

IN THE MATTER OF
GENERAL ELECTRIC COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-1251. Complaint, June 30, 1967—Decision, June 30, 1967

Consent order requiring a major manufacturer of electrical equipment with headquarters in Schenectady, N.Y., to cease conditioning its promotional payments to builders and contractors upon restrictive purchase agreements.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporation listed above in the caption hereof and more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of the said Act (U.S.C., Title 15, Section 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent General Electric Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1 River Road, Schenectady, New York.

PAR. 2. Respondent is now and for a number of years has been engaged in the manufacture, distribution and sale of numerous household or consumer products and appliances, such as, but not limited to, ranges, refrigerators, freezers, dishwashers, disposals, washers, dryers, water heaters, air conditioners and other equipment of various description.

Respondent is also presently engaged in the manufacture, distribution and sale of electric furnaces and resistance heating cables for homes heated by electricity.

Respondent's consumer goods and products are generally sold through its General Electric Supply Company Division, with offices and branches nationwide, and through independent distributors.

Respondent is the largest producer of such household or con-

sumer products and appliances in the United States and its volume of business in the sale and distribution of such products and appliances is substantial.

PAR. 3. In the course and conduct of its business, respondent General Electric Company has been for some time past, and is now, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that it has shipped and sold its products, or caused them to be transported from its place of manufacture and business for sale to customers with places of business located in the several States of the United States.

PAR. 4. Except to the extent that competition has been frustrated, hindered, lessened and eliminated as hereinafter set forth, respondent is, and has been for a substantial time in the past in competition with firms, partnerships and corporations engaged in the aforesaid business of manufacturing, distributing and selling residential electric heating equipment and major household appliances to residential accounts in commerce between and among various of the States of the United States.

PAR. 5. Respondent initiated a program in 1956 known as the Live Better Electrically program. Said program consisted of an advertising campaign aimed at the promotion and sale of electric home heating, lighting and appliances. In connection therewith respondent applied to the United States Patent Office for registration of certification marks, obtaining Mark Number 674342 on February 17, 1959, and Mark Number 692579 on February 2, 1960. Each of said Marks was used to certify that the home to which the Mark was applied, or the plans and specifications therefor, conformed to minimum standards set by the respondent as to home electrification; that is, lighting, wiring, and number of major electrical appliances. Respondent thereafter used said Marks as an incident to its Medallion Home Program, under which many of the leading electric utilities in the United States were appointed as agents of respondent to administer its said program and to grant the right to affix said Mark to homes which qualified by meeting said minimum standards.

On April 29, 1960 respondent made an assignment of all rights, title and interest in said Marks to the National Electrical Manufacturer's Association, hereinafter sometimes referred to as NEMA, under which it was agreed that respondent has the right to demand, and NEMA agreed to reassign to respondent all property rights herein conveyed, should NEMA thereafter cease to administer said program in the manner as outlined in a "Manual

for Utilities" prepared by respondent, and made a part of said assignment.

PAR. 6. In conjunction with this industry program, respondent initiated in 1960 its own medallion programs, administered by both its Major Appliance and Hot Point Divisions. The purpose of respondent's medallion programs has been and is to promote the offering for sale and sale of General Electric products for use and installation in medallion homes.

The program administered by respondent's Major Appliance Division is presently known as the "Construction Market Development Operation," hereinafter sometimes referred to as CMDO. The program administered by respondent's Hot Point Division is known as the "Local Medallion Allowance Plan," and it is substantially identical to the CMDO program.

PAR. 7. In the course and conduct of its business, respondent, through its aforesaid medallion homes programs, has been and is now engaged in unfair methods of competition and unfair acts and practices in that it has adopted, placed into effect and has been and is carrying out a policy, plan or scheme under which it has entered into restrictive arrangements, agreements or understandings with home and apartment builders or contractors whereby such builders or contractors are, expressly or impliedly, required to restrict their purchases of major household appliances, radiant heating equipment and wiring devices for use and installation in homes and apartments constructed for speculation to respondent's products, and prohibited from purchasing such products from competitors.

Such restrictive arrangements, agreements or understandings have been and are, expressly or impliedly, contained in the terms and conditions of respondent's medallion homes programs. For example, in promoting the offering for sale and sale of its major household appliances, radiant heating equipment and wiring devices to a substantial number of home and apartment builders or contractors, respondent's CMDO program contains and imposes requirements which are as follows:

1. A Bronze Medallion home—any home which includes a minimum of four major General Electric Appliances, one of which must be a range; Textolite (where applicable); and meets the local electric utility's lighting and "Full House Power" requirements.

2. A Bronze Medallion home (special)—any home which includes a minimum of four major General Electric appliances, one

of which must be a range; a General Electric gas or oil furnace; Textolite (where applicable); and meets the local electric utility's lighting and "Full House Power" requirements.

3. A Bronze Medallion home (plus)—any home which includes a minimum of four major General Electric appliances, one of which must be a range; a General Electric gas or oil warm air furnace plus central air conditioning; Textolite (where applicable); and meets the local electric utility's lighting and "Full House Power" requirements.

4. A Gold Medallion Home—any total electric home which includes all the maximum requirements in the Bronze Medallion category plus a service entrance panel of 150 or 200 amp. capacity as required, and a General Electric electrical heating and air conditioning system.

Under the express or implied terms and conditions of the aforesaid CMDO program, a home and apartment builder or contractor is required to purchase packages of four or more products sold by respondent including as a part thereof certain specifically designated appliances, equipment and devices, and to refrain from purchasing the designated appliances, among other products, from competitors of respondent.

Thus, respondent's competitors and others have been, and are now, unable to make sales to home and apartment builders or contractors which they could have made but for the restrictive arrangements, agreements or understandings described herein.

PAR. 8. As part and in furtherance of the aforesaid policy, plan or scheme, respondent has afforded and given to home and apartment builders or contractors who have entered into the restrictive arrangements, agreements or understandings, heretofore described, special treatment and valuable benefits which are not granted or afforded to other builders or contractors. The valuable benefits furnished by respondent include, among other things, contributions to the builder or contractor of substantial amounts of money for advertising. For example, in one instance alone, a builder who entered into the restrictive arrangements, agreements or understandings, heretofore described, received from respondent a contribution in excess of \$900,000 for advertising as consideration for purchasing over \$8,000,000 worth of respondent's electrical equipment and products for installation in a single housing development.

PAR. 9. The purpose, intent or effect of the aforesaid methods, acts and practices of the respondent has been, is, or may be,

substantially to lessen, hinder, restrain and suppress competition in the manufacture, distribution and sale of major household appliances, radiant heating equipment and wiring devices in interstate commerce, to cause a substantial number of builders or contractors to refrain from buying major household appliances, radiant heating equipment and wiring devices for use and installation in homes and apartments from competitors; to exclude, or tend to exclude competitors or potential competitors of respondent from selling major household appliances, radiant heating equipment and wiring devices to a substantial number of home and apartment builders or contractors; to foreclose competitors or potential competitors of respondent from a substantial share of the home and apartment construction market in various trade areas; to appropriate to respondent the exclusive right to supply and sell substantially the entire major household appliance, radiant heating equipment and wiring devices requirements of a substantial number of home and apartment builders or contractors; and to enhance further the dominant position of respondent in the electrical products industry and thereby to tend to create a monopoly in respondent in the sale of major household appliances, radiant heating equipment and wiring devices for use and installation in newly constructed homes and apartments in interstate commerce.

PAR. 10. The acts and practices of respondent, as alleged in this complaint, are to the prejudice of competitors of respondent and of the public; have a tendency to hinder and prevent, and have actually hindered and prevented, competition in the purchase and sale of major household appliances, radiant heating equipment and wiring devices; have a tendency to obstruct and restrain, and have actually obstructed and restrained such commerce in major household appliances, radiant heating equipment and wiring devices; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of

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Order

Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing, *inter alia*, a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondent has violated the Federal Trade Commission Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, accepts said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent General Electric Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1 River Road, in the city of Schenectady, State of New York.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent, General Electric Company, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of radiant electric heating equipment and major household appliances, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from conditioning the granting of any promotional allowance or discount in lieu thereof to any home or apartment builder or contractor purchasing any such product from respondent by requiring that said home or apartment builder or contractor, in order to qualify for and/or receive such promotional allowance or discount in lieu thereof, must purchase at the same time two or more separate and dissimilar General Electric products.

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Provided, however, That the above "*It is ordered*" paragraph shall not apply to any such allowance or discount in lieu thereof made by General Electric Company, its officers, representatives, agents and employees within the period terminating two years from the effective date of this order, if, and only if, such allowance or discount in lieu thereof is pursuant to the provisions of an agreement, arrangement or understanding which was entered into prior to the entry of this order.

It is further ordered, That the respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

Commissioners Elman and Reilly did not concur in the issuance of the complaint.

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

AMERICAN CYANAMID COMPANY ET AL.

Docket 7211. Order, Jan. 3, 1967

Order denying motion by Olin Mathieson Chemical Corporation that proceedings against it in connection with the price aspects of this case be dismissed.

ORDER DENYING MOTION TO DISMISS

Respondent Olin Mathieson Chemical Corporation, by motion filed December 27, 1966, having requested that further proceedings against it in connection with the price aspects of this matter be dismissed without prejudice and, in the alternative, having suggested that this part of the case be considered separately from the patent aspects, with separate briefing schedule and oral argument; and

The Commission having already determined that all contested issues of fact and law presented by the entire record will be considered and having set the time for the filing of briefs on such issues:

It is ordered, That the motion filed by respondent Olin Mathieson Chemical Corporation be, and it hereby is, denied.

Commissioner Dixon not participating.

ALLEGHANY PHARMACAL CORP. ET AL.

Docket 7176. Order, Jan. 6, 1967

Order denying complaint counsel's request for permission to file interlocutory appeal from rulings complained of.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission upon complaint counsel's request for permission to file an interlocutory appeal from the

ruling of the hearing examiner requiring complaint counsel to put on rebuttal witnesses on December 9, 1966, rather than January 24, 1967, and refusing to receive the offer of testimony of two additional witnesses whom complaint counsel wished to put on the stand. Respondents filed their answer and supplementary answer in opposition on December 22 and December 27, 1966, respectively. The Commission has reviewed the order of the examiner and has determined that the request for permission to file an interlocutory appeal should be denied. The hearing examiner's rulings on the scope of rebuttal testimony should not be unduly restrictive.¹ Nevertheless, upon a review of his ruling, the Commission cannot say at this time that the hearing examiner has abused his discretion in this regard. Accordingly, the Commission is unable to find that there are here extraordinary circumstances requiring it to consider at this time the objections raised to the examiner's order in complaint counsel's request for permission to file an interlocutory appeal. Accordingly:

It is ordered, That complaint counsel's request for permission to file an interlocutory appeal from the rulings complained of, be, and it hereby is, denied.

INTER-STATE BUILDERS, INC., ET AL.

Docket 8624. Order, Jan. 13, 1967

Order granting respondents' motion to file brief with respect to procedural issues of the case.

ORDER ON RESPONDENTS' MOTION

This matter is before the Commission on a motion by respondents to file a brief in the appeal herein limited to the procedural issues involved in the Commission's Order Directing Remand dated April 22, 1966 [69 F.T.C. 1152]. Complaint counsel submits that the motion should be denied, although contending that the Commission is now in a position to dispose of the matter on its merits.

Respondents in this matter were charged with making false and deceptive statements in advertising in connection with the sale of home improvement materials to the public. After full evidentiary hearings the examiner issued an initial decision on January 21, 1965, sustaining the allegations of the complaint and

¹ See *Modern Methods, Inc., et al.*, 60 F.T.C. 309, 339 (1962); *Foster-Milburn Co., et al.*, 51 F.T.C. 369, 371 (1954).

ordering respondents to discontinue the practices with which they had been charged.

Respondents appealed from this decision both on the substantive issues in dispute relating to the allegedly deceptive practices and on the ground that the examiner had erred in refusing to inspect certain interview reports to determine whether they were required to be provided for purposes of impeaching complaint counsel's consumer witnesses.

