits the truth of this allegation in its answer and Texaco, in the course of the proceedings, introduced evidence tending to show that service stations accounted for almost 43 percent of all new replacement tires and tubes sold to motorists in the United States in 1956. Total TBA sales by gasoline service stations amounted to approximately \$800,000,000 in 1956, according to Texaco.

The sales commission method of distributing TBA is a complex marketing technique affecting competitive relationships among manufacturers, wholesalers and retailers of various products linked together by but one common factor: the motor vehicle. Although Goodrich is one of the largest rubber companies in the United States and a leading manufacturer of tires, inner tubes and certain related products such as fan belts and radiator hose, the company does not manufacture automotive batteries at all, but instead purchases for resale batteries marked with the "B. F. Goodrich" label from The Gould National Battery Company and Globe-Union Battery Company. Among the automotive accessories purchased for resale by

Goodrich under the original manufacturers' own brand names are the following:

Product	Brand name
Oil filters.....	Fram.
Spark plugs.....	Champion.
Wiper blades.....	Trico; Anco.
Waxes.....	DuPont; Simoniz; Mac's; Johnson.
Battery cables.....	Auto-Lite.

Goodrich operates 5 tire manufacturing plants across the country, located in Ohio, Pennsylvania, Alabama, Oklahoma and California. Tires are shipped from these plants to 15 company-operated merchandising warehouses (also called master warehouses) situated in principal metropolitan areas of the nation. These plants and master warehouses in turn ship to 31 district warehouses of Goodrich located in various parts of the country. Batteries and accessories are shipped directly from the original manufacturers' own plants to master and district warehouses of Goodrich.

There are some 489 wholesale and retail stores operated by Goodrich throughout the United States, and these stores sell not only TBA products, but also many different household and home supply items, including toys, bicycles, power tools, lawn and garden equipment and furniture. In addition to these company-owned stores, Goodrich markets its products through various types of independent wholesale and retail distributors and dealers throughout the United States, including specialized tire dealers, new car dealers, garages, and service stations. Total net sales of the rubber company exceeded one-half billion dollars in 1954.

Texaco is a large producer and distributor of petroleum products. The company's products are sold at wholesale and retail in every state of the United States. Total net sales by the oil company exceeded one and one-half billion dollars in 1954.

Texaco sells its refinery products directly to some 31,000 retail outlets in the United States. These directly-supplied accounts are of two principal classes: 1) lessee-operated stations, and 2) contract dealers. Lessee-dealers lease service station properties from Texaco and these properties have facilities enabling the lessees to stock and sell TBA products. Contract stations are owned by the station operators themselves or are leased from someone other than Texaco. An undetermined number of Texaco's contract stations apparently do not have facilities to stock and sell TBA, or to do maintenance work on motor vehicles. Contract dealers of this description may be garages or restaurants and taverns with outside gasoline pumps.

Texaco sells its petroleum products indirectly to about 7,500 additional service stations through approximately 711 wholesale dis-

tributors. Wholesale distributors either own bulk storage facilities or lease them from Texaco. Many wholesale distributors also distribute TBA products along with petroleum products.

Goodrich maintains either company-owned or franchised independent wholesale and retail dealers in most principal cities of the United States and in many smaller communities as well. In cities and towns where Texaco retail stations are located, such stations are assigned to either the local Goodrich or the local Firestone dealer, or sometimes to both. The assigned TBA distributor is intended to be the supply point from which the Texaco dealer will purchase a substantial percentage of his requirements of TBA.

Texaco dealers who operate service station, as distinguished from non-service station establishments, such as restaurants and garages which also sell gasoline, not only buy and sell Texaco petroleum products but also offer TBA at their stations and in addition perform various automotive services and repairs. Texaco maintains sales offices throughout its marketing area and employs salesmen whose duty it is to solicit orders for Texaco petroleum products from Texaco dealers.

When orders for petroleum products are obtained, the salesmen cause such products to be delivered to the Texaco service station dealers who pay for them at time of delivery or at other specified times. The same Texaco salesmen *also* act as agents for Goodrich and Firestone, soliciting TBA orders from Texaco dealers, frequently accompanied on their rounds by salesmen employed by the local Goodrich or Firestone distributors. If TBA orders are obtained, they are turned in to the appropriate TBA suppliers—the local distributors of either Goodrich or Firestone—who deliver the merchandise and are paid by the Texaco dealers. The TBA suppliers, in turn, make reports of such sales to the District Sales Offices of their respective companies.

Under the terms of the sales commission contracts between Goodrich and Texaco and Firestone and Texaco, Texaco is entitled to a commission amounting to 10 percent of the net sales value of all sponsored (i.e., Goodrich or Firestone) merchandise sold to Texaco retail dealers, as consideration for the assistance given by the Texaco sales organization in obtaining TBA orders from Texaco dealers.²

Goodrich's TBA sales to Texaco accounts increased from \$12.7 million in 1952 to \$18.9 million in 1956, while Firestone's sales volume advanced from \$29.6 million in the former year to \$39.9 million in the latter. By 1956, Goodrich and Firestone were selling a combined total of almost \$60 million in TBA to Texaco accounts

² On purchases of sponsored TBA by its wholesale distributors, Texaco is entitled to a commission of 7½ percent. A 5 percent commission is payable in a few instances not significant for present purposes.

each year, and were paying Texaco approximately \$5.4 million in sales commissions annually. During the five year period 1952 through 1956, total sales to Texaco accounts by Goodrich and Firestone amounted to \$245.1 million, and the two rubber companies paid over \$21.8 million in sales commissions to Texaco.

Sales by Goodrich under its sales commission agreements with other oil companies have also increased over the years. In 1952 there were three oil companies other than Texaco having such agreements with Goodrich: Continental Oil Company, Jenney Manufacturing Company and Shell American Petroleum Company. Total sales by Goodrich to outlets of these three oil companies rose from \$3.5 million in 1952 to \$7.8 million in 1955, chiefly due to increases in sales to Continental Oil Company accounts. Then, in 1953, Goodrich undertook sales commission arrangements with Ohio Oil Company and Emblem Oil Company, and by 1955 was selling about \$2.6 million in TBA to outlets of these two oil companies.

Goodrich has attempted to supply service station accounts from local independent Goodrich wholesalers wherever possible, as shown by Table I, below:

TABLE I.—*Number of oil company outlets supplied by independent Goodrich distributors, 1952 through 1955*

Date	Total oil company outlets	Supplied by independent distributors	Percentage by independent distributors
12-31-50.....	2,040	442	22
12-31-51.....	2,469	820	33
12-31-52.....	4,075	1,876	46
12-31-53.....	5,065	2,486	49
12-31-54.....	6,065	3,127	52
12-31-55.....	7,042	3,908	55

The same trend is discernible for Texaco outlets, as shown by Table II:

TABLE II.—*Number of Texaco outlets supplied by independent Goodrich distributors 1952 through 1955*

Date	Total Texaco accounts	Supplied by independent distributors	Percentage by independent distributors
12-31-50.....	1,874	438	22
12-31-51.....	2,245	743	33
12-31-52.....	2,763	1,228	44
12-31-53.....	3,189	1,664	52
12-31-54.....	3,864	2,172	56
12-31-55.....	4,444	2,636	59

Table II indicates that the number of Texaco accounts assigned to Goodrich increased from 1874 in 1950 to 4444 in 1955, and that

during these years the number of such accounts supplied by independent local distributors of Goodrich TBA items increased from 22 percent to 59 percent. Table I shows that the number of accounts assigned to Goodrich by all six oil companies having sales commission agreements with Goodrich increased from 2040 in 1950 to 7040 in 1955, and that the percentage of such accounts supplied by independent local Goodrich distributors increased from 22 percent to 62 percent during the same years.

