It is further ordered, That the hearing examiner, upon completion of the said hearings, shall certify the record with his findings to the Commission for final disposition of the proceeding.

Commissioner MacIntyre dissented and has filed a dissenting opinion. Commissioner Elman also dissents.

MONTGOMERY WARD & CO., INCORPORATED

Docket 8617. Order, Sept. 30, 1966

Order denying respondent's petition for reconsideration of the Commission's decision and order dated July 26, 1966, page 52 herein, on the ground that the Commission failed to consider respondent's argument that the proceeding was not in the public interest.

ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION

Respondent Montgomery Ward & Co., Incorporated, has filed a petition pursuant to Sections 3.25 and 3.27 of the Commission's Rules of Practice for reconsideration of the Commission's decision and order herein dated July 26, 1966, page 52. In support of this petition respondent contends that the Commission in its opinion failed to consider respondent's argument that the proceeding was not in the "public interest" or to take into account certain admissions of fact allegedly made by complaint counsel.

Rule 3.25 requires that any petition filed thereunder "must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." Both issues which respondent now urges were not considered by the Commission were in fact raised by respondent during the hearing and argued at length by respondent in its brief on this appeal (pp. 1–2; 24–31) and in oral argument (Tr. 10–11, 21–22, 26).

Respondent's first argument that the proceeding is not in the public interest is based on its claim that respondent's alleged voluntary compliance with the Commission's Guarantee Guides makes the issuance of an order unnecessary. The authorities are legion that the Commission may in its discretion, as it has in this case, determine that the public interest requires that a cease and desist order must issue to ensure that a practice illegally engaged in in the past will not be resumed in the future by respondent once it has shaken the Commission's "hand from its shoulder." *Sears, Roebuck & Co.* v. *F.T.C.,* 258 F. 307, 312

(7th Cir. 1919); *Spencer Gifts, Inc.* v. *F.T.C.*, 302 F. 2d 267 (3d Cir. 1962); *Clinton Watch Co.* v. *F.T.C.*, 291 F. 2d 838 (7th Cir. 1961); *cert. denied*, 368 U.S. 912 (1962).

Respondent's second contention is that the Commission failed to consider complaint counsel's alleged admission that respondent had a policy that it would honor guarantees as advertised regardless of the terms of the actual guarantees themselves. The Commission's opinion made it clear, however, that the crucial question in the case was not whether such a policy existed but whether the existence of such a policy dissipated the deception inherent in respondent's practices. As we stated:

> Thus, irrespective of what Wards' policy may in fact be in honoring guarantees, Wards' practice here of having advertised a broad guarantee and furnishing the customer with a limited guarantee is deceptive and has the capacity to deceive regardless of whether or not respondent stands ready to perform as advertised (Op., p. 72).

Both of these issues were raised by respondent and considered by the Commission. There is, therefore, no basis for respondent's petition, and it is hereby

Ordered, That respondent's petition be, and it hereby is, denied Commissioner Elman dissenting.

ASSOCIATED MERCHANDISING CORPORATION ET AL

Docket 8651. Order and Opinion, Oct. 13, 1966

Order denying oral argument of complaint counsel and directing the respondents to commence their pretrial submissions as ordered in Prehearing Order No. 1.

OPINION OF THE COMMISSION

The Commission, on March 23, 1966, granted permission to complaint counsel to file an interlocutory appeal from the hearing examiner's order of March 7, 1966, denying their motion to implement Prehearing Order No. 1 by requiring respondents to commence their part of the pretrial to expedite proceedings. Complaint counsel and respondents have filed their respective briefs in support of, and in opposition to, the appeal. Respondents, on April 11, 1966, requested that the Commission hear oral argument in the matter.