The Commission, not reaching the merits of the case, sustained respondents' claim with respect to the examiner's failure to make the requested inspection of interview reports and remanded the matter to the examiner with directions to:

- (1) examine the interview reports made with respect to each of the witnesses (other than Milton S. Gottesman) called by counsel supporting the complaint to determine by appropriate procedures, including a hearing if necessary, whether or not such reports contain pre-hearing statements which should be made available to respondents' counsel under the "Jencks rule" as described in the Commission's opinion of this date;

- (2) deliver to respondents' counsel any of such reports or portions thereof found by him to be statements within the meaning of the "Jencks rule" and to be relevant for the purposes of cross-examination;

- (3) if requested by respondents' counsel reconvene the hearing-in-chief to permit respondents' counsel to utilize such reports or portions thereof for the purpose of cross-examining any of such witnesses whom respondents' counsel requests be recalled for such purpose; and

- (4) issue a new initial decision which should include specific findings with respect to the issues presented on this remand.

Pursuant to this order a hearing was held on August 15, 1966, at which complaint counsel produced copies of field reports with respect to each of the eighteen consumer witnesses who had testified in support of the complaint. The examiner inspected each of these reports "in camera" to determine whether any or all of said reports contained "Jencks statements." Complaint counsel and counsel for respondents each advised the examiner that they would waive the refiling of proposed findings of fact, conclusions of law and order, which had originally been submitted prior to the original decision of January 21, 1965.

The examiner thereupon issued an initial decision filed on September 9, 1966 [72 F.T.C. 370, 373], which was identical to his previous decision except that he inserted a brief additional conclusion that the investigator's reports of interviews with the eighteen consumer witnesses were mere summaries and none contained a "Jencks statement." Respondents have appealed.¹

¹ On October 15, 1966, respondents were granted an extension of time to file their appeal brief until December 22, 1966, the date on which the present motion papers were filed.

In the motion considered herein respondents contend that the examiner "failed to follow the Commission's directions on remand and that this threshold procedural matter should be resolved initially, prior to briefing and arguing the appeal on the additional substantive issues raised in the record in its present state." Respondents have also submitted a brief limited to the simple issue of the propriety of the procedure followed by the examiner in conducting the hearing on remand.

Complaint counsel disputes respondents' contention that the examiner failed to follow the Commission's directions on remand but takes the position that since no new facts have been introduced, no new conclusions have been reached and the order is identical to that originally proposed by the examiner, the Commission should now dispose of the matter on its merits.

In our opinion it would be improper to hear and decide the issues in the case on a piecemeal basis, since such a procedure would serve only to prolong the final determination of the matter and to cause unnecessary duplication of effort in the consideration of the cause. However, since the parties have filed briefs with respect both to the substantive and to the procedural issues in dispute, there would appear to be no valid reason why the case could not be presented to the Commission on the basis of the briefs submitted in connection with this motion as well as the briefs filed on the original appeal herein.

Accordingly, respondents will be permitted to file their brief limited to the procedural issues in the case, but the request that the Commission confine its consideration of the case to this single issue will be denied. With respect to the substantive issues the parties may rely on their briefs previously filed or file supplementary briefs incorporating any additional arguments on the merits which they may wish to make. Although respondents' time for filing their appeal brief has expired, they will be granted an additional period of time to file such supplementary brief. It is therefore

Ordered, That

1. Respondents' motion to file a brief with respect to the procedural issues it has raised be and it hereby is granted.
2. Respondents' request that the Commission dispose of these procedural issues prior to consideration of the substantive issues in the case be and it hereby is denied.
3. In presenting the case to the Commission on the appeal herein the parties may rely in whole or in part on the briefs submitted herein as well as the briefs filed in connection with respondents' appeal from the hearing examiner's initial de-

cision dated January 21, 1965. Any additional brief filed by respondents shall be filed within twenty days after service of this decision upon them and any answering brief by complaint counsel shall be filed within ten days after service upon him of respondents' brief. Respondents shall advise the Secretary within seven days after service of this order upon them whether or not they intend to file such supplementary brief. Commissioner Elman not concurring.

BEST & CO., INC.

Docket 8669. Order, Jan. 13, 1967

Order adopting the findings of the hearing examiner that complaint counsel not be barred from further participation in this proceeding.

ORDER RULING ON CERTIFICATION OF EXAMINER'S FINDINGS AND
RECOMMENDATIONS ON INTERLOCUTORY MATTER

This matter was remanded to the examiner by the Commission's order of June 23, 1966 [69 F.T.C. 1193], directing him to make findings on respondent's charges against complaint counsel raised by respondent's motion to suspend and bar complaint counsel from further participation in this proceeding.

The examiner held a hearing to resolve the issues raised by respondent's motion. On the basis of the testimony adduced in the course of that hearing, he concluded:

It is the conclusion and finding of the examiner that the record fails to establish that Ronald D. Schwartz, or any other member of complaint counsel's staff, made any misstatements or concealed any facts of the nature set forth in respondent's motion, or any similar statements or material facts, with the intent of preventing respondent from gaining access to information to which it was entitled in the files of Majestic Specialties, Inc.; and further, that the record fails to establish that the communication by complaint counsel with counsel for Majestic prevented respondent from obtaining information which it sought and to which it was entitled.

The Commission has decided to adopt the findings contained in the examiner's certification of October 24, 1966 [70 F.T.C. 1793], to which respondent's counsel has not taken exception, and concludes that the charges against Commission counsel are groundless. Accordingly,

It is ordered, That the findings in the hearing examiner's certification filed October 24, 1966, be, and they hereby are, adopted by the Commission.

It is further ordered, That the request to file an interlocutory appeal from the hearing examiner's order of May 10, 1966, refusing to bar and suspend complaint counsel from further participation in this proceeding, be, and it hereby is, denied.

THE CROWN CORK & SEAL COMPANY, INC.

Docket 8687. Order and Opinion, Jan. 13, 1967

Order denying Continental Can's appeal from hearing examiner's quashing of its subpoena requiring production of certain documents.

OPINION OF THE COMMISSION

BY REILLY, *Commissioner*:

This matter is before the Commission on the appeal of Continental Can Company pursuant to Section 3.17(f) of the Commission's Rules from denial by the hearing examiner on November 30, 1966, of Continental's motion to limit or quash subpoena duces tecum issued October 11, 1966, directed to Continental at the instance of respondent Crown Cork & Seal Company, Inc.

The Commission's complaint in this matter, issued May 31, 1966, alleges violation by Crown of Section 7 of the amended Clayton Act in the acquisition on November 13, 1963, of Mundet Cork Corporation. Both Crown and Mundet at the time of the acquisition were manufacturers of metal crowns commonly used as closures on beer and soft drink bottles and cans.

The adverse competitive effect alleged in the complaint is a lessening of competition in the manufacture and sale of metal crowns.

Respondent Crown contends that metal crowns do not comprise an appropriate line of commerce within which to test the competitive effect of the merger. It contends that other types of closures and containers for beer and soft drink bottles and cans are functionally interchangeable with metal crowns and thus sales of these products should figure in any delimitation of the relevant line of commerce.

Accordingly, at respondent's request, subpoenas duces tecum were directed by the hearing examiner to 33 manufacturers of cans, bottles and closures requiring sales data of specified products for years before and after the acquisition of Mundet by Crown. Thirty producers have complied. Three of the largest, Continental, American Can Company, and National Can Company, have not

complied pending the outcome of this appeal. American and National have stipulated with respondent that they will submit data to the same extent Continental is required to submit it.

Continental appeals from the adverse ruling of the examiner urging that a ruling on the question should be made by the Commission before the conclusion of the hearings because substantial rights of Continental are involved and justice requires that a determination of the correctness of the examiner's ruling be made now because a later determination of error cannot retrieve secrecy lost by virtue of the examiner's denial of Continental's motion to quash or limit.

We can rule at the outset that Continental has made sufficient showing under Section 3.17(f) of the Commission's Rules, and accordingly we entertain its appeal.

The subpoena in pertinent part calls for:

A. Such records as will disclose for each of the calendar years 1960, 1961, 1962, 1963, 1964, 1965, and the first six months of the calendar year 1966 for (a) beer and (b) soft drinks in (i) dollars and (ii) units,

- 1) cans sold by your company;
- 2) * * *
- 3) * * *
- 4) * * *
- 5) tear-type cans sold by your company;
- 6) crown-type bottle closures sold by your company;
- 7) tear-type bottle closures sold by your company;
- 8) screw-type bottle closures sold by your company;
- 9) other types of bottle closures sold by your company.

As to the remainder of the data called for, Continental is either ready to furnish it substantially as demanded or has agreed with respondent for a form of submission satisfactory to both.

Furthermore, as to all categories in dispute except A. (6), crown-type bottle closures, respondent will forego 1966 data, thus requesting data only for the years 1960 to 1965.

For its part, Continental stands ready to provide data for categories A (1), A (7), A (8) and A (9) for the years 1960 to 1964. It will provide data under A (6) for 1960 to 1965. As to A (5) it will agree only to submit data for the years 1960 to 1962.

In short, Continental urges limitation of the subpoena to the years 1960 to 1964 except that data for tear-type cans should be limited to 1960 to 1962 and for crown-type bottles to 1960 to 1965. Respondent wants the period to cover 1960 to 1965 for all categories except crown-type closures for which it asks for data covering the first 6 months of 1966 also.

In support of its motion and appeal, Continental directs its argument to the questions of relevancy and irreparable injury:

On the question of relevancy it argues first that information on sales of products other than crown-type bottle closures is not relevant to a charge that the merger will adversely affect metal crowns as a relevant market; and it cites *United States v. Von's Grocery*, 384 U.S. 270 (1966), to the effect that if competition is substantially lessened " * * * in a discernible market" it is irrelevant under Section 7 that competition in a larger market of which the lesser market is a part is relatively unaffected.

This argument must be rejected because it begs the question. Respondent's proposed defense, as we understand it from its memorandum brief in opposition to Continental's appeal, is that metal crowns is not a relevant line of commerce or submarket in the present context, that the sole relevant market is the larger market embracing all bottles, cans and closures. We note parenthetically that in rejecting Continental's argument in this connection we intimate no opinion as to the validity of respondent's proposed defense. We hold only that if it is argued that there is one indivisible line of commerce here involved embracing all containers and closures, industry universe figures for such containers and closures is relevant to this argument.

Secondly, regarding relevancy, Continental questions the propriety of respondent seeking data for years subsequent to the acquisition on November 13, 1963, arguing that " * * * post-acquisition evidence is of little, if any, relevance where a violation of Section 7 of the Clayton Act is charged because the mere probability of a lessening of competition at the time of the transaction complained of is sufficient to establish a violation," citing *F.T.C. v. Consolidated Foods*, 380 U.S. 592, 598 (1964).

Again, without ruling on the merits of respondent's defense prior to adjudication of the matter, we can nevertheless state that in supporting its argument that there can be no injury to competition in metal crowns because product obsolescence afflicts the industry and there has been a trend to other types of closures, it is relevant for respondent to project the trend beyond the acquisition date by examining post-acquisition sales. This, solely for the purpose of showing the fact of obsolescence.

Continental's principal argument in seeking to limit the data required under the subpoena is that recent and current sales data are business secrets which in the hands of a competitor would seriously disadvantage Continental. Especially regarding the 1966 metal crown data sought by respondent, Continental argues that data which is that current " * * * goes to the very heart of Continental's competitive position and its disclosure would cause irreparable injury." The data relating to tear-type cans is also

particularly sensitive according to Continental because it is a recently developed product and data is being sought for a period of test marketing when extensive product changes were made.

Furthermore, in answer to respondent's offer to disclose the figures only to its counsel and expert witness and to seek *in camera* treatment of data submitted in evidence, Continental argues that such a course is no answer to its objections. It states in its appeal brief, p. 5, "It is well known that in cases of this kind statistics of the type here involved become available to competitors in the industry no matter what precautions are taken and what good faith is brought to bear in taking such precautions."