Taken together, the facts set forth above indicate the possibility of serious potential threats to competition resulting from Goodrich's sales commission agreements with Texaco and other oil companies. Service station outlets of Texaco blanket the entire United States, as do Goodrich's TBA distribution facilities. The total volume of sponsored TBA sold to Texaco outlets increased from barely over \$40 million in 1952 to approximately \$60 million in 1956, and during the same years Goodrich entered into sales commission agreements with several other oil companies as well.

However, the record in this case does not contain sufficient market data to enable the Commission to assess the competitive effects of the sales commission method of distributing TBA employed by these respondents. The case will be remanded to the hearing examiner for the taking of evidence indicating the competitive effects of the sales commission contracts at the manufacturing, wholesale and retail levels of TBA distribution.

ORDER REMANDING PROCEEDING TO HEARING EXAMINER

Counsel supporting the complaint and respondent, The Texas Company, having filed cross-appeals from the hearing examiner's initial decision; and

The Commission having determined that the record as presently constituted does not provide an adequate basis for an informed determination of the competitive effects of the sales commission method of distributing tires, batteries and accessories employed by the respondents, and being of the opinion that the record should be supplemented in this respect to the end that all of the issues involved in the case may be finally and conclusively disposed of on their merits:

It is ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for the reception of such further evidence concerning the competitive effects of the respondents' practices as may be offered in conformity with the views expressed in the accompanying opinion of the Commission.

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

H. P. HOOD & SONS, INC.

Docket 7709. Order and opinion, Mar. 14, 1961.

Interlocutory order remanding matter to hearing examiner for reconsideration of rulings placing documents "*in camera*".

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

The complaint in this matter charging the respondent with violating subsections (a) and (d) of Section 2 of the Clayton Act was issued December 30, 1959. An answer denying the principal allegations of the complaint was filed March 24, 1960. The hearings commenced in Boston, Massachusetts, on May 2, 1960. Intermittent hearings were held throughout 1960, but at the time this appeal was filed counsel supporting the complaint had not yet completed the case in chief.

Throughout the hearings held to date, the hearing examiner has, upon motion of counsel for respondent and upon his own initiative, ordered that many documents offered as evidence in support of the complaint be placed "*in camera*". The term "*in camera*" in our practice means that documents made subject to such orders are not made a part of the public record but are kept secret and only respondents, their counsel and authorized Commission personnel are permitted access thereto. While the hearing examiner here has not defined the exact scope of his orders, it appears that they operate to prevent counsel supporting the complaint from disclosing the contents of the "*in camera*" documents to witnesses or prospective witnesses without the express permission of the hearing examiner.

The record indicates that the following documentary exhibits were placed "*in camera*" on the days indicated:

Commission Exhibits 27-30, May 3, 1960.

Commission Exhibits 35-148; 150-151, May 4, 1960.

Commission Exhibits 155-157; 180-245, October 18, 1960.

Commission Exhibits 246-248; 979-986, October 19, 1960.

Commission Exhibits 987-988, October 20, 1960.

Commission Exhibit 248A (revised), November 15, 1960.

Commission Exhibit 248C, November 16, 1960.

On November 23, 1960, counsel supporting the complaint moved the Commission to extend their time to appeal from the November "*in camera*" rulings of the hearing examiner to December 23, 1960. This extension was granted and the brief containing this appeal was filed December 22, 1960. Respondent filed its answering brief on January 13, 1961.

Specifically, this appeal asks that we reverse all of the hearing examiner's orders placing documents "*in camera*" made throughout the course of the hearings. Respondent raises the question of timeliness, pointing out that the 10-day period for taking appeals from the rulings of the hearing examiner (Rule 3.20(b)(1) of the Rules of Practice) had expired on all except the rulings made on November 15 and 16, 1960, before the appeal was filed. While this is technically true, we feel that in this instance the public interest dictates a comprehensive approach to all of the "*in camera*" rulings made. The appeal as a whole deals with what is, in effect, a continuing ruling based upon a consistent policy followed throughout the hearings. The rulings appealed from are harmonious and related and thus the thrust of a decision as to the correctness of any one of them should apply with equal force to all. This view has the additional merit of forestalling piecemeal future appeals which may be taken from refusals to release certain of these documents from their "*in camera*" status when circumstances arise which in the opinion of counsel supporting the complaint merit such release.

We are entertaining this appeal at this stage in the proceeding because it involves a question of transcending importance concerning the manner in which adjudicative hearings are conducted and because we are convinced that a decision now would better serve the interests of justice. An expression of the Commission's views at this time should effect a modification in the hearing procedure utilized in this matter which in turn may well affect the final decision rendered. Further, we are persuaded that a decision *in praesenti* is necessary to serve as a guide to hearing examiners and counsel in other proceedings.

The Commission's Rules of Practice do not specifically provide for the "*in camera*" procedure involved here. However, the selective withholding of exhibits from the public record has been the practice in our adjudicative hearings for many years. When properly employed, the practice has merit and we have not up to this time promulgated any definitive directions or restrictions with respect to it. The matter has been left where it belongs, to the sound discretion of the hearing examiner, and until now we are not aware that this discretion has been abused.

There can be no question that the confidential records of businesses involved in Commission proceedings should be protected insofar as possible. In fact, under certain circumstances such protection is guaranteed by statute. Thus, Section 6(f) of the Federal Trade Commission Act expressly prohibits the Commission from publishing by way of a report the "trade secrets and names of customers" obtained through the exercise of the inquisitorial powers granted

by other parts of that section.¹ The Administrative Procedure Act (5 U.S.C. 1002(c)) provides that some matters of official record may, for "good cause found", be withheld from public scrutiny.²

On the other hand there is a substantial public interest in holding all aspects of adjudicative proceedings, including the evidence adduced therein, open to all interested persons. While the Federal Trade Commission Act does not specifically provide that Commission adjudicative hearings must be open to the public, we have interpreted Section 5(b) which provides *inter alia*, that any interested person may, upon good cause shown, be allowed to intervene in a proceeding as imposing upon this body the duty of public hearings.³ Our interpretation has the support and concurrence of a United States Court of Appeals.⁴

