under a duty to conduct those proceedings in accordance with Section 7(c) of the Administrative Procedure Act which provides that "every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, and unduly repetitious evidence * * *." Without intruding upon the province of the examiner to determine the admissibility of specific evidence offered at the hearings, we can appropriately indicate the following: Nothing that respondent has revealed to date about the intended nature and scope of its defense provides any reason to suppose that respondent would find it necessary to offer, or that the examiner would find it necessary to admit, so vast a volume of testimony as respondent now suggests as the alternative to a Section 6(b) survey.

It is apparent from the proposed survey itself and from respondent's present arguments that respondent has misconceived the scope of the product-market issue in this case. The complaint alleges that the relevant product market is the production, distribution, and sale of friction materials in general and sintered metal friction materials in particular. If complaint counsel is able to establish that the line of commerce specified in the complaint is a valid one under the standards established by the Supreme Court, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356–57; and *United States* v. *Aluminum Co. of America*, 377 U.S. 271, it is entirely irrelevant that there might also be some broader market, encompassing additional products and additional sellers, which would also constitute a proper framework in which to consider the acquisition. See *United States* v. *Continental Can Co.*, 378 U.S. 441. In other words, it makes no difference whether the product market specified in the complaint constitutes a primary market or merely a well-defined submarket.[1] Section 7 prohibits any acquisition which may substantially lessen competition or tend to create a monopoly "in any line of Commerce."

Although the proposed survey (or the subpoenaed testimony of hundreds of sellers and purchasers, which respondent poses as the alternative) might incidentally yield a certain amount of information bearing on the only relevant-market issue in the case, this issue

---

[1] Complaint counsel during the prehearing conference acknowledged the limitations imposed by the complaint:

"Hearing Examiner SCHRUP. Do I understand you to say that if the proposed market or the line of commerce was expanded to the extent asked for by the respondent, that then the case in chief would fall on the basis of the material you have?

"Mr. GRUNDMAN. We have alleged a line of commerce which we must establish. Unless we establish this, the complaint must be dismissed, or in the unlikely event that evidence is adduced which might call for us to amend the complaint, it would have to be within the scope of the original complaint. I think that we must make our case on the basis that we have alleged in the complaint.

"Hearing Examiner SCHRUP. In other words, you have the burden of proof, of proving the product market.

"Mr. GRUNDMAN. Yes, sir."

is unspecified) that are engaged as resellers of friction materials (within the definition of the complaint) in the Boston, Chicago, and Los Angeles areas.

In this case, as distinguished from several others in which respondents have sought to have the Commission conduct surveys pursuant to Section 6(b), the Commission has not heretofore issued any Section 6(b) orders in connection with its investigation of the acquisition and thus none of the evidence that complaint counsel will offer in evidence has been obtained from special reports. Respondent thus makes no contention that the Commission should conduct the proposed survey in order to afford equal access to the Commission's discovery and investigational procedures.

Indeed, respondent does not assert that it has a legal right to have the Commission conduct a survey on its behalf pursuant to Section 6(b) (it states, however, that it does not waive such a contention). It contends only that such a survey would be a speedier and more efficient method of acquiring the information needed in its defense than would the issuance of subpoenas upon a responsible official of each of the several hundred companies from which it desires to obtain information. Moreover, respondent urges that the market-share information which it supplied to the Commission staff prior to issuance of the complaint, and which complaint counsel now intends to introduce in evidence, is inadequate and inaccurate and that without some further survey of companies within the relevant market as defined in the complaint, complaint counsel could not possibly establish a *prima facie* case.

As respondent recognizes, the Commission has on a number of recent occasions denied similar motions by respondents in merger cases on the ground that the discovery procedures and compulsory process provided by the Commission's Rules of Practice for Adjudicative Proceedings had not been shown to be inadequate or unavailable. *Union Bag-Camp Paper Corp.*, Docket No. 7940, orders issued July 30, 1962, and April 5, 1963; *Frito-Lay, Inc.*, Docket No. 8606, order issued July 30, 1964 [66 F.T.C. 1533]. See also *Union Bag-Camp Paper Corp.* v. *Federal Trade Commission*, 233 F. Supp. 660 (S.D.N.Y. 1964) [7 S.&D. 991].

Despite American Brake Shoe's vigorous efforts to distinguish these cases, we are unable to conclude that it has made a more convincing showing of the necessity for the Commission's undertaking a vast, expensive and time-consuming survey by means of Section 6(b) orders. We are not persuaded by respondent's argument that it will be more economical to have several hundred companies fill out a form than to have a representative of each appear at a hearing or deposition in response to subpoenas. Examiners in Commission proceedings are

tion or recurrence of the practices charged against Federated in the complaint.

SCHENLEY INDUSTRIES, INC., ET AL.

Docket 6048. Statement, June 11, 1965

Statement of Commissioner MacIntyre withdrawing from consideration of this case on the grounds that as a staff member in 1954 he had supervised its prosecution.

STATEMENT OF COMMISSIONER MACINTYRE RE RESPONDENTS' PETITION TO REOPEN PROCEEDINGS

On June 10, 1965, respondents in this matter filed a Petition to Reopen Proceedings for Purpose of Modifying Order to Cease and Desist. The order to cease and desist was issued on March 2, 1954 [50 F.T.C. 747], pursuant to a consent settlement.

Disposition of the pending Petition will call for the Commission to exercise its judgment on matters of public policy, fact, and law as provided for in 15 U.S.C. § 45(b). It appears that in doing this the Commission will be passing judgment on some of the public policy and other questions which were before the Commission when it decided to issue the complaint in Docket No. 6048 and again when it issued its order to cease and desist in this case on March 2, 1954. Under these circumstances, the task of the Commission here is to resolve issues under § 3.28(b)(2) of the Commission's "Rules of Practice for Adjudicative Proceedings."

When the Commission issued its complaint in Docket No. 6048 and subsequently until after the Commission had issued its order to cease and desist in this case on March 2, 1954, I served as Assistant Director of the Commission's Bureau of Antimonopoly and Chief of its Division of Investigation and Litigation. In that capacity I not only supervised the prosecuting staff which handled this matter, but also actively participated in the formulation of the order to cease and desist, the modification of which is sought by the pending petition.

In view of the foregoing, I have decided to refrain from participating in the Commission's consideration and action on respondents' Petition to Reopen Proceedings for the purpose of modifying the order to cease and desist.

plainly lends itself to more direct methods of proof, such as the expert-opinion testimony of persons familiar with the structure and functioning of the industry. While the parties to Commission proceedings have a considerable freedom to put on their cases in the manner they deem most effective, there is no absolute right to employ indirect, diffuse, repetitious, or protracted methods of proof when simpler and more expeditious ones are readily available. See *Great Lakes Airlines, Inc.* v. *Civil Aeronautics Board*, 291 F. 2d. 354, 362–63 (9th Cir.), *certiorari denied*, 368 U.S. 890.

We conclude that the regular processes of the Commission's Rules of Practice will be adequate to permit effective and expeditious litigation of all the relevant issues of this case and that it would not be in the public interest for the Commission to conduct a survey such as that proposed by respondent. Accordingly,

It is ordered, That respondent's motion for orders requiring the filing of special reports pursuant to Section 6(b) of the Federal Trade Commission Act be, and it hereby is, denied.