Respondent, on the other hand, relying on the Commission's ruling in *Mississippi River Fuel Corporation*, D. 8657, Interlocutory Opinion, June 8, 1966 [69 F.T.C. 1186, 1189], argues that it should be supplied the data because it is necessary as a " * * * foundation for whatever legal arguments based on market conditions [respondent] may wish to make." It points out that the data is relevant to its proposed defense and that industry universe figures so necessary in defining line of commerce cannot be constructed without the data from Continental, American and National.

The hearing examiner, relying upon *Covey Oil Company, et al. v. Continental Oil Company, et al.*, 340 F. 2d 993, *cert. den.*, 380 U.S. 964, and having balanced the claim of irreparable injury with the necessity that respondent's preparation of its defense be facilitated, has denied the motion of Continental. We know no reason for disturbing that ruling.

There is no question here nor does Continental assert that it has an absolute right to protection from disclosure. And the question whether Continental should be required to produce the information sought by the subpoena should be resolved by the hearing examiner in the exercise of his sound discretion. In absence of a showing that this discretion has been abused, the Commission will not interfere with the examiner's decision. We find no abuse here.

Nor are we persuaded by Continental's argument that protective provisions designed to reduce the effect of disclosure upon its competitive position would be unavailing. We remain of the conviction, which we have repeatedly expressed, that the hearing examiner may, consistent with Commission policy, order appropriate safeguards to protect sensitive data from falling into unauthorized hands. *National Dairy Products Corp.*, D. 8548, Interlocutory Opinion, February 14, 1964 [64 F.T.C. 1441]; *The Grand Union Company*, D. 8458, Interlocutory Order, February 11, 1963 [62

F.T.C. 1491] ; *Furr's Inc.*, D. 8581, Interlocutory Opinion, November 18, 1963 [63 F.T.C. 2225].

Because matters "* * *" so intimately connected with the conduct of hearings as the terms and conditions of production of documents [should] be left very largely to the responsible judgment of the examiner," *Furr's Inc.*, *supra*, we will not circumscribe him in the matter of determining what, if any, safeguards should be adopted, *National Dairy Products Corp.*, *supra*. It is for the examiner to decide whether simple restrictions for example as to those who should have access to the material be imposed as contemplated by the proffered agreement of respondent to keep the figures confidential and disclose them only to counsel and respondent's expert witness or whether more rigorous limitations are required such as a direction that the data be submitted to an accounting firm for compilation and presentation of aggregate industry figures to respondent's counsel as directed in our Interlocutory Order of June 8, 1966, in *Mississippi River Fuel Corporation*, D. 8657 [69 F.T.C. 1186].

An appropriate order will issue.

ORDER ENTERTAINING AND DENYING APPEAL FROM HEARING
EXAMINER'S DENIAL OF MOTION TO QUASH OR LIMIT SUBPOENA

The hearing examiner, at the instance of respondent herein, having on October 11, 1966, issued a subpoena duces tecum to Continental Can Company, Inc., requiring the production of certain information and material allegedly necessary to the respondent's defense to the charges contained in the Commission's complaint of May 31, 1966, and,

Continental Can Company having filed with the hearing examiner a motion to quash or limit said subpoena and the examiner having denied said motion, and

Continental Can Company having on December 7, 1966, filed with the Commission pursuant to Section 3.17(f) of the Commission's Rules an appeal from the hearing examiner's ruling, and

The Commission being of the opinion that said appeal should be entertained, and

The Commission being further of the opinion that nothing in the hearing examiner's denial of the motion to quash indicates an abuse of discretion,

It is ordered, That the appeal of Continental Can Company, filed December 7, 1966, be, and it hereby is, denied.

AMERICAN HOME PRODUCTS CORPORATION

Docket 8641. Order, Jan. 23, 1967

Order extending time for filing reconsideration petition from January 24 to February 6, 1967, and extending time for filing review petition in Court of Appeals from March 6 to March 17, 1967.

ORDER GRANTING RESPONDENT'S MOTION FOR EXTENSION OF TIME
WITHIN WHICH TO FILE PETITION FOR RECONSIDERATION OF COM-
MISSION ORDER AND FOR RELATED RELIEF

Respondent American Home Products Corporation has moved by its counsel for an order extending for a period of ten days the time for filing of a petition for reconsideration of the Commission's Order dated December 16, 1966 [70 F.T.C. 1524], and staying the Commission's Order so that the time for filing a petition for review in the Court of Appeals may also be extended for a period of ten days.

In his supporting affidavit respondent's attorney stated that he was seriously injured in an automobile accident last October, has only recently returned to his office and still has not recovered his full strength and that he is required in addition to the instant matter to devote considerable attention to two other pending matters. In our opinion respondent's request for this short extension of time is reasonable in the circumstances and should be granted. Accordingly,

It is ordered,

(1) That respondent's time for filing a petition for reconsideration of the Commission's Order dated December 16, 1966, be and it hereby is extended from January 24, 1967, to and including February 6, 1967; and

(2) That the date of service of said Order shall be deemed to be January 16, 1967, instead of January 4, 1967, thus tolling the running of the statutory time period for filing a petition for review in the Court of Appeals, from March 6, 1967, to and including March 17, 1967.

GROVE LABORATORIES, INCORPORATED*Docket 8643. Order, Jan. 26, 1967*

Order denying respondent's motion that hearings in this case be reopened.

ORDER DENYING RESPONDENT'S MOTION TO REOPEN HEARINGS

Respondent has moved for an order reopening the hearings herein before the hearing examiner for the purpose of presenting

evidence relevant and material to the issue of whether the Commission should include in any final cease and desist order to be issued herein a prohibition against disseminating or causing the dissemination of any advertisement in connection with the offering for sale, sale or distribution of any drug within the meaning of the Federal Trade Commission Act which misrepresents directly or by implication the efficacy of such drug. In its motion papers respondent states that this issue was "suggested for the first time by the Commission in its decision *In the Matter of American Home Products Corporation*, Docket 8641" [70 F.T.C. 1524].

We cannot agree with the premise of respondent's claim—that the scope of the order which may be entered by the Commission herein was not at issue in the case until the Commission's decision in the *American Home Products* case. The order issued by the Commission in *American Home Products* was formulated pursuant to the established principle that the Commission has "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" (*Jacob Siegel v. Federal Trade Commission*, 327 U.S. 68, 611 [1945]). The *American Home Products* decision in no way represented a departure from existing law. Thus respondent herein has or should have been aware from the inception of this proceeding of the Commission's "wide latitude for judgment" (*id.* p. 613) in selecting an appropriate form of relief, and it had full opportunity to introduce at the hearing below any evidence relevant to the scope of the order. Therefore, there would appear to be no necessity for the reopening of this proceeding. This does not preclude respondent from making any argument it wishes to make with regard to the scope of the order which may be entered in this case.

Accordingly, it is hereby

Ordered, That respondent's motion be and it hereby is denied in its entirety.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order, Feb. 2, 1967

Order denying complaint counsel's request to file an interlocutory appeal from hearing examiner's granting of respondents' application for depositions and issuance of subpoenas duces tecum.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission upon the request of complaint counsel, pursuant to § 3.20 of the Commission's Rules of

Practice, for permission to file an interlocutory appeal from the hearing examiner's order filed January 9, 1967, granting respondent's applications for depositions and the issuance of subpoenas duces tecum.¹ Respondents have filed an answer thereto opposing such request.

The Commission, on October 13, 1966, issued an order instructing the examiner, upon making such provisions as he deemed necessary to assure respondents an opportunity for future discovery in the circumstances mentioned, to "direct the respondents to commence, as soon as possible, their pretrial submissions and procedures as ordered in Prehearing Order No. 1." The examiner thereafter, on October 20, 1966, filed an amendment of Prehearing Order No. 1, ordering the filing by respondents of itemized pretrial submissions. Respondents thereupon filed a submission pursuant to the examiner's order and an application for depositions and the issuance of subpoenas duces tecum involving the ten "resources" or suppliers designated by complaint counsel in response to Item 1(a) of the original Prehearing Order No. 1.²

Complaint counsel, in their request for permission to file interlocutory appeal, state that the order of the hearing examiner permits respondents to depose and to obtain documents from the principal suppliers they intend to rely on to prove price concessions in asserted violation of Section 2(a) of the Clayton Act and that the taking of the depositions will be to a large extent a duplication of the trial of the case. We do not believe, however, complaint counsel have sufficiently demonstrated they can show that the hearing examiner has erred in granting respondents' application. The hearing examiner, as has been noted in prior matters, has broad discretion in discovery proceedings. *American Brake Shoe Company*, Docket No. 8622 (order issued September 1, 1965) [68 F.T.C. 1169]. The examiner, in this instance, has based his order upon a finding of a showing of good cause by the respondents and we have no reason to dispute this finding.

¹ While complaint counsel has filed a request under Rule 3.20, it should be pointed out that since the matter concerns a ruling by the examiner on a request for issuance of subpoenas, direct appeal to the Commission could have been taken pursuant to § 3.17 of the Rules. See *American Brake Shoe Company*, Docket No. 8622 (order issued September 1, 1965) [68 F.T.C. 1169], and *Best & Co., Inc.*, Docket No. 8669 (order issued June 28, 1966) [69 F.T.C. 1199].

² Respondents, in their submission, state that they are now "prepared to begin their pretrial discovery by taking depositions suggested by the Commission" and will subsequently "be able to commence the other discovery suggested in the Commission's order." This we believe concerns a misconstruction on the Commission's October 13, 1966, ruling. The opinion there, while discussing respondents' apparent discovery needs which respondents themselves had previously suggested, makes no determination that respondents are required to or should engage in certain discovery procedures or in any procedure not covered by Prehearing Order No. 1. This is clear from the precise terms of the Commission's order directing the commencement of pretrial procedures. Respondents must justify each request and all requests for pretrial discovery in accordance with the Commission's Rules and we believe that is what the examiner has required on the application here involved.

The examiner, of course, must be vigilant and firm in preventing any abuse of the Commission's procedures. The Commission's Rule on depositions (§ 3.10(a)) reads in part:

Such order [as to a deposition] may be entered upon a showing that the deposition will constitute or contain evidence relevant to the subject matter involved and that the taking of the deposition will not result in any undue burden to any other party or *in any undue delay of the proceeding*. . . . (Emphasis supplied.)

As the Commission pointed out in *Topps Chewing Gum, Inc.*, Docket No. 8643 (order issued July 2, 1963) [63 F.T.C. 2196, 2198]:

. . . care must be taken that depositions are not substituted for continuous hearings required by these Rules and that they are not used as a means to delay the disposition of the proceeding. . . .

There is no indication here that the examiner will not follow the letter and the spirit of the Commission's Rules and prevent any misuse of the pretrial discovery procedures.

In the circumstances, we do not believe that complaint counsel have justified their request for permission to file an interlocutory appeal as provided for under § 3.20 of the Commission's Rules. Accordingly,

It is ordered, That the request of complaint counsel for permission to file an interlocutory appeal from the hearing examiner's order granting respondents' application for depositions and issuance of subpoenas duces tecum, filed January 9, 1967, be, and it hereby is, denied.

LEHIGH PORTLAND CEMENT COMPANY, Docket No. 8680
MARQUETTE CEMENT MANUFACTURING COMPANY,
Docket No. 8685
MISSISSIPPI RIVER FUEL CORPORATION, Docket No. 8657

Orders and Opinion, Feb. 6, 1967

Orders denying respondents' motions to vacate complaints and remanding proceedings to hearing examiner for hearings.

OPINION OF THE COMMISSION

BY ELMAN, *Commissioner*:

In each of these three separate cases, in which the Commission issued complaints alleging violations of Section 7 of the Clayton

Act, as amended,¹ the respondents have filed motions to dismiss or suspend the proceedings. Since these motions raise the same questions, they will be dealt with in a single opinion.

On April 22, 1966, the Commission announced that it would hold a public hearing for the purpose of developing a general enforcement policy with regard to vertical mergers in the cement industry (Appendix A). The hearing was held on July 11-13, 1966; and on January 3, 1967, the Commission issued a Statement of Enforcement Policy with Respect to Vertical Mergers in the Cement Industry (Appendix B).