The desirability and in fact the necessity for public hearings is such an engrained and accepted part of our judicial system that it needs no lengthy endorsement from us. However, with respect to Federal Trade Commission hearings in particular, there are peculiarly pressing reasons for holding all aspects of adjudicative hearings open to public gaze. Quite obviously the deterrent effect of public proceedings upon potential violators is greater by reason of the fact that they are open to all interested persons. But of greater importance is the fact that the public record of past proceedings serves as a guide to the Bar and other professions who are called upon to advise the business community of this country in trade regulation matters. To foreclose our hearings and the evidence adduced therein from the scrutiny of such professionally interested persons would serve in a large measure to defeat the very reason for our existence. To the unesoteric the field of trade regulation law is a labyrinth, and the guiding "silken thread" is the study and analysis of past proceedings. Problems such as the formulation of an adequate cost justification defense or the erection of a statistical rebuttal to an inference of adverse competitive effect can only be solved by access to the evidence in past cases. One need only to glance through the many books and articles on subjects of this type to discover the authors' dependence upon a study of the public record, including the documentary evidence in decided cases. Suffice it to say that we firmly believe the best interests of the public are served when all interested persons may, if they so desire, famil-

¹ Section 6(f) has no application to adjudicative hearings but forbids only " * * * the publication of 'trade secrets and names of customers,' in public reports that the Commission may make 'from time to time' * * * ." *Federal Trade Commission v. Tuttle*, 244 F. 2d 605, 616 (2d Cir. 1957), cert. denied 354 U.S. 925.

² See also Rule 30(b) Federal Rules of Civil Procedure.

³ Accordingly, Rule 3.16(a) of our Rules of Practice decrees "All hearings in adjudicative proceedings shall be public unless otherwise ordered by the Commission."

⁴ *E. Griffiths Hughes, Inc. v. Federal Trade Commission*, 63 F. 2d 362 (D.C. Cir., 1933).

iarize themselves with all aspects of an adjudicative proceeding. And it matters not whether that person's interest is motivated by an intention to intervene in the matter, to prepare for other litigation, to write an article or by mere curiosity.

Quite obviously a hearing in which the documentary evidence is kept secret is not in all aspects a public hearing. And this is especially true in Robinson-Patman Act cases where by far the greater percentage of basic facts tending to prove or disprove the charge consists of documentary evidence. Lists of favored and nonfavored customers, their purchase volumes and the prices they were charged are among the facts generally shown by documents. Defensive evidence such as cost savings data is necessarily submitted in documentary form. Thus, the indiscriminate placement of documentary evidence "*in camera*" makes a pretense of our announced public hearings since the testimony, without the documents, may make little or no sense.

It is also important to keep in mind that the final resolution of proceedings of this type almost invariably requires not only the production of the respondent's records but also the production of similar records by the competitors of respondent. Injury at the primary level of competition is most often shown by recourse to the confidential records of competitors. Quite obviously there is no way in which the relevant records of competitors can be shielded from the eyes of a respondent as an "*in camera*" ruling does not bar the parties. Thus, the effect of any "*in camera*" ruling is, of necessity, one-sided, it shields the respondent from his competitors but cannot protect the competitors from respondent.

But, as we have indicated, the Commission should protect the confidential records of persons or corporations involved in proceedings before it insofar as such protection is practicable. Is this duty in conflict with our duty to hold public hearings? We think not. The answer lies somewhere between the Scylla of indiscriminate "*in camera*" rulings and the Charybdis of complete and unnecessary disclosure.

As we have pointed out, the Administrative Procedure Act sanctions the secretion of "matters of public record . . . for good cause found." As we view it, the solution of the problem lies in the judicious interpretation of the rather indefinite words, "good cause". The rule followed by the hearing examiner in this matter is illustrated by his statements in the record. In making one of his rulings placing documents "*in camera*", he said:

My reason for receiving these records in camera, as stated off the record previously, is that in this hearing examiner's opinion these exhibits, Commission's exhibits 180 through 245 inclusive, contain confidential business information and there is no showing at this time that the public interest would be

served by making this confidential information a matter of public record. On the other hand, by requesting that they go in camera, counsel for respondents [sic] has stated and implied it might possibly harm his client if they were received as public exhibits.

The rule followed by the hearing examiner is obviously incorrect since he placed upon counsel supporting the complaint the burden of showing why the documents should be placed in the public record. As grounds for placing the documents "*in camera*", he relied upon the unsupported statement of respondent's counsel that their public disclosure might result in injury to respondent. Quite clearly, the burden of showing "good cause" rests with the party requesting that the documents be placed "*in camera*". Neither party need show cause why evidence should be placed in the public record since such placement is mandatory unless excused.

We come now to the heart of the problem. What minimum showing constitutes "good cause" and will justify withholding documents from the public record? Of course, a definitive answer responsive to all factual situations cannot be given and indeed none should be attempted since this is an area which quite obviously falls peculiarly within the scope of the hearing examiner's discretion. The most that we shall attempt is to define the policy framework within which the examiner's discretion should operate.

It is our belief that the correct rule requires a showing that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved. The showing may consist of extrinsic evidence or, in certain instances, may be inferred from the nature of the documents themselves.

While all authorities agree that there is no absolute privilege against disclosure of business secrets, the courts have generally attempted to protect confidential business information from unnecessary airing. Cases dealing with this subject quite frequently make use of the term "trade secrets", but there appears to be some confusion as to the scope of the term, with some courts defining it to include only those facts dealing with secret formulas, research or processes,⁵ while others seem to hold the term embraces all confidential business records.⁶ It seems to us that there is such a wide difference between a secret formula or process and ordinary business records that a single term cannot encompass the whole field. Obviously, the disclosure of a secret formula will almost invariably

⁵ In *re Dependable Merchandise Corp.*, 14 F.R.D. 257 (S.D.N.Y. 1953); *Ferguson v. Ford Motor Co.*, 8 F.R.D. 414 (S.D.N.Y. 1948).

It should be noted that Section 6(f) of the Federal Trade Commission Act apparently recognizes a distinction by separately naming "trade secrets and names of customers."

⁶ *Erone Corp. et al. v. Skouras Theatres Corp. et al.*, 22 F.R.D. 494 (S.D.N.Y. 1958).
8 Wigmore, *Evidence* § 2212 (3d ed. 1940).

result in injury while the revelation of a business record may in many instances produce no more than embarrassment. In the parlance of the military, the former would be labeled "top secret" while the latter would rate only the classification of "confidential" or "restricted". Thus, it seems obvious that a different degree of protection should be afforded these two classes of information.

Since the impact of disclosure of a "trade secret", as distinguished from other records, would almost certainly be productive of injury, motions to place documents of this nature "*in camera*" should be sympathetically considered. In most instances, injury sufficient to establish "good cause" for sealing the documents can be inferred from the nature of the "trade secret" itself.

The documents involved in this proceeding are not "trade secrets", but consist for the most part, of ordinary business records. They do contain information of a type which most businesses would prefer to keep confidential, such as the names of customers, prices to certain customers, costs of doing business and profits. But the probability of a concrete injury resulting from the disclosure of these documents cannot be inferred from the nature of their content nor from the mere fact that respondent prefers to keep them confidential. Thus, documents of this type do not merit the degree of protection afforded to "trade secrets". In our view, requests to seal relevant evidence of this type should be looked upon with disfavor and only granted in exceptional circumstances upon a clear showing that an irreparable injury will result from disclosure.

