regard itself as disqualified from deciding this case, and the Commission itself being aware of none:

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

Commissioner Elman not participating.

TOPPS CHEWING GUM, INC.

Docket 8463. Order, Nov. 15, 1963

Order denying respondent's supplemental request to appeal hearing examiner's refusal of permission to take certain depositions.

Order Denying Supplemental Request For Appeal

Respondent has filed on October 31, 1963, a supplemental request to appeal, pursuant to Section 3.17(f) of the Commission's Rules of Practice, from the hearing examiner's order of October 21, 1963, denying respondent permission to take certain depositions. The Commission has determined that respondent's supplemental request does not show "that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing will better serve the interests of justice", as required by Section 3.17(f).

As pointed out in our earlier Opinion and Order Disposing of Motions in this proceeding (issued July 2, 1963) [p. 2196 herein], the "conduct of adjudicative proceedings is primarily the responsibility of the hearing examiners, and, as Sections 4.15(e) and 4.18 [now Sections 3.17(f) and 3.20] of the Commission's Rules of Practice make clear, an examiner's rulings upon evidentiary or procedural matters arising in the course of such proceedings will not be reviewed or disturbed in the absence of unusual circumstances." The showing required for the entertainment by the Commission of an

interlocutory appeal is analogous to that applied to appeals from the interlocutory orders of district courts in judicial proceedings, pursuant to 28 U.S.C. § 1292(b), i.e., that the order appealed from "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The need for affording wide discretion to hearing examiners in the conduct of adjudicative proceedings is particularly clear with respect to the handling of pretrial procedures, including requests for depositions. The proper disposition of such requests cannot be determined by reference to abstract legal principles or "controlling question[s] of law", but depends upon an intimate knowledge of the facts of the proceeding, and a careful balancing of the needs of the parties, together with the public interest in the fair and expeditious disposition of the proceedings. For the Commission to entertain interlocutory appeals from every such pretrial ruling of the examiner would, in effect, require the Commission to take over the entire conduct of the proceeding and would result in delaying the proceeding to the same extent as if the appeal had been deliberately taken for that purpose.

The only reason urged by respondent in support of its request that the Commission entertain its appeal is that the denial of the depositions which it has requested would be reversible error. This is obviously insufficient; any procedural ruling may ultimately constitute reversible error if it is later determined to be incorrect and if it has resulted in substantial prejudice. The test for interlocutory review under Rule 3.17(f) is not whether the examiner's ruling could result in reversible error but whether the question presented is of the type which should be considered by the Commission in interlocutory, piecemeal appeals prior to the termination of the proceeding before the examiner.

Moreover, under the Commission's Rules of Practice, respondent need not request an interlocutory appeal in order to preserve its right to show that it has been prejudiced by the examiner's ruling when and if this proceeding should come before the Commission upon appeal from the initial decision of the hearing examiner. At such time, when the entire proceeding is before the Commission, the Commission will be able to determine whether any prejudice to respondent has resulted from the examiner's conduct of the proceeding and to take such action as may be necessary and appropriate to remedy any prejudice found to exist. Accordingly,

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

FURR'S INC.

Docket 8581. Order and Opinion, Nov. 18, 1963

Interlocutory order setting forth guiding principles for hearing examiner as to procedure in dealing with respondent's requests for production of documents in possession of complaint counsel concerning affairs of competitors.

Opinion Accompanying Order

By the Commission:

In *Grand Union Co.*, FTC Docket 8458 (Order of February 11, 1963) [62 F.T.C. 1491], followed in *Columbia Broadcasting System, Inc.*, F.T.C. Docket 8512 (Order of February 26, 1963) [62 F.T.C. 1518], the Commission outlined certain conditions and safeguards governing the production of documents in the possession of complaint counsel sought by respondent in aid of preparing its defense, in circumstances where the Commission found that there was a substantial danger of unnecessary or improper disclosure of information, contained in such documents, concerning the operations and affairs of respondent's competitors. Respondent in the instant matter, in its request for permission to file an interlocutory appeal, raises substantial questions as to the proper application of the procedure established by the Commission's order in *Grand Union Co., supra.* However, rather than entertain an appeal at this time, the Commission deems it appropriate to return the matter to the hearing examiner for reconsideration in the light of the following principles, which should guide examiners in dealing with the kind of problem presented here.

First. The procedure established in *Grand Union* is not to be inflexibly or invariably followed in all cases in which a respondent seeks production of documents containing information concerning the operations or affairs of competitors. Whether the procedure used in *Grand Union*, as opposed to unconditional production, is necessary or appropriate depends on the circumstances of the particular case. The danger of improper or unnecessary disclosure must be balanced against the respondent's interest in the practical and expeditious preparation of its defense. Other relevant interests must also be taken into account, such as the public interest in preventing undue delay or confusion in the conduct of Commission proceedings. The number and kind of documents involved may have a bearing on the applicability of the *Grand Union* procedure. Furthermore, the circumstances of a particular case may require appropriate modification of the procedure.

Second. The question whether and to what extent the procedure established in *Grand Union* shall be followed in a particular case is a matter within the sound discretion of the hearing examiner. This is