In essence, the respondents assert that the Commission acted improperly, and denied them a fair hearing, by conducting a general industrywide inquiry into vertical mergers in the cement industry while these particular complaints were pending.

As appears from the Commission's Statement of Enforcement Policy:

The Commission early became concerned with vertical mergers in the cement industry in the course of carrying out its statutory duties in the enforcement of the antitrust laws. Complaints were issued at the outset initiating a series of adjudicative cases. The trend of acquisitions, however, continued. By the end of 1965 no fewer than 40 ready-mixed concrete companies had been acquired by leading cement companies, while several large ready-mixed companies had entered into the manufacture of cement. Many cement companies had indicated that while they were opposed to this development, they might be forced in the future to acquire major customers to protect their outlets from further foreclosure. Various segments of the industry requested the Commission to clarify, as soon as possible, the legal status of such mergers. The Commission, therefore, determined to consider the problem on an industrywide basis to determine whether its current approach to vertical mergers in these industries was correct and effective, or whether it should be supplemented. (Pp. 1-2.)

The Statement sets forth certain criteria which will be followed by the Commission in identifying those vertical acquisitions in the cement industry which will receive the Commission's immediate attention and, if the facts should so warrant, will result in the issuance of complaints challenging their legality. These criteria have been promulgated as part of a general *enforcement* policy for the guidance of the staff and of industry members and their counsel, who might otherwise be uncertain of the Commission's enforcement intentions in this area. The Statement pointedly emphasizes, however, that "the issues in any proceeding instituted by the Commission will be decided on the merits of that case." (P. 9.)

¹ The complaint in *Lehigh Portland Cement* was issued on April 1, 1966; in *Marquette Cement Manufacturing Company*, on May 20, 1966; and in *Mississippi River Fuel Corporation*, on January 22, 1965.

In conducting a general study of vertical mergers in the cement industry, and publicly announcing its enforcement policy with respect thereto, the Commission has carried out its statutory obligation "to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." (*Moog Industries v. Federal Trade Commission*, 355 U.S. 411, 413.) Respondents seem to be contending that the Commission, in order to formulate such a general enforcement policy, was compelled to declare a moratorium on bringing or continuing with Section 7 cases in this area—and, in practical effect, to immunize from challenge under Section 7 any acquisitions involved in complaints pending before the Commission. However, considerations of fairness and efficient administration of the law require no such extraordinary result.

Respondents proceed on the premise that the background information which has been acquired by the Commission as a result of making a broad survey of the problem of vertical mergers in the cement industry will prejudice the adjudication of particular cases. The premise is erroneous. It has not heretofore been thought that the expertise of an administrative agency constitutes a ground for challenging the fairness of its decision-making process. On the contrary, federal agencies have a duty to bring such expertise, based on their accumulated knowledge and experience, to the consideration of particular cases. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793. Wise enforcement policy cannot be formulated in a factual vacuum. The determination of what cases, or kinds of cases, to bring is a crucial part of the administrative process. An agency must exercise sound discretion in such regard, and its discretion must be *informed*. By informing itself on the competitive problems raised by vertical acquisitions in the cement industry—as a basis for determining the general enforcement policy it should pursue in this area—the Commission has in no way prejudiced any particular cases, whether pending or brought in the future.

Contentions similar to those made here were rejected by the Supreme Court almost twenty years ago in *Federal Trade Commission v. Cement Institute*, 333 U.S. 683. One of the respondents in that case argued that the Commission was prejudiced and biased against the Portland cement industry generally, had prejudged the issues before it, and that the industry and the respondent could not receive a fair hearing. In support of its charges, the respondent introduced copies of Commission reports made to Congress or to the President, as required by Section 6 of the Federal Trade Commission Act. The Court stated that the reports, and testimony

given by members of the Commission before Congressional committees, made clear that at least some members of the Commission were of the opinion that the basing point system under attack was unlawful. The language of the Court in response to this argument is directly applicable to the issues raised here:

Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are "unfair," from any cease and desist order by the Commission or any other governmental agency.

There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *United States v. Morgan*, 313 U.S. 409. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress. For Congress acted on a committee report stating: "It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Cong 2d Sess 10-11. 333 U.S. at 701-02.

See also *Pangburn v. C.A.B.*, 311 F. 2d 349 (1st Cir. 1962), where the court stated:

Upon examination of the foregoing cases, we cannot say that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required. Particularly is this so in the instant case where the Board's prior contact with the case resulted from its following the Congressional mandate to investigate and report the probable cause of all civil air accidents. If we were to accept petitioner's argument, it would mean that because the Board obeyed the mandate of Section 701, it was thereupon constitutionally precluded from carrying out its responsibilities under Section 609. 311 F. 2d at 358.

The Commission reiterates that the respondents in these cases have in no way been prejudiced by the Statement of Enforcement Policy issued on January 3, 1967. In each case the burden of proving the allegations of the complaint remains with complaint counsel, and has in no degree been shifted to the respondents. In each case, adjudication by the hearing examiner and the Commission will be made on the record, in accordance with the Administrative Procedure Act. In each case, the hearing afforded the respondents will be full and fair, in the same measure as if no Statement of Enforcement Policy had been issued. If the Commission's expertise has been enlarged as a result of the general inquiry conducted by it in connection with formulating the Statement of

Enforcement Policy, that fact neither prejudices the respondents' rights nor constitutes any reason for dismissing these proceedings. Respondents are entitled to have their cases adjudicated by Commissioners with open minds, not empty ones.

Commissioner MacIntyre did not participate.

APPENDIX A

NOTICE OF PUBLIC HEARING ON VERTICAL INTEGRATIONS IN THE CEMENT INDUSTRY

Notice is hereby given that the Federal Trade Commission will hold a public hearing before the full Commission on June 6, 1966, to afford all interested parties an opportunity to present their views on the subject of vertical mergers in the cement industry.

In December 1964, the Commission announced its investigation into acquisitions by producers of cement of ready-mixed concrete and concrete products companies. The investigation was conducted initially by securing special reports from industry members on pertinent matters. The Division of Industry Analysis of the Commission's Bureau of Economics, based upon information contained in the aforesaid reports and other information and data available to it, has published a staff report entitled, "Economic Report on Mergers and Integration in the Cement Industry." Requests for copies should be addressed to: Division of Industry Analysis, Bureau of Economics, Federal Trade Commission, Pennsylvania Avenue and Sixth Street, NW., Washington, D.C., 20580.

The Commission is of the opinion that it would be in the public interest, as the next step in its investigation, to hold a public hearing. The purpose of the hearing is to secure additional information and to afford the Commission the benefit of the views of all concerned to assist the Commission in reaching a determination as to what action, if any, it should take.

As the Commission originally announced, it is endeavoring to obtain information "on pertinent matters such as the structure of the cement-producing and principal cement-consuming industries, the nature of the relevant product and geographical markets, the causes and business reasons underlying such acquisitions in these industries, and the probable effects of such acquisitions on competitive conditions of the markets and industries involved." These subjects have been dealt with at some length in the Bureau of Economics' industry report. While the Commission has not approved, disapproved or passed upon the matters contained in that report, it is desirable that parties who wish to participate in the hearing direct their comments to matters contained in the report.

The basic purpose of this hearing is to provide an appropriate means for "organizing and appraising the general economic facts involving industry and market structure that are so important under Section 7" (*Permanente Cement Co.*, F.T.C. Docket No. 7939, decided April 24, 1964, p. 9 [65 F.T.C. 410, 494]), in relation to vertical mergers in the cement industry. The hearing is intended to elicit, not specific "adjudicative" facts relating to specific cases or parties, but general "legislative" facts which will help the Commission decide questions of law, policy, and discretion. See 1 Davis, *Administrative Law* § 7.02, p. 413 (1958).

Interested parties are hereby invited to submit any information or comments pertinent to these matters or other aspects of the general subject of vertical integration in the cement industry. Written data, views or arguments concerning the subject matter of the hearing may be filed with the Secretary, Federal Trade Commission, Pennsylvania Avenue and Sixth Street, NW., Washington, D.C., 20580, not later than May 31, 1966. To the extent practicable, persons wishing to file written presentations in excess of two pages should submit twelve copies.

The oral hearing will be held at 10:00 a.m., e.d.t., on June 6, 1966, in Room 532 of the Federal Trade Commission Building, Pennsylvania Avenue and Sixth Street, NW., Washington, D.C. Any person desiring to present orally his views at the hearing should so advise the Secretary of the Commission not later than May 31, 1966, and estimate the time required. The Commission may impose reasonable limitations upon the length of time allotted to any person. Oral presentations should not constitute mere duplications of prior written submittals. Copies of oral presentations or summaries thereof may be submitted at the time of the oral hearing.

The data, views or arguments presented orally or in writing will be available for examination by interested persons at the Federal Trade Commission, Washington, D.C.

Issued: April 22, 1966.

By the Commission without the concurrence of Commissioner MacIntyre.

APPENDIX B

COMMISSION ENFORCEMENT POLICY WITH RESPECT TO VERTICAL MERGERS IN THE CEMENT INDUSTRY

JANUARY 3, 1967

Vertical mergers and acquisitions are today the most significant, critical and important problem faced by the cement and ready-

mixed concrete industries. Beginning in the late nineteen-fifties a trend of acquisitions of leading ready-mixed concrete producers by cement manufacturers began which now threatens to transform the structures of both industries. This vertical merger movement is of vital importance to the public, and to each of the industries involved. Cement and concrete are basic building materials essential to the nation's economy.

The Commission early became concerned with vertical mergers in the cement industry in the course of carrying out its statutory duties in the enforcement of the antitrust laws. Complaints were issued at the outset initiating a series of adjudicative cases. The trend of acquisitions, however, continued. By the end of 1965 no fewer than 40 ready-mixed concrete companies had been acquired by leading cement companies, while several large ready-mixed companies had entered into the manufacture of cement. Many cement companies had indicated that while they were opposed to this development, they might be forced in the future to acquire major customers to protect their outlets from further foreclosure. Various segments of the industry requested the Commission to clarify, as soon as possible, the legal status of such mergers. The Commission, therefore, determined to consider the problem on an industry-wide basis to determine whether its current approach to vertical mergers in these industries was correct and effective, or whether it should be supplemented. An industry-wide investigation was commenced, and on April 26, 1966, a Staff Economic Report on "Mergers and Vertical Integration in the Cement Industry" was published. Thereafter, Public Hearings on the problem were held in July 1966, and oral presentations and written statements from the industry were received.

The Federal Trade Commission has concluded that vertical mergers and acquisitions involving cement manufacturers and consumers of cement, particularly ready-mixed concrete companies, can have substantial adverse effects on competition in the particular market areas where they occur. This conclusion of the Commission is based upon prior cases involving such mergers and acquisitions, its own experience in merger policy enforcement, the industry-wide investigation of the problem which culminated in the published report of the staff on "Mergers and Vertical Integration in the Cement Industry," and upon the "Public Hearings" of the Commission held in July 1966.

Based on the information now available to the Commission it appears that the recent trend of vertical acquisitions has involved, almost invariably, leading high volume ready-mixed concrete producers located in major urban areas. Because urban areas contain

concentrations of people and industry, they account for the most intense day-to-day construction activity and consequent cement demand, and thus constitute the choice high-volume centers for cement sales. Cement companies therefore concentrate their sales effort upon the urban areas. In recent years, for example, the great majority of over 230 newly constructed cement distribution terminals have been located so as to serve particular metropolitan centers. Distinguishable competitive features usually characterize different urban areas. Different prices generally prevail from one to another, and each is marked by unique supply and demand characteristics. In summary, metropolitan centers are focal points of cement demand and are regarded by cement companies as key marketing areas. It is within these centers that the effects on competition resulting from vertical acquisitions tend to be most keenly felt.