While it is obviously not possible to make an *a priori* ruling as to the facts which would constitute a showing of "good cause" under the rule, we can point to certain possible grounds which, in our opinion, would not support an "*in camera*" ruling. Quite clearly the mere embarrassment of the movant should not foreclose public disclosure. Nor should documents be sealed simply on the ground that they contain information which competitors for business reasons are extremely desirous to possess.

Certainly the exposure of the respondent to possible treble damage actions is not the type of injury which would constitute "good cause" for secreting this evidence. Placing documents "*in camera*" for this reason would constitute a direct attempt to frustrate and defeat the will and intent of Congress. In enacting Section 4 of the Clayton Act (15 U.S.C. 15), which provides in part that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor * * * and shall recover threefold the damages * * *." Congress intended that such private suits would supplement and bolster the antitrust enforcement efforts of government prosecution. This Congressional purpose has been recognized by the Supreme Court in *Lawlor v.*

National Screen Service,⁷ wherein the Court, holding that the circumstances of that case did not bar the action as *res judicata*, stated:

Particularly is this so in view of the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble damage action.

Thus, in our view the secretion of evidence for the purpose of frustrating possible treble damage plaintiffs would be opposed to the public interest and the clearly expressed will of Congress. Our efforts should be directed to aiding, not hindering, private enforcement of the antitrust laws.⁸

There is, moreover, a common sense reason why protection of parties from treble damage litigants is not a valid ground for sealing exhibits. We must assume that all documentary evidence admitted by the hearing examiner is relevant and material to the charges made in the complaint and would, as a consequence, be relevant and material in a similarly founded treble damage proceeding. Thus, *all* documentary evidence submitted in this case could be sealed on this ground. As we have indicated, a "public hearing" in which most of the relevant evidence was secret would be little more than a pretense.

Of course, if documents were tendered and received upon the express condition that they would be placed "*in camera*", there is no room for the exercise of any rule since good faith would demand that the condition be kept. Some of the documents here in question were secured from respondent by means of a subpoena *duces tecum*. Respondent claims that its return to several of the subpoena's specifications was conditioned on the hearing examiner's assurance that the documents would be placed "*in camera*". Our examination of the record reveals only one instance which would support respondent's claim. While the situation is not exactly clear, it appears that respondent supplied the documents identified in the record as Commission Exhibits 155-157 on the condition that if offered in evidence they would be placed "*in camera*". Counsel supporting the complaint voiced neither assent nor objection to the conditional response, but their subsequent acceptance of the documents constitutes assent to the limitation placed upon their use and bars them from objecting to their "*in camera*" status. We find no merit in and reject respondent's claim that a number of other documents were supplied pursuant to a similar agreement.

In keeping with our belief that matters of this type should remain subject to the sound discretion of the hearing examiner, we

⁷ 349 U.S. 322, 329 (1955).

⁸ There is no question that confidential business data is not privileged in a private treble damage action and parties are obligated to disclose all information relative to the charges made in the action. E.g., *Seff v. General Outdoor Advertising Co. et al.*, 11 F.R.D. 597 (N.D. Ohio 1951).

are remanding this matter to him for his further consideration in accordance with the views expressed in this opinion. The documents in question shall remain "*in camera*" pending reconsideration by the hearing examiner after he has afforded respondent opportunity to show cause why they should not be made a part of the public record.

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

ORDER REMANDING CASE

This matter having been heard and considered by the Commission upon the interlocutory appeal filed by counsel supporting the complaint from orders of the hearing examiner placing documents "*in camera*" and upon respondent's answer in opposition to said appeal; and the Commission for reasons stated in the accompanying opinion having determined that said orders of the hearing examiner are based upon an erroneous standard:

It is ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner with instructions that he remove from their "*in camera*" status and place in the public record all documents heretofore received "*in camera*" excepting Commission Exhibits 155-157 and such other of said documents which upon reconsideration, after the parties have been afforded an opportunity to present their views thereon, appear to warrant "*in camera*" protection in accordance with the Commission's views as expressed in the accompanying opinion.

Commissioner Kern not participating.

CARNATION COMPANY ET AL. (D. 6172)
THE BORDEN COMPANY ET AL. (D. 6173)
BEATRICE FOODS COMPANY (DELAWARE) ET AL.
(D. 6174)
NATIONAL DAIRY PRODUCTS CORPORATION ET AL.
(D. 6175)
PET MILK COMPANY ET AL. (D. 6176)
FAIRMONT FOODS COMPANY ET AL. (D. 6177)
ARDEN FARMS CO. ET AL. (D. 6178)
FOREMOST DAIRIES, INC., ET AL. (D. 6179)
H. P. HOOD & SONS, INC. (D. 6425)

Dockets 6172 through 6179 and 6425. Order, Mar. 15, 1961
Order remanding proceedings for further evidence as to competitive effects of alleged unlawful practices.

Counsel in support of the complaints having appealed from the hearing examiner's initial decision dismissing the complaints in

these proceedings, and the Commission having tentatively considered the matter on the briefs and oral arguments; and

It appearing that an informed disposition of the appeal requires an appraisal of all aspects of the competitive effects of the practices alleged to be unlawful, involving, among other things, a consideration of the approximate amount of trade and commerce in ice cream and other frozen products which has been or may be restrained or otherwise affected by such practices; and

The Commission having noted that the records as presently constituted do not contain accurate and reliable statistics from which this information may be ascertained, and being of the opinion that the records in the several cases should be supplemented by the addition of such material:

It is ordered. That each of these proceedings be, and it hereby is, remanded to the hearing examiner for the reception of such further evidence as may be offered for the purpose of showing, for some reasonable period of time, the extent to which requirements contracts, "trade agreements" or other exclusive dealing agreements have been used by the various respondents, their subsidiaries and affiliates in connection with, or ancillary to, the sale of ice cream and other frozen products, the identity and location of the customers with whom such arrangements have been negotiated, and the quantities and dollar volumes of the products which have been involved in the transactions.

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

Commissioner Kern not participating.

EKCO PRODUCTS COMPANY

Docket 8122. Order, Apr. 12, 1961

Interlocutory order upholding hearing examiner's denial of motion to strike charges of Sec. 7 violation.

This matter having been heard by the Commission upon respondent's interlocutory appeal from that portion of the hearing examiner's order of March 9, 1961, denying respondent's motion to strike all of the allegations of the complaint which charge that the acquisition of McClintock Manufacturing Company by respondent violates Section 7 of the Clayton Act; and

It appearing that respondent has made no showing of any additional circumstances which warrant the conclusion that the Commission, in issuing its complaint herein, erred in its administrative decision that it had reason to believe that respondent's acquisition

of McClintock Manufacturing Company violates Section 7 of the Clayton Act; and

The Commission being of the opinion that a determination of the issues presented herein before conclusion of the trial is not required to better serve the interests of justice; and hence, the appeal is not one to be granted under §3.20 of the Commission's Rules of Practice:

It is ordered, That the respondent's appeal from the hearing examiner's order of March 9, 1961, be, and it hereby is, denied.

GIANT FOOD, INC.

