Docket 8599. Order, Mar. 5, 1964

Order denying respondent's motion relative to the production of staff memorandum to the Commission.

Order Denying Motion and Dismissing Request for Permission To File Interlocutory Appeal

Part 2 of the Commission's Procedures and Rules of Practice (effective August 1, 1963) establishes a consent order procedure whereby cases can be settled in advance of issuance of the Commission's complaint. Pursuant to this procedure, the Commission served the respondent with notice of its determination to issue a complaint, along with a copy of the proposed complaint and form of order. Consent negotiations ensued but were unsuccessful, and the Commission subsequently issued its formal complaint. The matter is now in the hearing stage.

On January 3, 1964, respondent made a motion to the hearing examiner requesting that a memorandum which had been submitted to the Commission by the Commission's staff in the course of the consent negotiations be turned over to respondent. The examiner denied the motion on the ground that "the motion is not one in the present proceeding before him" within the meaning of Section 3.6(a) of the Commission's Procedures and Rules of Practice. However, the examiner indicated that in his opinion respondent was not entitled to production of the memorandum. On February 6, 1964, respondent filed with the Commission a request pursuant to Section 3.20 of the Commission's Procedures and Rules of Practice for permission to file an

interlocutory appeal from the examiner's ruling, and on February 12 complaint counsel filed a statement in opposition thereto.

(1) The examiner erred in his ruling that respondent's motion was not one made in the proceeding before him. Rule 3.6(a) provides that "During the time a proceeding is before a hearing examiner, all motions therein . . . shall be addressed to the hearing examiner, and if within his authority shall be ruled upon by him. Any motion upon which the hearing examiner has no authority to rule shall be certified by him to the Commission with his recommendation." Since respondent's motion was made during the pendency of the proceeding before the examiner, it was incumbent upon the latter either to rule upon it or certify it to the Commission with his recommendation. He did neither.

(2) Considering respondent's motion as properly before the Commission, as respondent asks us to consider it, we agree with the examiner that it should be denied. Nothing in the Administrative Procedure Act or in the basic principles of fair procedure precludes the Commission from creating and following a procedure for settling disputes without recourse to adjudication. Consent negotiations are not a stage in an adjudication but a means of establishing whether adjudication can be avoided altogether. Like investigations, consent negotiations are distinct from the adjudicative process and hence are not governed by the standards which control adjudicative procedure.

(3) Our conclusion that respondent's motion, which is the basis of its request for leave to file an interlocutory appeal, must be denied moots respondent's request. Accordingly,

It is ordered, (1) That respondent's motion to compel service of staff memorandum be, and it hereby is, denied; and (2) that respondent's request for leave to file interlocutory appeal be, and it hereby is, dismissed.

FRITO-LAY, INC.

Docket 8606. Order, Mar. 13, 1964

Order returning to hearing examiner his request to hold hearings in eight different cities.

Order Ruling Upon Certificate of Necessity

By certificate of necessity filed on February 27, 1964, the hearing examiner in the above-captioned proceeding requests the Commission to permit hearings in this matter to be held in eight cities with "reasonable intervals" between hearings in these locations and between complaint counsel's case and respondent's case.

Section 3.16(d) of the Commission's Procedures and Rules of Practice provides:

Hearings shall proceed with all reasonable expedition. Unless the Commission otherwise orders upon a certificate of necessity therefor by the hearing examiner, all hearings shall be held at one place and shall continue without suspension until concluded. (This does not bar overnight, week end, or holiday recesses, or other brief intervals of the sort normally involved in judicial proceedings.)

This Rule expresses the determination of the Commission that the public interest in having fair, orderly and expeditious adjudicative proceedings is normally best served by a requirement of continuous hearings to be held in one place. This is not an inflexible principle, and exceptions will be allowed upon a showing that the public interest would in a particular case be better served by deviating from the prescribed procedure. Such deviation will not be allowed by the Commission merely upon request therefor without supporting reasons, even if the parties to the proceeding are willing to conduct it without regard to the requirements of Section 3.16(d).

In the present case, the examiner makes his request to hold hearings in more than one city and non-continuously on the basis of complaint counsel's motion filed February 10, 1964, and respondent's reply thereto filed February 24. An examination of these motions, however, discloses that neither contains any supporting reasons, except in the most general and purely conclusory terms, for the requested departures from the Section 3.16(d) procedure. Nor does the examiner's certificate of necessity furnish any concrete reasons why the Commission should waive the requirements of the Rule. Moreover, the Commission is given no indication as to the length of the "reasonable intervals" requested in the certificate.

For the foregoing reasons, the Commission lacks any basis in the papers before it for making an informed determination as to whether the public interest justifies the requests made in the certificate of necessity. Accordingly,

It is ordered, That this matter be, and it hereby is, returned to the hearing examiner for reconsideration in light of this order.

Commissioner MacIntyre not concurring.

CHESEBROUGH-POND'S, INC.

Docket 8491. Order, Mar. 13, 1964

Order denying respondent's petition to rescind Commission's order permitting filing of consolidated briefs.

Order Denying Petition To Rescind Commission Order Permitting Filing of Consolidated Briefs