Such urban markets, within which vertical mergers and acquisitions take place, are often highly concentrated on both the supply and demand sides. Cement is a heavy, bulky product economically impractical to ship very far except by water. For this reason, almost all cement is sold and used comparatively near the site of production. Cement production is decentralized and is based upon a network of geographically scattered plants which ship directly, or through terminals, to consumers in adjacent markets. Most urban markets therefore are served by comparatively few producers. Out of the fifty largest metropolitan markets in the United States, 19 had five or fewer cement companies soliciting sales, and an additional 19 had only five to ten suppliers. Illustrative are: Seattle—3; Miami—6; Tampa—6; San Francisco—4; Portland (Oreg.)—4; Denver—2; Detroit—9; Jacksonville—7. A survey conducted of 22 "top" cement markets and 11 "secondary" markets by one of the industry participants in the public hearings showed 25 had only three to eight suppliers. Notwithstanding the possibility of some technical improvements in bulk rail transportation of cement, it nevertheless appears that today the geographic area practicable for any given cement producing plant to service is a limited one. From the information known to us to date, it seems improbable that any fundamental change in the relative concentration of available cement suppliers servicing particular metropolitan markets, as well as larger regions, will occur in the foreseeable future.

Similarly, although there are well over 4,000 ready-mixed concrete producers in the United States, the major needs of most urban areas are supplied by a few sizeable ready-mix firms. Concrete is a highly perishable commodity of great bulk and weight

and, even more crucially than in the case of cement, high transportation costs in comparison with the selling price limit the area serviceable from a particular plant. Concrete is normally not transported more than five to ten miles from the production site to the construction job of the purchaser. Any given metropolitan area would therefore appear to be a definitive market for concrete production and sale, and it is not likely that there are any outside suppliers actually or potentially available. In most urban centers, the ready-mixed concrete industry is quite concentrated. For example, the four largest ready-mixed concrete companies doing business in San Francisco, Boston, Cleveland, Milwaukee, New York, Buffalo, Philadelphia, Baltimore, Pittsburgh, Kansas City, Memphis, Phoenix, Norfolk, Portland (Oreg.), Seattle, Jacksonville, and Richmond made approximately 50 percent or more of the concrete sales in those cities.

The ready-mixed concrete industry is relatively new, having its origins subsequent to World War I and its period of rapid development after World War II. Nevertheless it has already greatly surpassed the cement industry in the total dollar value of shipments. In 1964, the value of all cement produced was \$1,190,000,000 whereas the total value of sales of ready-mixed concrete was larger by almost \$800,000,000 amounting to \$1,987,000,000. Out of a total 1964 cement production in the United States of 368,633,000 barrels, ready-mixed concrete companies purchased about 60 percent. The importance of the ready-mixed concrete firms as cement consumers is even greater in metropolitan centers where there is reason to believe that they account for 70 percent or more of cement purchases.

In any given metropolitan market ready-mixed concrete producers are therefore dominant cement consumers and constitute the crucial link in cement distribution and use. When one or more major ready-mixed concrete firms are tied through ownership to particular cement suppliers, the resulting foreclosure not only may be significant in the short run, but may impose heavy long-run burdens on the disadvantaged cement suppliers who continue selling in markets affected by integration. Acquisitions of leading cement consumers in markets containing comparatively few volume buyers may have the effect of substantially disrupting the competitive situation at the cement level, and, in fact, may set off a "chain" reaction of acquisitions.

Unintegrated ready-mixed concrete producers furthermore may be at a disadvantage in competing with rivals who are integrated cement and concrete manufacturers. This is true not only because of disparities in size and access to capital, and the advantages in-

herent in product and market diversification, but also because of the potential "price squeeze" latent in competition with integrated companies.

The more extensive vertical integration becomes in the cement and concrete industries, the higher tends to be the level of entry barriers in individual metropolitan markets and in larger geographic regions. This can result from a number of causes. Higher capital requirements are necessitated by entry into the production of cement and ready-mixed concrete on an integrated basis. The capital requirements for entry on an integrated basis appear to be double the cost of entry into the production of cement only. But the need for far more capital is not the only problem. Industry executives at the public hearings were unanimous in stating the difficulty of penetrating the ready-mixed concrete industry on a significant scale in markets containing long established ready-mixed concrete producers. New entrants in ready-mixed concrete in integrated markets, of course, may face the additional deterring effect of competition with very large, diversified and integrated rivals.

CRITERIA USED TO IDENTIFY MERGERS WHICH WARRANT IMMEDIATE ACTION

The Commission's characterization of particular organizational developments in the cement and ready-mixed concrete industries and their probable competitive consequences represent the Commission's current knowledge of these matters as revealed by its own experience in various litigated cases, as well as an industry-wide investigation accomplished through survey, staff analysis and public hearings. In view of its extensive activity in the application of Section 7 to forestall anticompetitive mergers, together with its understanding of prospective developments in cement manufacture and distribution, this Commission wishes to make abundantly clear insofar as possible, its future enforcement policy with regard to vertical mergers in the cement and ready-mixed concrete industries. In so doing it is expected that needless litigation may be forestalled. At the same time however it should be noted that the issues in any proceeding instituted by the Commission will be decided on the merits of that case.

I. The Commission has determined as a matter of general enforcement policy to use all the legal weapons at its disposal to proceed against and order the divestiture of those vertical acquisitions which it believes may unlawfully lessen competition in any market. Specifically, the Commission intends to investigate ex-

peditionously every future acquisition by a cement producer of any substantial ready-mixed concrete firm in any market to which such acquiring producer is an actual or potential supplier. Whenever such an investigation reveals the market circumstances described below, the Commission shall issue a complaint challenging the acquisition under Section 7 of the Clayton Act, unless unusual circumstances in a particular case dictate the contrary.

II. In general, the acquisition of any ready-mixed concrete firm ranking among the leading four nonintegrated ready-mixed producers in any metropolitan market, or the acquisition of any ready-mixed concrete company, or other cement consumer, which regularly purchases 50,000 barrels of cement or more annually, will be considered to constitute a substantial acquisition.

III. The determination of the Commission to challenge the acquisition by a cement supplier selling in a market of any of the top four ready-mixed concrete firms therein, or of any cement consumer in such market who regularly buys 50,000 or more barrels annually, does not mean that the acquisition of smaller firms will necessarily be considered lawful or go unchallenged by the Commission. The acquisition of several smaller ready-mixed concrete producers whose cumulative purchases of cement annually approximate those of a ready-mixed concrete company of the foregoing specified size or the acquisition of a cement user which gives to a cement producer that is already integrated forward into the relevant market a substantial position of the foregoing specified size may have at least as severe anticompetitive effects as the acquisition of a single larger firm.

IV. The Commission's intention to challenge all substantial vertical acquisitions does not exempt markets where integration has already occurred. A partially integrated market can still be attractive to a new cement producer who is looking for multiple markets to serve from a large efficient plant, or to attract a manufacturer on the edge of a market who wishes to expand his geographic area of sales. Likewise markets which have witnessed significant vertical integration may still offer inducement to new ready-mixed concrete competitors to enter. The Commission therefore intends to act to preserve the open portions of partially integrated markets to the fullest extent possible.

V. In promulgating a statement of general enforcement policy with respect to integration through mergers and acquisitions, the Commission recognizes that there are other means by which it is possible, to some extent at least, for cement suppliers to exert pressure on consumers of cement. In some cement markets, the acquisition of key aggregates producers can constitute a way by

which ready-mixed concrete companies, and other cement consumers, can be influenced in making their cement purchases and competition can be substantially lessened thereby. The anticompetitive effects usually associated with the acquisition of ready-mixed concrete producers can be brought about in such areas indirectly by the acquisition of aggregates concerns. The Commission therefore will oppose the acquisition of key aggregates suppliers in a market wherever there is reason to believe that such acquisitions may confer upon the acquiring cement company any significant ability to exert anticompetitive "leverage" on cement consumers affecting their freedom to choose cement suppliers.

VI. To carry out this program expeditiously and uniformly, the Commission must know of prospective acquisitions and mergers in advance of their consummation. Accordingly, all portland cement companies will be required to notify the Commission at least 60 days prior to the consummation of any merger or acquisition involving any ready-mixed concrete producer. The Commission will notify all portland cement companies each year, so long as this enforcement policy is in effect, and will require each to file special reports with the Commission under the authority provided by Section 6 of the Federal Trade Commission Act.

This action by the Commission should not be interpreted to mean that cement firms must request Commission approval prior to the consummation of any merger or acquisition. However, the Commission shall continue to provide advisory opinions, as provided by its Rules of Practice, regarding the legality of particular mergers, and invites those contemplating mergers to avail themselves of this program in any situation where they are uncertain as to the legality of a prospective merger.

Chairman Dixon and Commissioner MacIntyre, while approving the enforcement criteria set forth in this statement, did not concur in the action of the Commission in providing for the requirement that special reports be filed with the Commission 60 days in advance of any merger under the authority of Section 6 of the Federal Trade Commission Act.

LEHIGH PORTLAND CEMENT COMPANY, DOCKET NO. 8680

ORDER DENYING MOTION TO VACATE COMPLAINT

This matter is before the Commission upon the certification of the hearing examiner of respondent's motion to vacate the complaint, without prejudice, or to suspend the proceedings. For the reasons set forth in the accompanying opinion of the Commission,

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

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for hearing.

Commissioner MacIntyre not participating.

MARQUETTE CEMENT MANUFACTURING COMPANY, DOCKET NO. 8685
Docket No. 8685

ORDER DENYING INTERLOCUTORY APPEAL

This matter is before the Commission on respondent's interlocutory appeal from the hearing examiner's denial of respondent's motion to dismiss the complaint. For the reasons set forth in the accompanying opinion of the Commission,

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

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for hearing.

Commissioner MacIntyre not participating.

MISSISSIPPI RIVER FUEL CORPORATION, DOCKET NO. 8657

ORDER DENYING MOTION TO VACATE COMPLAINT

This matter is before the Commission upon the certification of the hearing examiner of respondent's motion to vacate the complaint, without prejudice, or to suspend the proceedings. For the reasons set forth in the accompanying opinion of the Commission,

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

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for hearing.

Commissioner MacIntyre not participating.

COLE NATIONAL CORPORATION ET AL.

Docket 8701. Order, Feb. 6, 1967

Order dismissing the complaint in all respects as to respondent Independent Lock Company and granting permission to file an interlocutory appeal.

ORDER GRANTING INTERLOCUTORY APPEAL AND AMENDING
COMPLAINT

This matter having come before the Commission upon the respondents' request for permission to file an interlocutory appeal

from the hearing examiner's order of December 23, 1966, granting in part and denying in part motions to strike and dismiss and therein ordering that the complaint be dismissed as to respondent Independent Lock Company to the extent only that it charges Independent Lock Company with a violation of Section 7 of the Clayton Act, as amended, and denying respondents' motion to strike the allegations of the complaint charging them with violation of Section 5 of the Federal Trade Commission Act; and

The Commission (1) having determined that the respondents have made the showing required by Section 3.20 of the Commission's Rules of Practice, and that, therefore, the request should be granted; and (2) having further determined that the Section 5 charge should be stricken from the complaint, and that the complaint should in all respects be dismissed as to the Independent Lock Company,

It is ordered, That the request of respondents for permission to file an interlocutory appeal be, and it hereby is, granted; and upon consideration of such interlocutory appeal,

It is further ordered, That the allegations of the complaint relating to violation of Section 5 of the Federal Trade Commission Act, be, and they hereby are, stricken.

It is further ordered, That the complaint be, and it hereby is, dismissed in all respects as to respondent Independent Lock Company.

LEON A. TASHOF TRADING AS NEW YORK JEWELRY
COMPANY

Docket 8714. Order, Feb. 6, 1967

Order rejecting respondent's offer of consent settlement and remanding case to hearing examiner.

ORDER WAIVING RULE 2.4(d) AND REJECTING RESPONDENT'S OFFER
OF CONSENT SETTLEMENT

The Commission having issued its complaint in this proceeding on September 29, 1966, charging respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with a copy of that complaint; and

The respondent having subsequently filed with the hearing examiner a motion requesting waiver of Rule 2.4(d) by the Commission to afford respondent opportunity to have the Commission

consider his offer of consent settlement based upon his proposed order as attached to said motion, and the hearing examiner having certified to the Commission the said motion, along with answer in opposition thereto by counsel supporting complaint; and

The Commission having, in its discretion, waived Rule 2.4(d) in order to consider, and now having considered, respondent's offer of consent settlement based upon his accompanying proposed order; and

The Commission having now determined that respondent's aforementioned offer of consent settlement is insufficient to protect the public interest; accordingly,

It is ordered, That respondent's offer of consent settlement be, and it hereby is, rejected.