Docket 7773. Order and Opinion, Apr. 20, 1961

Interlocutory order denying issuance of subpoena ad testificandum directing Commission investigator to release confidential information obtained in interviewing witnesses.

OPINION OF THE COMMISSION

By the Commission: This matter has been certified by the hearing examiner to the Commission for its consideration of respondent's request that an employee of the Commission be permitted or ordered to testify in this proceeding. Counsel for respondent has filed a memorandum in support of this request.

Respondent is charged with violating the Federal Trade Commission Act through the use of false, misleading and deceptive statements and representations with respect to the prices of merchandise which it offered for sale and the savings accorded to purchasers thereof. Certain witnesses, members of the public, were called by counsel supporting the complaint for the purpose of testifying as to their understanding of claims used by respondent in its advertising. On cross-examination, these witnesses testified that they had been interviewed by an investigator of the Commission prior to the hearing. Some of them also testified that other persons had been contacted by the investigator but had not received subpoenas to appear as witnesses in this proceeding. On the basis of this testimony, respondent contended that it was entitled to know whether persons who had been interviewed but who had not been called as witnesses had given statements in response to the investigator's inquiries which were favorable to respondent. It, therefore, made application for issuance of a subpoena duces tecum directing the investigator to produce "such documents, records, diary, correspondence or memoranda as will disclose the dates, places and persons whom you interrogated with regard Federal Trade Commission Docket No. 7773, along with such documents, records, correspondence or memoranda

which disclose the nature of the interview, the type of questions asked and the responses received." This application was denied by the hearing examiner and, while an appeal from this ruling was pending before the Commission, respondent requested that a subpoena ad testificandum be issued directing the investigator to appear and testify with respect to his participation in the proceeding. This request was granted by the hearing examiner and the subpoena was issued. The investigator appeared in response thereto and after having given his name and address and his position and length of service with the Commission declined to answer questions asked by respondent's counsel concerning the investigation of this matter on the ground that he had not been authorized by the Commission to divulge this information. Respondent now requests the Commission to permit or order the investigator to testify and the matter is before us on this request and on the certification of certain questions by the hearing examiner.

The information which respondent seeks was obtained by the investigator in the performance of his official duties and, therefore, is clearly confidential under the Commission's Rules of Practice. Since the persons from whom this information had been obtained had not testified concerning the subject matter of the interviews, the confidential status of such information had not been waived. Consequently, the hearing examiner had no authority to require the investigator to divulge this information and his issuance of a subpoena ad testificandum for that purpose was improper. *Postal Life & Casualty Insurance Company*, Docket No. 6276 (Order Ruling on Interlocutory Appeal, January 10, 1956), and *Sun Oil Company*, Docket No. 6934 (Order Ruling on Interlocutory Appeal, September 15, 1958).

Although it has not been presented in proper form, we will regard respondent's request as an application for release of confidential information made pursuant to §1.134 of the Commission's Rules of Practice. We have held that in determining whether requested information will be disclosed, we will consider the purpose for which such information is to be used and will order its release only upon a showing by the applicant of a real or actual need therefor. *Postal Life & Casualty Insurance Company*, *supra*; and *Thomasville Chair Company*, Docket No. 7273 (Order Ruling on Interlocutory Appeal, November 6, 1959). It is, therefore, necessary to consider respondent's reason for requesting the information.

Respondent argues, in effect, that of the persons interviewed by the investigator, only those whose testimony would support the complaint were called as witnesses and that the persons who had indicated that they would not be misled by respondent's advertising

had not been asked to testify. Its purpose in calling the investigator as a witness is to prove through his testimony that certain members of the public would not be deceived by the advertising in question.

Respondent's argument is at best conjectural. The mere fact that certain persons were not called as witnesses does not indicate that they would have testified adversely to the complaint. In any event, the investigator's account of what he was told by those persons concerning their understanding of respondent's advertising would not be competent evidence. Moreover, there is nothing in respondent's brief to indicate that there is anything unique about the persons interviewed by the investigator. It appears that they are merely members of the public who were asked to give their impressions of respondent's advertising. Certainly, respondent does not wish to argue that the only persons who would not be misled by the advertising in question are the ones that were interviewed by the investigator but not called as witnesses. Consequently, respondent has not only failed to demonstrate an actual need for the information it requests but does not even claim that such a need exists. Its application for the release of confidential information is, therefore, denied.

The questions which have been certified to us by the hearing examiner are in effect broad, general inquiries concerning the right of an attorney-examiner to refuse to answer questions when called as a witness for respondent and concerning the protection against disclosure afforded by the "work product" principle to the notes, memoranda, interview reports and other information assembled by an attorney-examiner in preparation of a case for trial. In view of the disposition made of respondent's request for the release of confidential information, these questions are not presently before the hearing examiner. Consequently, we do not deem it appropriate at this time to enter into an academic discussion of technical procedural problems which can best be resolved when presented in specific factual situations as they arise.

An appropriate order denying respondent's application will be entered.

ORDER DENYING RESPONDENT'S APPLICATION FOR RELEASE OF INFORMATION

This matter having been heard by the Commission upon respondent's application for the release of certain information allegedly obtained by an attorney-examiner of the Commission in the performance of his official duties and upon the answer of counsel supporting the complaint in opposition thereto; and

The Commission, for the reasons stated in the accompanying opinion, having directed that an appropriate order denying respondent's application for the release of said information be entered;

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

GIANT FOOD, INC.

Docket 7773. Order, Apr. 20, 1961

Interlocutory order granting respondent's appeal for production of department store records and denying production of investigator's confidential interviews.

This matter having come on to be heard upon respondent's appeal from the hearing examiner's ruling denying respondent's application for the issuance of subpoenas duces tecum for the production of records of three department stores which would disclose the prices at which certain merchandise had been sold by such stores and from that part of another ruling of the hearing examiner denying respondent's application for the issuance of a subpoena duces tecum directing an investigator of the Commission to produce certain documents containing information obtained from members of the public who had been interviewed by the investigator but who had not been called to testify in support of the complaint; and

It appearing that inasmuch as the aforesaid records of certain department stores requested in respondent's application for issuance of subpoenas duces tecum are to be used by respondent in its defense and are relevant to issues involved in this proceeding, the request for their production should have been granted; and

It further appearing that the aforesaid documents requested in the application for the issuance of a subpoena duces tecum directed to the Commission's investigator are classified as confidential under the Commission's Rules of Practice and that the hearing examiner properly rules that he has no authority in the circumstances here presented to require the production thereof:

It is ordered. That respondent's appeal from the hearing examiner's ruling denying respondent's application for the issuance of subpoenas duces tecum for the production of the aforesaid records of certain department stores be, and it hereby is, granted.

It is further ordered. That respondent's appeal from the hearing examiner's ruling denying respondent's application for the issuance of a subpoena duces tecum directed to the Commission's investigator be, and it hereby is, denied.

PET MILK COMPANY ET AL.

Docket 6176. Order, Apr. 27, 1961

Interlocutory order denying reconsideration of remand for evidence regarding trade and commerce affected by exclusive-dealing arrangements.