Prehearing Order No. 1, issued January 25, 1965, requires complaint counsel, within 45 days of the date of that order, to file with the examiner and to serve on the other parties various disclosures and requests covering their case, including a list

setting forth each illegal price discrimination, allowance, discount, etc., intended to be established at the hearings and the names and addresses of the resources, a list of the documents and exhibits to be introduced, a list of witnesses to be called, requests for admissions, proposed stipulations, requests for production of documents and other items. The prehearing order requires respondents, within 30 days after the completion by complaint counsel of their part of the order, to file with the examiner and serve on complaint counsel their pretrial submission, which is to include, among other things, a list of documents and exhibits they intend to introduce, a list of witnesses, and requests for admissions and for the production of documents. The prehearing order further provides for additional procedures upon the completion of the respective disclosures.

Complaint counsel have completed their portion of the pretrial as required under the examiner's Prehearing Order No. 1, with the exception of their failure to obtain—and to make further submissions, if any, based thereon—certain documents in the respondents' possession, which the hearing examiner, on August 12, 1965, ordered respondents to produce.[1]

Complaint counsel's argument in support of their motion to the examiner, and to the Commissioner on this appeal, is that they have completed their portion of the pretrial to the extent that they are able, excepting only that area covering documents which respondents have in their possession and have not produced, and that therefore there is no reason why respondents should not be directed to commence their pretrial submissions at this time. Respondents' answer to the motion and the substance of their brief on this appeal is that complaint counsel must bear the responsibility for the delay because they assertedly are seeking to continue the investigation. Respondents make other arguments such as that requiring respondents to commence their pretrial submissions would result in a disorganized and ineffective discovery procedure and would deny them a fair hearing and due process.

The hearing examiner, on March 7, 1966, denied complaint counsel's motion to implement Prehearing Order No. 1, giving his reasons in a six-page order and opinion. In the examiner's

[1] The respondents' failure to comply with the hearing examiner's order of August 12, 1965 ordering the production of certain documents, was certified by the examiner to the Commission December 10, 1965. Thereafter, the United States Attorney, pursuant to the Commission's request, moved the United States District Court for the Southern District of New York for a court order directing respondents to comply with the examiner's order. Such motion is now pending in that court for decision [256 F. Supp. 318 (1966), 261 F. Supp. 553 (1966) (8 S. & D. 338, 382)].

view, the scheduling of the pretrial submissions is tied in with his ruling on respondents' earlier motion for a more definite statement. He denied that motion but in so doing stated that he would order complete disclosures by complaint counsel of all of the specific acts and practices relied upon prior to the commencement of the hearings in the matter, with sufficient time granted respondents to prepare their defense. He now feels that to require respondents to make their submissions while complaint counsel have not completed their discovery would result in piecemeal and endless submission and counter-submission. The examiner further states that he has "serious doubts" about whether the action requested would provide respondents with a fair hearing and due process.

So far as pretrial submissions made to date are concerned, complaint counsel state they have furnished respondents with detailed tabulations setting forth all purchases from ten suppliers and showing the names of the unfavored customers, the precise items purchased, the date, the price and the amount of discrimination involved. In addition, they state that respondents have been given descriptions of all documents and exhibits that complaint counsel will rely upon and the opportunity to examine the same and that they have been supplied with a schedule showing the names and addresses of all Government witnesses, with a description as to the transactions about which they will testify. Accordingly, it appears that respondents have been provided with complete discovery, with the exception of whatever further discovery may be involved in connection with the documents not yet produced by them.

There is no reason that we can see why the examiner's objective (expressed in his order of March 7, 1966) of assuring that respondents obtain complete disclosures by complaint counsel of all specific acts and practices relied upon prior to the commencement of the hearings in this matter, with sufficient time granted respondents to prepare their defense thereto, cannot be achieved in this proceeding even though respondents are now required to go ahead with their pretrial procedures. There has never been any question that discovery proceedings can be engaged in at intervals if the circumstances so demand. Prehearing procedures, if they are ever to serve their purpose fully and effectively, must be flexible.[2]

[2] The courts have not adopted a hard and fast rule on the priority of discovery submittals. In *Sturdevant* v. *Sears, Roebuck & Company*, 32 F.R.D. 426, 427 (W.D. Mo. 1963), the court ruled: "Only in unusual cases should the priority rule be enforced to permit one party to complete all discovery before the other party may commence discovery proceedings." See also *Caldwell-Clements, Inc.* v. *McGraw Hill Pub. Co.*, 11 F.R.D. 156 (S.D.N.Y. 1951).

