a document certified herein by the hearing examiner be, and it hereby is, denied.

Commissioner Elman dissenting.

MERCURY LIFE AND HEALTH COMPANY ET AL.

Docket 8704. Order, Dec. 9, 1966

Order denying respondents' motions to extend time for filing consent order and for the postponement of the hearings, and returning the motion to dismiss to the hearing examiner.

ORDER RULING ON MOTIONS CERTIFIED BY THE HEARING EXAMINER

This matter is before the Commission upon the certification by the hearing examiner of respondents' "Motion to Dismiss," "Motion to Extend Time for Filing Consent Order," and "Motion to Postpone Hearing," which motions were filed November 10, 1966. These will be treated *seriatum* below.

In their motion to dismiss, respondents assert that respondent Mercury Life and Health Company is a nonprofit corporation and that it is thus not within the ambit of the Federal Trade Commission Act. Complaint counsel, in his answer to such motion, requests that the motion be denied for the reasons (a) that Mercury Life and Health Company is a "corporation" under the definition in Section 4 of the Federal Trade Commission Act because it is organized to carry on business for the profit of its members and (b) that it is not a genuine nonprofit corporation because its operations return revenues to Leonard Hyatt, president and chairman of the board, under the terms of a management contract between Mr. Hyatt and Mercury Life and Health Company. The hearing examiner, as to this motion, recommends that in the event the motion to extend time for filing consent order is denied, the ruling be held in abeyance until all the evidence is received.

An issue raised in an adjudicative matter as to whether or not a company is a corporation within the meaning of Section 4 of the Federal Trade Commission Act is one which can only be resolved upon the basis of the facts of record. Moreover, since this is here a highly contested issue, it appears to us that a determination probably should not be made except on the basis of the whole record after it has been closed for the reception of evidence. The examiner has discretion to so defer

the decision.[1] While we concur in the examiner's recommendation in the matter, we do not believe it is necessary for the Commission to rule directly on respondents' motion. Therefore, as to the motion to dismiss, the matter is returned to the examiner for his determination.

Respondents' next motion certified by the examiner is a motion to extend time for filing a consent order. In this motion, respondents assert that because of alleged illness of individual respondent Leonard Hyatt, it was impossible for any of the respondents or their attorneys to avail themselves of the consent order procedure set forth in Part 2 of the Commission's Rules. Complaint counsel, in his answer to this motion, while pointing out that respondents did not give notice of Mr. Hyatt's illness until October 13, 1966, and did not indicate a desire to enter a consent negotiation until October 19, 1966, states that it appears the public interest would be best served by granting the motion. The hearing examiner recommends that the motion to extend time for filing a consent order be granted.

This matter is now before the hearing examiner for adjudication in accordance with the Commission's Rules of Practice for Adjudicative Proceedings. It would be inappropriate for the Commission, at this time, to extend the time for the filing of a consent order and so in effect to return the matter to its pre-complaint posture. The Commission may consider whether or not it will waive § 2.4(d) of its Rules if and when faced with that proposition. Thus, the motion, so far as it is merely a request to extend time for the filing of a consent order, will be denied.

In the third and final motion certified by the examiner, the respondents move to postpone the hearing on the basis that Leonard Hyatt, the individual respondent, is recovering from a severe and disabling heart condition; that it is medically impossible for him to appear and participate in any type of legal proceeding at this time without endangering his health and life; and that respondents assertedly find it impossible to take part in the proceeding until Mr. Hyatt has sufficiently recovered from his illness to advise and assist the attorneys representing the respondents and to testify at the hearings. Complaint counsel opposes such motion and the hearing examiner recommends that it be denied.

[1] Relevant to this is a provision in § 3.6(e) of the Commission's Rules of Practice, which states that when a motion to dismiss is made at the close of the evidence offered in support of a complaint based upon an alleged failure to establish a *prima facie* case, the examiner may, if he so elects, defer ruling thereon until the close of the case for the reception of the evidence.

The same motion was made to the hearing examiner in the course of the hearings held on October 19, 1966. At that time the examiner carefully considered this issue and expressed his concern, among other things, that there is no indication at what time Mr. Hyatt will be available to participate in the case. He denied the motion but stated that it was with the understanding that he would subsequently entertain a motion to strike any and all of the evidence if it appears to be prejudicing or endangering any of respondents' rights. We believe he has made a sound determination in the matter, making adequate provision for the protection of the rights of respondents. Thus, we will accept his recommendation thereon and deny the request for postponement. Accordingly,

It is ordered, That respondents' motion to extend time for filing a consent order be, and it hereby is, denied.

It is further ordered, That respondents' motion for postponement of hearings be, and it hereby is, denied.

It is further ordered, That as to the motion to dismiss this matter be returned to the hearing examiner for his appropriate determination thereon.

DEVCON CORPORATION ET AL.

Docket C–607. Order and Opinion, Dec. 16, 1966

Order denying respondents' request to file an interlocutory appeal and