It is further ordered, That this matter be, and it hereby is, remanded for expeditious conclusion of adjudicatory proceedings before the hearing examiner.

MODERN MARKETING SERVICE, INC., ET AL.
C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY

Dockets 3783, 4589. Order, Feb. 7, 1967

Order denying respondents' "Request to be Heard" and closing the investigation.

ORDER CLOSING INVESTIGATION

The Commission, on February 1, 1963 [62 F.T.C. 1486], ordered that public investigational hearings be conducted to determine whether C. H. Robinson Company and Nash-Finch Company have complied with the Commission's order to cease and desist in Docket No. 4589 [43 F.T.C. 297]. On June 2, 1965 [67 F.T.C. 1382], the Commission broadened the investigation and ordered that it include a determination of whether C. H. Robinson Company and Nash-Finch Company have complied with the Commission's order in Docket No. 3783 [37 F.T.C. 386]. The public investigational hearings were begun on July 21, 1965, and were concluded on April 20, 1966. Commission counsel have filed a pleading entitled "Proposed Report and Certification to the Commission of Record of Investigational Hearing." Counsel for C. H. Robinson Company and Nash-Finch Company have filed pleadings entitled "Respondent's Proposed Recommendations" and "Respondent's Reply to Commission Counsel's Proposed Report and Certification to the Commission of Record of Investigational Hearing." As instructed,

the hearing examiner made no findings of fact or conclusions of law and, on August 24, 1966, certified the transcript of the hearings to the Commission. Counsel for C. H. Robinson and Nash-Finch have filed a document entitled "Request to be Heard," which presumably is a request for oral argument before the Commission.

The Commission having concluded that the pleadings submitted by the parties adequately state their positions and, on the basis of a consideration of the transcript of the hearings as certified by the examiner and the pleadings submitted by the parties, having concluded that the investigation should be closed:

It is ordered, That the "Request to be Heard," as filed by counsel for C. H. Robinson Company and Nash-Finch Company, be, and it hereby is, denied.

It is further ordered, That the investigation be, and it hereby is, closed.

Commissioner MacIntyre not participating.

THE SEEBURG CORPORATION

Docket 8682. Order, Feb. 8, 1967

Order denying respondent's renewed motion for the production of certain Commission documents.

ORDER RULING ON HEARING EXAMINER'S CERTIFICATION OF RESPONDENT'S RENEWED MOTION FOR PRODUCTION

This matter is before the Commission on the examiner's certification of December 19, 1966, with the recommendation that it be denied, of respondent's renewed motion for production, filed December 15, 1966. Subsequently, on December 22, 1966, respondent Seeburg filed its memorandum concerning the examiner's certification, to which complaint counsel filed their answer on December 30. On review of the examiner's certification, respondent's memorandum and complaint counsel's answer, the Commission has determined that the renewed motion for production should be denied.

The Commission is of the view that, essentially, the same issues as those presented by the current certification were before it on the examiner's certification of Seeburg's original motion for production denied by the Commission's opinion and order of October 25, 1966 [70 F.T.C. 1809]. Seeburg's original motion for production, which requested documents from the Commission's confidential files, was treated as an application for the release of confidential information under § 1.134 of the Commission's Rules.

The same procedure is applicable in the case of the renewed motion for production under consideration at this time. The Commission agrees with the examiner that at this stage of the proceeding respondent's need for the documents in question has not been established and thus respondent has not shown good cause as required by § 1.134. In this connection, the Commission notes that respondent has apparently failed to take advantage of the procedures available under §§ 3.10 and 3.17 of the Rules of Practice to obtain the data sought directly from the third parties involved, in spite of the views expressed in the Commission's order and opinion of October 25, 1966, ruling on respondent's first motion for production. No showing has been made that the procedures made expressly available to respondent to secure the data which it desires are either ineffective or in any way inadequate. Further, the examiner still stands ready to make available to respondent the procedures under §§ 3.10 and 3.17 of the Rules, and he has expressly stated respondent is not foreclosed from making the showing of specific need prerequisite to production under § 1.134 of the Rules. In view of the foregoing, the Commission is confident that Seeburg's rights are fully protected and that it should adopt the examiner's recommendation that the renewed motion for production be denied. Accordingly,

It is ordered, That respondent's renewed motion for production, certified by the examiner, be, and it hereby is, denied.

Commissioner Elman dissenting.

THE CROWN CORK & SEAL COMPANY, INC.

Docket 8687. Order and Opinions, Feb. 8, 1967

Order remanding case to hearing examiner with direction that certain material which cannot be obtained from third parties be made available to respondent.

OPINION OF THE COMMISSION

BY REILLY, *Commissioner*:

This matter is before the Commission on certification, filed October 14, 1966, by the hearing examiner pursuant to Section 3.6(a) of the Commission's Rules of Practice, of respondent's motion of August 15, 1966, seeking production of documents pursuant to Section 3.11 of the Commission's Rules.

The Commission on May 31, 1966, issued its complaint herein charging respondent The Crown Cork & Seal Company, Inc., with

violation of Section 7 of the amended Clayton Act by reason of its acquisition on November 13, 1963, of Mundet Cork Corporation. At the time of the alleged acquisition, both firms were engaged in the manufacture of metal crowns commonly used as closures on beer and soft drink bottles and cans.

Pursuant to the Commission's Rules and practice relating to pretrial disclosure of documents, respondent has been provided by complaint counsel with all documentary material and a list of witnesses comprising the case-in-chief. Respondent's motion, however, calls for documents, assertedly necessary to the preparation of its defense, which, if they exist, are in the confidential files of the Commission and can thus only be released as provided in Section 1.134 of the Commission's Rules.

The respondent's motion sought 24 categories of documents, 22 of which related to share of the market and line of commerce and 2 of which related to a proposed "failing company" defense.

The data required under the 22 categories is now being sought from third parties pursuant to subpoenas issued by the hearing examiner at the instance of respondent. Thus, as to these, the hearing examiner takes the position that the respondent's motion is moot, and respondent does not press its motion in this regard.

As to the "failing company" data, however, respondent has filed a memorandum brief supporting the examiner's certification recommending disclosure. Complaint counsel has filed a memorandum in opposition.

We can rule at the outset that this matter is properly before us. Respondent's motion filed under Section 3.11 of the Commission's Rules seeks disclosure of "* * * all documents submitted to Complaint Counsel or to the Commission * * *" falling within the specified categories. Such documents, if they exist, fall within the provisions of Section 1.133 of the Commission's Rules and request made during the course of hearings for their release is treated as an application under Section 1.134 for the release of confidential information which the hearing examiner should certify to the Commission with his recommendation. *The Sperry & Hutchinson Company*, Docket 8671, Interlocutory Opinion, April 15, 1966 [69 F.T.C. 1112]; *Viviano Macaroni Company*, Docket 8666, Interlocutory Opinion, March 9, 1966 [69 F.T.C. 1104]; *L. G. Balfour Company*, Docket 8435, Interlocutory Opinion, October 5, 1962 [61 F.T.C. 1491]. The hearing examiner has duly certified the motion with recommendation that the two categories of documents relating to the "failing company" defense be produced.

Under these two categories respondent seeks the following:

9. With respect to the allegation of paragraph 14 of the Complaint that prior to Respondent's acquisition of Mundet, Mundet was "a substantial and effective competitor in the market," all documents submitted to Complaint Counsel, or to the Commission, whether in response to subpoena or not, which contain information concerning or related to:

(a) the effectiveness, competence, loyalty or ability of Mundet's Board of Directors and/or officers prior to November 13, 1963;

(b) the quality, attractiveness, or obsolescence of the "metal crowns" produced by Mundet prior to November 13, 1963;

(c) the condition, state of repair, and state of obsolescence of Mundet's equipment and machinery for the production of "metal crowns" prior to November 13, 1963;

(d) the profitability of Mundet's operations (i) generally and (ii) in its production and sale of "metal crowns," prior to November 13, 1963;

(e) the financial condition of Mundet prior to November 13, 1963;

(f) Mundet's attempts to obtain credit from banks and other financial institutions and its relationships with such institutions prior to November 13, 1963;

(g) the prospects for the future of Mundet and for its continued operation in the lines of endeavor in which it was engaged prior to November 13, 1963;

(h) the possible liquidation of the assets of Mundet;

(i) the sale of the stock or assets of Mundet to [13 named individuals and corporations and] any other prospective buyer.

23. All documents containing information related to any of the allegations of the Complaint, including the allegation of paragraph 8 that Mundet was an "effective" competitor prior to November 13, 1963, submitted to Complaint Counsel, or to the Commission, whether in response to subpoena or not, by any of the following [55 listed] persons, firms, and corporations.

It is respondent's contention that although the complaint alleges that Mundet was an effective competitor, in fact the company was a "failing company" due *inter alia* to inept management, obsolescence of machinery, dissension among the board of directors, disloyalty on the part of officers, unsound financial condition, etc., and that, accordingly, data in the hands of the Commission should be made available since a showing of failing condition is a defense to an alleged violation of Section 7 under the rule in *International Shoe Company v. F.T.C.*, 280 U.S. 291, 302.

The examiner has recommended that the respondent's motion be granted because of his conviction that "* * * there might possibly be in existence and in the files of the Commission documents relating to the financial position of Mundet which may not be available to [respondent] by subpoena."

In our opinion the examiner's recommendation must be followed with some modification.

In matters of this sort, the examiner's recommendation, because he is closer to the issues involved in the proceeding, is entitled to considerable weight. *L. G. Balfour Company, supra*. Nevertheless, the Commission cannot substitute his judgment for its own par-

ticularly where, in the opinion of the Commission, he is not wholly correct. The responsibility for release of confidential material is confided under the Rules to the Commission itself.

Although complaint counsel has suggested that he can identify some documents of the categories described because he was going to use them to surprise respondent's witnesses, a tactic, parenthetically, we find objectionable, the identification of the material provided in respondent's motion is characterized by a notable lack of specificity, suggesting that the request is merely a dragnet operation conducted in the hope that something would be produced having residual evidentiary value.

Section 1.134 requires a showing of good cause sufficient to outweigh the public interest in the integrity of the Commission's investigative procedures preserving the confidentiality of documents entrusted to the Commission by their owners. Good cause in such a case has two aspects: (1) a requirement that the respondent demonstrate a need for the documents, *L. G. Balfour, supra*, *Viviano Macaroni, supra*, and (2) a requirement that the party requesting disclosure specify what it is that he needs. *Sperry & Hutchinson, supra*.

A mere averment of need is not enough nor is it sufficient that respondent is demonstrably in a position where he must of necessity defend himself against charges contained in the complaint. This latter is true of every respondent and hardly justifies a demand for virtually unrestricted access to the Commission's confidential files.

It seems anomalous that in the present instance respondent is saying in effect "I bought a company which may have been in a failing condition when I bought it. I did not know then nor do I know now whether in fact it was failing. At least I do not have the necessary proof but I suspect it was failing and I propose to prove it with the help of whatever documents the Commission may have in its files on the subject."

This plea has little to recommend it except candor but we think its candor saves it. If respondent's suspicions are correct and the company was in fact failing, it is important that that fact be brought to light in the trial of this matter because it bears vitally upon the central issue of Section 7 violation, *International Shoe Company v. F.T.C., supra*.

Breaching the confidential character of the Commission's files would not be warranted, as we have said, upon a mere averment of need but here the character of the information sought and statements made in the course of the prehearing conference suggest the existence of circumstances in the operation of Mundet

bearing upon the viability of the firm. More importantly, the fact that respondent is prepared to make its request, considering the anomaly of its seeking data from the Commission to prove a fact which it should itself have apprehended in advance of purchase, argues mutely in favor of the existence of real need.