The Commission, by its order of March 15, 1961, having remanded certain proceedings, including the instant proceeding, to the hearing examiner for the reception of such evidence as may be offered relating to the nature and amount of trade and commerce affected by any "requirements contracts, 'trade agreements' or other exclusive dealing agreements" used by the respondents in those proceedings in distributing their ice cream and other frozen products; and the respondents in this proceeding having filed a motion requesting that the Commission reconsider its action in remanding this case, which motion states, among other things, that the hearing examiner in effect found that no such agreements were used by the respondents in this proceeding; and

It appearing to the Commission that one of the issues implicit in the appeal from said initial decision involves a determination of whether the instant respondents' contracts, including those whereby they have leased cabinets and other equipment to retailer customers in consideration of purchases by them of respondents' products, are kindred in purpose and effect to the agreements referred to in the Commission's order of remand, and the Commission having determined that no adequate showing has been made in the motion that the order of remand herein should be rescinded; and

It appearing that the motion and the answer filed in opposition thereto by counsel supporting the complaint afford adequate basis for informed decision of such motion, and the Commission having determined that the respondents' request for oral argument thereon should accordingly be denied:

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

It is further ordered, That the request for oral argument in support of said motion be, and it hereby is, denied.

Commissioner Kern not participating.

JAMES LEES AND SONS COMPANY

Docket 7640. Order and Opinion, May 11, 1961

Interlocutory order remanding to hearing examiner motion to amend complaint by substituting allegations identifying as respondent, purchaser of assets of dissolved corporation.

OPINION OF THE COMMISSION

By the COMMISSION:

This matter is before the Commission on a Motion To Amend Complaint filed by counsel supporting the complaint. Such motion, in effect, requests the hearing examiner (1) to permit the substitution of James Lees and Sons Company, a Delaware corporation, as party respondent in this proceeding in the place of James Lees and Sons Company, a Pennsylvania corporation, and (2) to issue and direct service of an amended complaint on the latter corporation. The hearing examiner, being of the opinion that he had no authority to entertain the motion, certified it to the Commission for determination.

The complaint in this proceeding charges that the respondent Pennsylvania corporation has discriminated in price in violation of Section 2(a) of the Clayton Act, as amended. The motion states that the assets of that corporation were purchased by another corporation on March 25, 1960, that such assets were transferred to a newly organized Delaware corporation of the same name, and that the Pennsylvania corporation is now in the process of being dissolved. The motion further states that the pricing practices of the new corporation are in all respects identical to those formerly used by the original concern and that many of the officials responsible for the latter's management at the time the complaint issued continue in similar managerial positions with the Delaware corporation.

The same acts and practices are challenged under the motion's proposed amendment as in the complaint, and no change in the circumstances leading the Commission to issue that complaint in the first instance is presented. The proposed amendment would merely redesignate the respondent to correctly identify the party engaged currently in the activities dealt with in the complaint. Amendment in that respect clearly would effectuate the Commission's purpose in issuing the complaint. Hence, the amendment appears to be within the purview of §3.9 of the Commission's Rules which authorizes hearing examiners to allow appropriate amendments under conditions there designated if "reasonably within the scope of the proceeding initiated by the original complaint."

Although the hearing examiner was correct in concluding that he had no authority to issue and direct the service of an amended complaint, he erred in further ruling in effect that he lacked authority to allow amendment of the complaint itself. Cf. *Capitol Records Distributing Corp.*, Docket No. 8029, Order Remanding Record to Hearing Examiner (March 1, 1961). The hearing examiner should have construed the motion as a request to amend the complaint by substituting certain of the allegations of the proffered draft of

amended complaint which identify the respondent and the hearing examiner should have ruled on the motion.

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

ORDER REMANDING MOTION TO HEARING EXAMINER

The hearing examiner, by order dated July 19, 1960, having certified to the Commission a motion to amend complaint theretofore filed by counsel supporting the complaint; and

The Commission, for reasons stated in its accompanying opinion, having determined that said motion should have been considered and ruled upon by the hearing examiner:

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

THE FIRESTONE TIRE & RUBBER COMPANY ET AL.

Docket 6487. Order, May 26, 1961

Order denying motions for modification of desist order of Mar. 9, 1961, 58 F.T.C. 371 and stay of effective date until issuance of final order in *The B. F. Goodrich Co.*, Docket 6485, or challenge by the Commission of the use of the sales commission method of distribution by other marketers of TBA products.

Each of the respondents having filed two separate motions which request that the order issued by the Commission in this proceeding on March 9, 1961, be modified and limited and that its effective date be suspended or stayed pending issuance of final order in the *Goodrich* matter, Docket 6485, or, in the alternative, institution by the Commission of additional proceedings challenging the use of the sales commission method of distribution by other marketers of TBA products; and

The respondents having requested in their motions for modification that the order to cease and desist be limited so as to proscribe only the continuance of the sales commission agreement between them in reference to the distribution of the respondent Firestone's TBA products, but the Commission having found, among other things, in its decision that the record fully established that the respondents' use of the sales commission method of distribution for TBA products had resulted in far-reaching anti-competitive effects among manufacturers and distributors of TBA products and constituted unfair methods of competition and unfair acts and practices in commerce, and the Commission having further validly determined that the appropriate remedy to be applied was to prohibit like use of such distributional method by the respondent Fire-

stone in conjunction with any other marketing oil company and by the respondent Shell in conjunction with other distributors of TBA products; and

The Commission having further considered the respondents' motions to modify or suspend the effective date of the order, but the Commission when rendering its decision in this proceeding having determined that the public interest would be best served by issuance of order requiring that the unlawful methods and practices found be terminated and discontinued forthwith, and the Commission being of the view that its decision in that respect had sound basis in law and public policy:

It is ordered, That the respondents' motions be, and they hereby are, denied.

Commissioner Elman not participating.

LESLIE SALT CO.

Docket 8220. Order, May 29, 1961

Interlocutory order denying motion to dismiss charges of complaint in Sec. 7, Clayton Act, proceeding.

This matter having come on for hearing upon the interlocutory appeal of the respondent from the hearing examiner's rulings of April 11, 1961, whereby he denied three separately filed motions by the respondent, including its motion to dismiss the charges of the complaint which challenge the respondent's acquisition of the stock, assets and business of California Salt Company as violative of Section 7 of the Clayton Act, as amended and approved December 29, 1950; and

The respondent having argued in support of the request to dismiss that the acts charged are outside the purview of the statute for the reason, among others, that the respondent had acquired a substantial stock interest in such company prior to the above amendment date and prior to the acquisition in 1959 of that company's assets and the remainder of its outstanding capital stock, but it being evident that the hearing examiner's ruling merely contemplates informed decision of the issues upon the basis of facts subsequently developed in the orderly course of hearings; and

There being no showing that such ruling or the denials of the motions to strike and for a bill of particulars constituted an abuse of discretion by the hearing examiner or will operate in any way to deprive respondent of its rights to full and fair hearing, and the Commission having accordingly determined that the appeal is not within the category of those to be entertained under §3.20 of the Commission's Rules of Practice:

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

BENRUS WATCH COMPANY ET AL.