One of respondents' arguments, as indicated, is that to require them to start their pretrial submissions prior to the completion of complaint counsel's pretrial procedures would result in a piecemeal approach and would not expedite the ultimate progress of the proceeding. We do not agree that this would be so. It is quite possible that in the interim period a great deal of respondents' pretrial discovery and submissions can be disposed of. Among the items respondents have indicated they will, or might, ask for on discovery will be the depositions of the ten resources on which complaint counsel has made submittals, depositions of the alleged unfavored customers, and depositions on the 200 resources listed in Appendix A of complaint counsel's submission. Thus, respondents' discovery needs are sufficiently broad so that duplication of effort, if any, will no doubt be relatively small. A great deal can probably be accomplished without necessarily covering areas which will be affected by later possible submissions. We are convinced, moreover, that such duplication as might occur will be a minor matter compared to the delay involved in an indefinite stay of proceedings.

Respondents further insist that to grant the request of complaint counsel would be to deviate from the requirements of the Commission's Rules of Practice and constitute a violation of respondents' due process rights. However, nothing in the Commission's Rules requires a staggered discovery, and it appears that in some instances it would be entirely appropriate to have discovery on a concurrent basis. Respondents cannot be disadvantaged, surprised or hurt in any way by information or data which complaint counsel does not have and at this time cannot show. At such time as this material will be available to complaint counsel, if it does become available, appropriate provision can be made for notice to respondents and for counter-discovery. *Cf. Texas Industries, Inc.*, Docket No. 8656 (order issued October 8, 1965) [68 F.T.C. 1195], where the Commission indicated that, if necessary, additional discovery could be made by respondent therein even after complaint counsel's case had been put in. In the circumstances, respondents' claim that they would be denied due process is unjustified.

There is great public interest in bringing administrative proceedings to an early conclusion on the merits. We believe that the examiner has exceeded his discretion in the circumstances here shown where the effect of his ruling is to indefinitely stay proceedings. This case, while still in its pretrial stages, is stalled on dead center and it is possible that it will be suspended for a lengthy period unless respondents proceed at this time with

their pretrial discovery procedures. If they do so proceed, we do not see, nor has it been shown, that respondents will be harmed in their defense to this proceeding or that their rights under the Commission's Rules or under the law will be in any way abridged. Moreover, we believe that to begin now on respondents' pretrial submissions will materially expedite the disposition of this proceeding. Accordingly, complaint counsel's appeal is granted. We will issue an order herewith, directing the examiner to issue an appropriate direction to the respondents to begin their pretrial discovery.

ORDER DENYING ORAL ARGUMENT AND DIRECTING COMMENCEMENT OF PRETRIAL PROCEDURE

This matter having come on to be heard upon the interlocutory appeal of complaint counsel from the hearing examiner's order of March 7, 1966, denying their motion to implement Prehearing Order No. 1 by requiring respondents to commence their part of the pretrial procedure to expedite proceedings, the respondents' answer in opposition thereto, and upon respondents' request of April 11, 1966, for oral argument on such appeal; and

The Commission, for the reasons stated in the accompanying opinion, having granted complaint counsel's appeal and having further determined that the request for oral argument should be denied:

It is ordered, That the examiner, making such provisions as he deems necessary to assure respondents the opportunity for discovery on subsequent submittals by complaint counsel, if any, resulting from delayed discovery, direct the respondents to commence, as soon as possible, their pretrial submissions and procedures as ordered in Prehearing Order No. 1.

It is further ordered, That respondents' request for oral argument on the interlocutory appeal of complaint counsel be, and it hereby is, denied.

Commissioner Elman, seeing no reason for the Commission to interfere with the hearing examiner's intelligent and responsible handling of prehearing discovery procedures, dissents.

ROYAL CONSTRUCTION COMPANY ET AL.

Docket 8690. Order, Oct. 17, 1966

Order granting respondents' request to hold hearings in Washington, D.C., and Roanoke, Va., but denying its request for access to certain documents.