Conceding a need therefore, the question arises can the Commission satisfy the need; and this in turn raises the question precisely what documents in the Commission's files are being sought. It is not sufficient to aver that respondents need documents generally and would like to rummage through the Commission's files in hope of finding them. This would clearly warrant summary rejection of respondent's motion on authority of *L. G. Balfour, supra*.

Respondent does not specify with any precision what documents it wants because indeed it does not know the identity of the documents. It is acting on the probability that the Commission having conducted an extensive investigation has in its files material which may be of assistance. Its assumption in this regard is buttressed by the statement of complaint counsel that he has some material which he planned on using to "keep them honest."

As to Paragraph 9 of respondent's motion, the material is described in broad category but not otherwise identified. This hardly satisfies the requirement that the material be identified with some particularity both to assist in extracting it from the Commission's records and to facilitate a determination of need.

As to Paragraph 23 no attempt to describe the material is made except a general reference to the complaint, however, some clue is provided in a list of firms and individuals from whom the Commission presumptively has secured data in the course of its investigation.

Thus, while both Paragraphs 9 and 23 are each inadequate standing alone, it is possible that combining the two will diminish the dragnet character of each standing alone and provide adequate basis for identification of the material, that is, material falling within the categories set out in Paragraph 9 received from the firms and individuals specified in Paragraph 23.

We are of the opinion however that crucial to a showing of good cause is a demonstration that the material is not available directly to respondent from the same third parties from whom the Commission received it, through compulsory process available to respondent. We are not satisfied that this condition has been met. Respondent avers merely that the documents cannot practicably be obtained from third parties because many of them are unfriendly

to respondent owing to alleged past disputes among Mundet management and directors.

We are not aware that friendliness and a spirit of cooperation is a necessary precondition to the effectiveness of compulsory process. We feel that respondent must make a more persuasive demonstration on this point, particularly with regard to those firms and individuals listed in Paragraph 23 who have not been involved in Mundet management or upon its board.

Finally, we note that nothing in this opinion or the accompanying order should be taken as limiting in any way respondent's right of access under The Jencks Act, 18 U.S.C. Section 3800 (1958) to prior statements of persons called by complaint counsel as witnesses.

An appropriate order will issue directing the hearing examiner to order production of such documents described in Paragraph 9 received by the Commission from the sources listed in Paragraph 23, which respondent is able to demonstrate, cannot be secured from third parties.

Commissioner Elman dissented, and has filed a dissenting statement.

DISSENTING OPINION

BY ELMAN, *Commissioner*:

I see no need for a remand to the hearing examiner. It seems clear to me that respondent has shown "good cause," under Section 3.11 of the Rules of Practice, for production of the documents described in Paragraphs 9 and 23 of its motion. The requested documents are "nonprivileged"; they are plainly material to the "failing company" issue; they are identified with sufficient specificity; they are readily available and in the possession of complaint counsel, who intend to use them in cross-examining respondent's witnesses. What more is required to show "good cause" under Section 3.11?

The Commission insists that respondent must also demonstrate that the requested "material is not available directly to respondent from the same third parties from whom the Commission received it, through compulsory process available to respondent." (Opinion, p. 1638.) This seems to me to be inconsistent with the basic purpose of prehearing discovery. When the Commission amended its Rules in 1961 by permitting discovery in adjudicative proceedings, it made a sharp break with the past:

Prior to amendment of the Rules, hearings in adjudicative proceedings were held at uncertain intervals and in different locales. Under this type of practice

there was little need to afford respondents the right to pretrial discovery for they were customarily afforded an ample interval to prepare their defenses subsequent to the close of the case in chief. But the revised rules now require that, insofar as it is possible and practical, the hearings must be held in one place and continue without interval until all evidence in support of and in opposition to the complaint has been received. Thus respondents must now be prepared to offer their evidence immediately after the close of the case in chief and, accordingly, must be afforded all of the rights necessary for them to prepare before trial. (*L. G. Balfour Company*, Docket 8435, May, 10, 1963, pp. 2-3 [62 F.T.C. 1541, 1543].)

Section 3.11 of the Commission's present Rules of Practice was taken from, and is in terms substantially identical with, Rule 34 of the Federal Rules of Civil Procedure. The essential objective of pretrial discovery, in agency as well as court proceedings, is—by providing for advance disclosure and exchange of relevant facts between the parties—to expedite trials, avoid surprise and unfairness, and thus promote efficient and just adjudication. As the Supreme Court stated in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958), "Modern instruments of discovery serve a useful purpose, as we noted in *Hickman v. Taylor*, 329 U.S. 495. They together with pretrial procedures make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." In *Hickman v. Taylor*, 329 U.S. 495, 507, the Court stated that "the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise."

The government as a litigant is subject to the rules of discovery like any other party. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681. To be sure, documents in the possession of a government agency may be privileged from disclosure for reasons not ordinarily applicable to documents held by a private party. For example, disclosure of government documents may be barred in order to protect national defense or the so-called informer's privilege. *United States v. Reynolds*, 345 U.S. 1; *Roviaro v. United States*, 353 U.S. 53. But documents which are "confidential" solely because they are in the possession of a government agency are not thereby privileged from disclosure in litigation. In regard to

documents relating to the acts or transactions involved in the litigation and which might be material and helpful to the defense, "mutual knowledge" by both parties is, as the Supreme Court has held, "essential to proper litigation." Where the government is the moving party, "the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully." *United States v. Andolschek*, 142 F. 2d 503, 506 (2d Cir. 1944).

It is important to distinguish between documents which are privileged from disclosure and those which are "confidential." Under the Commission's Rules (Sec. 1.133), everything in our files is "confidential." But not every letter or other document in the files is "privileged" in the sense of Rule 34 of the Federal Rules of Civil Procedure and Section 3.11 of the Commission's Rules. The discovery rules refer to privilege "as that term is understood in the law of evidence." *United States v. Reynolds*, 345 U.S. 1, 6.

There is a vast difference between confidential and privileged. Almost any communication, even an ordinary letter, may be confidential. Such a document may not relate to any matter of high public concern. But privileged means that the contents are of such character that the law as a matter of public policy protects them against disclosure. * * * So, too, with Government documents. Some are privileged, such, for example, as the President's advices in the conduct of foreign affairs and some papers relating to the internal security of the nation. *Communist Party of U.S. v. Subversive Activities Control Board*, 254 F. 2d 314, 321 (D.C. Cir. 1958).

The documents involved here are "confidential," not privileged. There is no assertion of any privilege "as that term is understood in the law of evidence." There is no suggestion that disclosure of these documents would impair the national security, violate any informer's privilege, or reveal trade secrets. Nor is there any claim that these documents were obtained under a pledge that they would be kept secret. If complaint counsel wish to introduce the documents into evidence, no prior authorization by the Commission would be required. (Section 1.133 of the Commission's Rules of Practice.) And, as already indicated, complaint counsel have expressed their intention to make full use of the documents at the hearing "to contradict assertions of fact by defense witnesses." Complaint counsel argue for nondisclosure of these documents to respondent on the ground that "it is necessary that respondent's witnesses testify with a full awareness that any deviation from the truth will bring to bear stern tests of their credibility. The documents which we seek to withhold from respondent's pretrial ex-

amination contain the essential elements of this test." (Brief in Opposition, p. 10.) In short, complaint counsel frankly seek a return to the pre-1961 Commission procedures "conducted under the 'sporting theory' of litigation where the goal is to surprise and confound your opponent." *L. G. Balfour Company, supra*.

In the circumstances of this case, it seems clear that the documents involved are not only not "privileged" from disclosure; they have lost whatever "confidential" character they possessed because they are in the Commission's files. Respondent is in effect saying to complaint counsel: "You've got these documents; you know exactly what they are; you intend to use them against my witnesses; the documents aren't 'confidential' any longer; and they are plainly material to the 'failing company' defense. Could we please see these documents now?" I would order complaint counsel to turn them over to respondent now, without any further ado.

Under Section 3.11 of our Rules, both parties are on a parity with respect to discovery. Where complaint counsel request discovery of documents in a respondent's possession, they are not required to show that the "material is not available directly to [the Commission] from the same third parties from whom [the respondent] received it, through compulsory process available to [the Commission]." Why should such a requirement be imposed on a respondent? It will take months for respondent to go through the laborious process of subpoenaing third parties in an effort to secure copies of the documents in the possession of complaint counsel. And when the process is completed, how will respondent's counsel know that they have gotten everything that complaint counsel now have? Will there indeed be that "mutual knowledge of all the relevant facts gathered by both parties" which the Supreme Court in *Hickman v. Taylor* said "is essential to proper litigation"? And even if the answer could be yes, what discernible public interest is served by stretching out the prehearing process for this purpose? The advantage of discovery is that it avoids all the burdens and delays involved in obtaining from third persons documents which are readily available and possessed by the other party. It seems to me that the Commission fails to respect the spirit and letter of its own Rules of Practice by denying discovery here.

An unfortunate aspect of the Commission's action is that it introduces a double standard into the enforcement of the merger law. The Federal Trade Commission and the Department of Justice have concurrent authority to bring proceedings to enforce Section 7 of the Clayton Act. If this case had been brought by the Department of Justice in a federal district court, and if the documents

sought here were in the possession of the Antitrust Division or the United States Attorney, discovery would clearly be granted. Surely the rights of a party charged with violating the merger law should not be substantially diminished because the proceeding is brought by the Federal Trade Commission rather than the Department of Justice. Apart from other considerations favoring broad and liberal discovery, even-handed administration of justice should preclude the restrictive interpretation of Section 3.11 adopted in this case. Nowhere is the administrative process more vulnerable than in regard to the fairness of agency adjudication. Prehearing discovery is, as the Administrative Conference recognized, essential to fair as well as efficient adjudication. "Where executive, legislative, and judicial powers are blended in a single agency's activity, the resulting need for adherence to scrupulous standards of fairness is served by providing reasonable opportunity for discovery. Public acceptance of agency decisions is not unrelated to the giving of satisfaction in these regards." Selected Reports of the Administrative Conference of the United States, S. Doc. No. 24, 88th Cong., 1st Sess. (1963), p. 128.

ORDER RULING ON EXAMINER'S CERTIFICATION OF RESPONDENT'S
MOTION FOR PRODUCTION OF DOCUMENTS AND REMANDING TO
HEARING EXAMINER

The hearing examiner herein pursuant to Section 3.6(a) of the Commission's Rules of Practice having on October 14, 1966, certified to the Commission respondent's motion for production of documents filed August 15, 1966, and

The Commission for the reasons set forth in the accompanying Opinion being of the opinion that respondent has shown good cause under § 1.134 of the Commission's Rules for production of the documents specified in Paragraph 9 of its motion received from the parties listed in Paragraph 23 except that respondent has not made adequate showing why the material cannot be secured directly from the persons and firms listed in Paragraph 23 of its motion, and

The Commission being further of the opinion that a determination in this regard should be made by the hearing examiner,

It is ordered, That this matter be remanded to the hearing examiner with the direction that as much of the material described in Paragraph 9 of respondent's motion received from the parties listed in Paragraph 23 of said motion be made available to respondent as respondent is able to show cannot be secured directly from the parties listed in Paragraph 23.

Commissioner Elman dissented, and has filed a dissenting opinion.

L. G. BALFOUR COMPANY ET AL.

Docket 8435. Order, Feb. 9, 1967

Order rejecting proposed agreement containing consent order and remanding case to the hearing examiner.

ORDER REJECTING PROPOSED AGREEMENT CONTAINING CONSENT
ORDER AND REMANDING FOR CONTINUATION OF PROCEEDING

This matter is before the Commission upon the hearing examiner's recertification, filed January 13, 1967, of the agreement and consent order entered into between the parties and upon the memorandum of Retail Jewelers of America, Inc., with respect to the hearing examiner's certification and the answers of the parties in opposition thereto; and

The Commission having determined that the memorandum of Retail Jewelers of America, Inc., should be received only as a supplement to its brief as an *amicus curiae*, filed November 21, 1966, and it hereby is so received, and having further determined that the proposed agreement containing consent order submitted by the parties is inadequate to fully protect the public interest and should be rejected:

It is ordered, That the matter be, and it hereby is, remanded to the hearing examiner for a continuation of the proceedings.