Docket 7352. Order, June 9, 1961

Interlocutory order granting respondents' motion to dismiss paragraph 7 of the complaint of Jan. 8, 1959, and denying motion to dismiss other allegations.

Respondents move to dismiss the Commission's complaint after counsel in support of the complaint has rested his case.

As stated by counsel for respondents, the complaint should be dismissed for the following reasons:

1. A prima facie case has not been established with regard to Paragraph Four of the complaint since counsel in support of the complaint has failed to prove that the respondents' pre-ticketed prices are fictitious and are not regularly and customarily charged in consumer sales.

2. A prima facie case has not been established with regard to Paragraph Five of the complaint since counsel in support of the complaint has failed to prove that the trade-in of a watch does not result in a saving to the consumer and that the pre-ticketed price is not usually and regularly charged absent a trade-in.

3. A prima facie case has not been established with regard to Paragraph Six of the complaint since counsel in support of the complaint has failed to prove that the presentation of an allowance certificate did not effect an actual saving to the customer and the pre-ticketed price was usually and regularly charged without the presentation of such a certificate.

4. A prima facie case has not been established with regard to Paragraph Seven of the complaint since counsel in support of the complaint has failed to prove that certain low-priced models of respondents' products were not available for purchase and that consumers believed such models were available.

5. A prima facie case has not been established with regard to Paragraph Eight of the complaint since counsel in support of the complaint has failed to prove that respondents have not honored their guarantees in accordance with their terms.

6. A prima facie case has not been established with regard to Paragraph Nine of the complaint since counsel in support of the complaint has failed to prove that respondents have represented, except in one instance, that their watches are shock proof or that such representation, if made, was misleading in the circumstances of this case.

7. A prima facie case has not been established with regard to Paragraph Ten of the complaint since counsel in support of the

complaint has failed to prove that respondents' watches do not contain gold or gold alloy or that any watch composed solely of base metal has been considered by consumers to consist of gold or gold alloy.

8. A prima facie case has not been established with regard to Paragraph Eleven of the complaint since counsel in support of the complaint has failed to prove the metal composition of respondents' chrome top cases or that consumers are misled by the appearance of such cases.

The crux of the charges alleged in the complaint appears to be those set forth in Paragraph Four thereof which are as follows:

Respondents, for the purpose of inducing the purchase of their products, have engaged in the practice of attaching or causing to be attached price tickets to their said products upon which certain amounts are printed. Respondents have also disseminated, or caused to be disseminated, price lists, catalogs, brochures, leaflets, newspaper and magazine advertisements, and other forms of advertising, in which certain amounts are shown as the retail prices of respondents' products. Respondents thereby represent, directly or by implication, that said amounts are the usual and regular retail prices of said products. In truth and in fact said amounts are fictitious and in excess of the usual and regular retail prices of said products.

As to Paragraph 4 above, the evidence adduced by counsel supporting the complaint appears in some measure to establish, in the absence of rebuttal evidence, that some retail sales of Benrus watches were made at the manufacturer's ticketed price and other retail sales, equally substantial, were made at prices less than the manufacturer's ticketed price. The general retail price structure appears to have no uniformity except that some retailers having a discount policy consistently sell at prices less than the manufacturer's ticketed price, whereas other retail merchants sell at the best obtainable price not exceeding the manufacturer's ticketed price, or consistently sell at the ticketed price. It is unnecessary for counsel supporting the complaint to establish that Benrus watches were predominantly sold at less than the ticketed price. It is sufficient if it may be inferred from the evidence adduced that a substantial number of retailers of Benrus watches sell at prices less than the price ticketed by Benrus. In order to establish a prima facie case in this respect, it is sufficient if the sales as evidenced indicate a pattern that such a practice exists even though there may be evidence of the fact that Benrus watches are sold not infrequently at the ticketed price.

The foregoing proof appears to establish prima facie evidence of the fact that the manufacturer's ticketed price is not the usual

and regular price in the sense that the price pattern as evidenced indicates the nonexistence of a usual and regular price. Under these circumstances, unless explained by the respondents in going forward with the evidence, it would appear that the price tickets provided by the respondents are meaningless and if so, fictitious. This inference is nonetheless reasonable because there is a growing number of discount houses in the market place which sell at less than the manufacturer's ticketed price. The effect of this increasingly competitive market for goods that appear to be sold at reduced prices, which is a matter of common public knowledge, may in and of itself have caused manufacturer's pre-ticketing at a specified price to be misrepresentative of a regular and usual price. However, the intention of the manufacturer is not an essential issue. The real issue would seem to be whether or not the manufacturer's indicated price is a misrepresentation in substantial segments of the market where it is usually and regularly not the adopted retail price. See *Household Sewing Machine Company*, Docket 6148, 52 FTC 250; *The Orloff Company, Inc.*, Docket 6184, 52 FTC 709; *The Clinton Watch Company*, Docket 7434, order issued July 10, 1960; *The Baltimore Luggage Company*, Docket 7683, Initial Decision issued September 28, 1960. See also Sec. VIII of the Commission's Guides Against Deceptive Price, adopted October 2, 1958.

As regards paragraphs of the complaint numbered five, six, eight, nine, ten and eleven, it appears there is some evidence from which it can reasonably be inferred under the circumstances as evidenced that a prima facie case has been established to an extent requiring the respondents to go forward with the evidence.

As regards Paragraphs Seven of the complaint, there appears to be no evidence sufficient to establish a prima facie case.

A full opinion evaluating the evidence in more detail than herein set forth will be included in the Initial Decision following the conclusion of the hearings in the instant case. Accordingly, it is

Ordered, That respondents' motion to dismiss Paragraph Seven of the complaint is herein and hereby granted, and it is further

Ordered, That respondents' motion to otherwise dismiss the complaint, or allegations of the complaint, is herein and hereby denied without prejudice to the renewal of motion to dismiss the complaint upon the conclusion of the respondents' case.

THE PROCTER & GAMBLE COMPANY

Docket 6901. Order and opinion, June 15, 1961

Order remanding case to hearing examiner for further evidence concerning the competitive effects of the challenged conglomerate acquisition of Clorox Chemical Co., the dominant concern in the liquid bleach field, including market share data in specified geographical regions.

OPINION OF THE COMMISSION

By the COMMISSION:

The complaint in this matter charges respondent, The Procter & Gamble Company, with violating Section 7 of the Clayton Act, as amended, by acquiring the assets and business of Clorox Chemical Co. (hereinafter referred to as Clorox). The hearing examiner has filed his initial decision holding that the acquisition violated Section 7, as alleged, and the matter is now before the Commission on cross-appeals of respondent and counsel supporting the complaint. The complaint alleges in substance that the acquisition of the dominant firm in the household liquid bleach field by the leading producer in related product fields may have the effect of substantially lessening competition or tending to create a monopoly in the production and sale of household liquid bleach. It specifically charges in this connection that producers of household liquid bleach may be unable to compete with respondent due to any one, any combination of, or all of the following factors:

- (a) Respondent's market position;
- (b) Respondent's financial and economic strength;
- (c) Respondent's advertising ability and experience;
- (d) Respondent's merchandising and promotional ability and experience;
- (e) Respondent's "full-line" of cleansing and laundry products;
- (f) Respondent's ability to command consumer acceptance of its products and of valuable grocery store shelf space;
- (g) Respondent's ability to concentrate on one of its products, or on one selected section of the country, the full impact of its advertising, promotional, and merchandising experience and ability.

As the hearing examiner has pointed out, this case involves a conglomerate acquisition and is therefore one of first impression. In all previous Section 7 proceedings before the Commission, the challenged acquisitions were of either a vertical or horizontal nature. Here, however, the acquiring firm was neither a supplier or customer, nor a competitor of the acquired. Such a merger, therefore, does not have the effect of automatically foreclosing to competitors any market outlet or source of supply as in a vertical merger, nor does it have the effect of automatically eliminating a competitor as in a horizontal merger. Nevertheless, such a merger violates Section 7 if it has the proscribed effect. We repeat here with emphasis our recent holding in the *Scott Paper* case:¹ "Under Section 7, as amended, any acquisition whether it be vertical, conglomerate or horizontal is unlawful if the effect may be substantially to lessen competition or to tend to create a monopoly in any line of com-

¹ *In the Matter of Scott Paper Company*, Docket 6559 (Dec. 16, 1960), 57 F.T.C. 1415, at 1440.

merce.”² Therefore, respondent's contention that this type of acquisition is not embraced by Section 7 has no merit and is rejected.

The question in this proceeding thus is whether the proscribed effect may in fact result from this particular acquisition where the only immediate effect is the replacement of one competitor by another. In making this determination, the same tests apply as in any other matter coming within the purview of Section 7, but since a conglomerate acquisition does not have the above-mentioned “automatic” effects of a vertical or horizontal merger, such a determination is necessarily difficult to make from a consideration of evidence relating solely to the competitive situation existing in the relevant market prior to the acquisition and to the pre-merger status of the acquired and acquiring corporations. Consequently, a consideration of post-acquisition factors is appropriate.

In this case, the hearing examiner has placed considerable emphasis on evidence relating to the post-acquisition activities of Clorox. Relying primarily on this evidence, he has concluded that the dominant market position held by Clorox in the production and sale of liquid bleach has been enhanced to the detriment of actual and potential competition; that there is an increasing tendency of concentration of competitors in the liquid bleach industry and that other liquid bleach producers will be unable to expand their operations by normal methods of competition. While we are of the opinion that, in the circumstances of this case, he was correct in considering this evidence, we do not agree that it supports his conclusions with respect to the probable effects of the acquisition.

The hearing examiner has found in this connection that, subsequent to the acquisition, Clorox has systematically countered the promotional activities of Purex Chemical Company, the second largest producer of liquid bleach, by its own advertising and promotional campaigns in various market areas throughout the country. With one exception, however, the effectiveness of these counter promotional activities cannot be determined from the record. The evidence discloses that in one market area, Erie, Pennsylvania, Purex was unsuccessful in its attempt to conduct a market test by reason of respondent's counter promotions. We do not believe that it can be inferred from this one showing, however, that the same results would occur in other market areas that Purex or other producers may attempt to enter or in which they may attempt to expand their operations.

² This holding follows both from the language of the statute and from relevant legislative history. The House Committee report stated:

“... the bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition * * * or tending to create a monopoly.” (H.R. Rep. No. 1191, 81st Cong. 1st Sess. p. 11 (1949).)

The hearing examiner has also found that, subsequent to the acquisition, Clorox's market share of the total household liquid bleach sales had increased substantially. This finding is based on data obtained from reports covering the period August, 1957, to November, 1958, made by the A. C. Nielsen Company Marketing Service. It appears that the increase in the Clorox market share in the first twelve months of this period was .3 of one Nielson point and, in the entire sixteen months, .42 of one Nielson point. This increase, however, is only about half of the average increase of .8 of one Nielson point made by Clorox in each of the five years prior to the acquisition. The hearing examiner's failure to consider this pre-acquisition growth trend of Clorox detracts from his conclusion that there had been a substantial increase in the dominant market position held by Clorox as a result of the acquisition.

In our opinion, the post-acquisition data neither supports the hearing examiner's conclusions nor does it indicate in any manner that the acquisition will not result in a substantial lessening of competition or tendency toward monopoly. As pointed out by counsel supporting the complaint, very few of respondent's merchandising techniques were used during the first eight months after the acquisition. Thereafter, when consumer promotions were used, although only on a limited basis, the market share of Clorox increased sharply. Moreover, counsel supporting the complaint contend that, during the sixteen month period after the acquisition, respondent had put into effect only a few of the changes which it might reasonably be expected to make in the production and merchandising of liquid bleach. These changes did not extend to the use of respondent's manufacturing facilities, the use of respondent's sales force in place of independent brokers, coordination of the advertising and promotion of Clorox with respondent's full line of related products and the use of national television advertising. According to counsel supporting the complaint, it is only when respondent begins to use the merchandising techniques and methods by which it has achieved spectacular successes against major competition in the soap and detergent fields that the full impact of this financially powerful corporation will be made on competition in the liquid bleach industry.

The record as presently constituted does not provide an adequate basis for determining the legality of this acquisition. In the circumstances, we might dismiss the complaint and direct our staff to maintain continuing surveillance of this market, with the possibility of bringing another complaint in the future if we think it warranted. We believe, however, that the public interest will be better served and the respondent not unduly inconvenienced by our remanding the case for the taking of additional evidence. This is

likely to obviate the necessity of a plenary proceeding in the future that would be more costly in time and money to both the Commission and respondent than adding to the present record. Moreover, this disposition of the matter, providing as it will a more complete and detailed post-acquisition picture, has the advantage of allowing the Commission an informed hindsight upon which it can act rather than placing too strong a reliance upon treacherous conjecture.

The case will, therefore, be remanded to the hearing examiner for the reception of evidence relating to the competitive situation as it presently exists in the liquid bleach industry. This evidence should relate to events occurring subsequent to November 1958, and should include market share data in each of the geographical regions specified on page 17 of the initial decision, as well as information directed to more clearly delineating the production and merchandising facilities and techniques which have been utilized by Clorox under the control of respondent.

Chairman Dixon and Commissioner Elman not participating.

ORDER REMANDING PROCEEDING TO HEARING EXAMINER

Counsel supporting the complaint and respondent having filed cross-appeals from the initial decision in this matter; and

The Commission having determined that the record as presently constituted does not provide an adequate basis for informed determinations as to the actual or probable effects of respondent's acquisition of Clorox Chemical Co. on competition in the production and sale of household liquid bleach, and being of the opinion that the record should be supplemented in this respect to the end that all of the issues involved in the case may be finally and conclusively disposed of on their merits:

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

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for the reception of such further evidence concerning the competitive effects of the aforementioned acquisition as may be offered in conformity with the views expressed in the accompanying opinion of the Commission.

It is further ordered, That after the receipt of such additional evidence the hearing examiner make and file a new initial decision on the basis of the entire record herein.

Chairman Dixon and Commissioner Elman not participating.