It is further ordered, That the time for filing the initial decision in this proceeding be, and it hereby is, extended from March 6, 1967, to and including May 8, 1967, it being understood that the examiner will set the times for the parties to file their respective submittals.

BENRUS WATCH CO., INC., ET AL.

Docket 7352. Order and Opinion, Feb. 20, 1967

Order denying petition of Clifford L. J. Siegmeister that an earlier order be set aside as to him in his individual capacity.

OPINION OF THE COMMISSION

This matter is before the Commission upon a petition filed January 10, 1967, by respondent Clifford L. J. Siegmeister, re-

questing that the final order issued herein on February 28, 1964 [64 F.T.C. 1018], be set aside as to him in his individual capacity. The Director, Bureau of Deceptive Practices, has filed an answer in opposition to the request.

Although not cited by the petition, the validity of this request must be determined under § 3.28(b) (2) of the Commission's Rules which provides, in part, that "Whenever any person subject to a decision containing an order to cease and desist which has become final is of the opinion that changed conditions of fact or law require that said decision or order be altered, modified or set aside, or that the public interest so requires, such person may file with the Commission a petition requesting a reopening of the proceeding for that purpose."

The complaint in this matter issued on January 8, 1959, charging two corporations and fourteen persons in their official capacities and individually with certain unfair and deceptive practices in violation of Section 5 of the Federal Trade Commission Act. An answer was filed on March 9, 1959, purportedly on behalf of the two corporations and certain of the individual respondents, including petitioner. In effect, the answer admits that certain of the individual respondents, again including petitioner, formulated, directed and controlled the acts and practices of the corporate respondents, including the practices set forth in the complaint. However, the answer specifically denies this charge as to three of the named individuals on behalf of whom the answer was filed.

Service of the complaint upon petitioner was effected by registered mail at the principal office of the corporation of which he was a vice president in charge of sales. As a first grounds in support of his request, petitioner states that the person who signed the return receipt was not authorized to accept personal service for him as an individual. He further states that he never received a copy of the complaint and was not aware that he had been named in his individual capacity. Moreover, petitioner states that he never authorized anyone to file an answer in his behalf, and that the statement in the answer which constitutes an admission that he formulated and controlled the company's acts and policies, is completely inaccurate.

Petitioner states that he resigned from the company on December 2, 1959, and alleges that it was not until after the Commission issued its Final Order in February, 1964, that he learned that he had been named in the order to cease and desist. However, in this regard, the record discloses that on September 12, 1962, petitioner was personally served with a copy of the hearing examiner's order correcting an error in the initial decision and that service was

effected at the offices of the Waltham Watch Company in New York City. Also, as shown by the record, a copy of the initial decision and the order correcting an error therein were served upon petitioner on September 14, 1962, by delivery thereof to the receptionist of the Waltham Watch Company at its place of business in New York City. Petitioner does not make specific reference to the service of these documents and the evidence of such service would appear to refute his contention that he was unaware that he had been named individually in this proceeding until after issuance of the Final Order.

As a second grounds in support of his request, petitioner states that contrary to the admission in the answer, he had nothing to do with formulating or controlling sales policy of the corporate respondent of which he was an official. In support of this contention, petitioner has submitted two affidavits. One of these is by a former official of Benrus who left the employment of that company before issuance of the complaint. The other is that of the private secretary to Mr. S. Ralph Lazrus who was an official of Benrus until his death in September, 1959.

Affiants state that the title accorded to petitioner as a vice president in charge of sales did not vest in him the right or duty to formulate or control policy. Affiants base their statements on the asserted belief that the policies of Benrus were under the sole supervision and jurisdiction of Mr. S. Ralph Lazrus. That this is not an accurate premise, however, is evidenced by the testimony of two Benrus officials, who are named in the order in their individual capacities, which establishes that they also formulated, directed and controlled the acts and practices of the company.

As stated in the petition, petitioner engaged an attorney to file an appeal to the United States Court of Appeals, requesting that the order be set aside as to him in his individual capacity. In support of his argument, petitioner alleged in his appeal brief that there is no evidence that he had any individual responsibility for any of the practices involved, and that he severed his connection with Benrus in 1959. The court held that counsel supporting the complaint had a right to rely on the admission in the answer and that it was not erroneous to include petitioner in the order even though he had nothing to do with Benrus policies at the time of his petition, if he occupied a policy making or directing position during the period of the violations charged in the complaint. Petitioner raised no issue before the court concerning the validity of service of the complaint nor did he allege that he was unaware that he was named individually until after the date of the Final Order. Moreover, as pointed out by the court, petitioner's pleading

did not actually deny that he was engaged in formulating, directing and controlling Benrus policies and practices prior to issuance of the complaint.

Petitioner does not rely on a changed condition of fact or law in support of his request. Under the foregoing circumstances, and considering the evidence of record negating the grounds advanced by petitioner, it is the Commission's opinion that reopening this proceeding for the purpose of setting aside the order as to petitioner is not warranted in the public interest and that petitioner's alternative request for a hearing for the purpose of receiving additional evidence is not justified. Accordingly, the petition is denied and an appropriate order will be entered.

Commissioner Elman did not concur.

ORDER DENYING PETITION

This matter having come before the Commission upon petition by respondent Clifford L. J. Siegmeister, filed January 5, 1967, requesting that the order issued on February 28, 1964 [64 F.T.C. 1018], be set aside as to him in his individual capacity, and upon an answer in opposition thereto filed by the Director, Bureau of Deceptive Practices; and

The Commission for the reasons stated in the accompanying opinion, having determined that petitioner's request should be denied:

It is ordered, That the petition filed by Clifford L. J. Siegmeister on January 5, 1967, be, and it hereby is, denied.

Commissioner Elman not concurring.

THE KROGER CO.

Docket 7464. Order, March 1, 1967

Order remanding case to hearing examiner for the purpose of exploring possibilities for a settlement.

ORDER OF REMAND

On February 15, 1967, the hearing examiner certified to the Commission various motions filed by respondent. The examiner's certification contains the following general recommendation:

In view of the longevity of this case, the admitted need for additional information, and the prospects that this matter will not be ripe for hearings in the near future, the hearing examiner suggests that it might be fruitful to

delay action on the three motions for 30 days to explore the possibilities of a settlement. In this connection, it should be noted that no such opportunity was afforded respondent prior to the August 10, 1966, amendment of the complaint. Furthermore, a consent order has been recently accepted by the Commission *In the Matter of Winn-Dixie Stores*, Docket No. C-1110, September 14, 1966 [70 F.T.C. 611], which might form the basis for a settlement here. Finally, the Commission on January 17, 1967, announced its "Enforcement Policy with Respect to Mergers in the Food Distribution Industries" which referred to its prior actions in the *Winn-Dixie* and other food cases. By its announcement, the Commission spelled out "*its future enforcement policy in this important area.*" [Emphasis added.] Since respondent's most recent acquisition took place prior to these significant developments, settlement discussions would not appear to be inappropriate.

Accordingly, without at this time reaching or determining the questions presented by the motions certified to the Commission,

It is ordered, That this matter be, and it hereby is, remanded to the hearing examiner for the purpose of exploring the possibilities of a settlement, and that the hearing examiner report to the Commission in thirty (30) days as to the status of such discussions.

Commissioner MacIntyre not participating.

CROWELL-COLLIER PUBLISHING COMPANY ET AL.¹

Docket 7751. Order and Opinion, Mar. 3, 1967

Order denying respondents' appeal from the hearing examiner's denial of motion to quash certain subpoenas.

OPINION OF THE COMMISSION

This matter is before the Commission on respondents' appeal from the hearing examiner's denial of respondents' motion to quash certain subpoenas issued at the request of counsel supporting the complaint.

Respondents' motion to quash giving rise to this appeal was filed on December 6, 1966, and denied by the examiner on January 9, 1967.² Three of the subpoenas challenged on this motion are subpoenas *ad testificandum* directed to three officers of the respondents. A fourth seeks documents from one of the respondents.³

¹ Now Crowell Collier and Macmillan, Inc.

² Since we have considered this matter on its merits, it is unnecessary to decide whether this appeal is pursuant to the Rules of Practice in effect at the time of the issuance of complaint, or those presently in existence.

³ Subpoenas *ad testificandum* were issued for Mr. John Boe, president of Crowell Collier and Macmillan, Inc.; Mr. Norman Bennett, president of P. F. Collier, Inc.; and Mr. John G. Ryan, a former official of respondent P. F. Collier & Son Corporation. A subpoena *duces tecum* was issued for Mr. E. M. Harris, secretary of Crowell Collier and Macmillan, Inc. Other subpoenas which were issued at the request of complaint counsel have now become moot by the substitution of new witnesses or the issuance of duplicate subpoenas.

Complaint counsel has also stated that he proposes to request subpoenas *ad testificandum* for representatives of Standard and Poor's, Moody's, the Copyright Office of the Library of Congress and The Washington Post and a subpoena *duces tecum* for a representative of the National Better Business Bureau.⁴ Respondents and complaint counsel jointly request that the Commission consider on this appeal the extant subpoenas as well as those proposed by complaint counsel.

Respondents' motion to quash the subpoenas is based on two grounds: (1) the remand to the examiner is illegal; and (2) the subpoenas are beyond the scope of the remand order.

Preliminary to a consideration of the validity of the grounds urged by respondents in support of their motion to quash, it is necessary to review briefly the circumstances of this remand proceeding. This matter was remanded on September 30, 1966, after the Commission's consideration of the appeal of counsel supporting the complaint from the initial decision of the hearing examiner dismissing the complaint. The Commission in its remand opinion found that respondent P. F. Collier & Son Corporation had made the misrepresentations charged in the complaint and that an order to cease and desist was necessary. The Commission reserved its determination on the liability of respondent Crowell-Collier Publishing Company and on the liability of P. F. Collier, Inc., as the alleged successor to respondent P. F. Collier & Son Corporation. Further hearings were ordered to determine this limited issue of liability.

On November 3, 1966, in accordance with the mandate in the remand opinion for expeditious disposition, the examiner contacted counsel for each side requesting a pre-hearing conference and the submission by counsel of a memorandum "setting forth the issues in connection with the remand, the names of the witnesses, the nature of their testimony, and the documents that he intended to employ" (Tr. 3676). Counsel supporting the complaint complied on November 16, 1966. Respondents, however, refused to comply or to agree to any procedure to be followed during the hearing, contending that the entire remand proceeding was illegal (Tr. 3680). In view of respondents' position, the examiner ruled that he would not bind complaint counsel to the witnesses and matters

⁴ The return dates of all of the subpoenas have expired as a result of respondents' appeal. Respondents state on their appeal that they are assuming, without conceding, that the subpoenas are still outstanding but in any event wish to have a decision on the subpoenas to guide them in the hearings as they progress. We agree that the issue raised by respondents in respect to these subpoenas is not moot, whether or not the subpoenas may have to be re-issued.

set forth in the pretrial memorandum (Tr. 3690).⁵ Respondents' instant motion to quash was filed on December 6, 1966.

Respondents challenge the legality of the remand on the ground that the issues have already been tried once, and that the evidence initially submitted did not support a finding of liability; hence, according to respondents, complaint counsel should not be afforded an opportunity to supplement the evidence.⁶ In effect, respondents argue that the Commission prejudged the issue, found liability, concluded that the evidence was insufficient to support its conclusion and remanded the matter to obtain sufficient evidence. Thus, respondents conclude, the remand is illegal as an abuse of discretion (Resps. App. Br. p. 3). We do not find any support either in law or in logic for this argument.

The right of an administrative agency to return a matter for further proceedings by its hearing examiners is well established. *Federal Trade Commission v. Weingarten*, 336 F. 2d 687 (5th Cir. 1964), *cert. denied*, 380 U.S. 908 (1965), *Deering Milliken, Inc. v. Johnston*, 295 F. 2d 856 (4th Cir. 1961). The courts are clear that questions of remand are within the broad discretion of the agency in discharging its adjudicative responsibility and that the courts should not interfere in this process except in extraordinary situations.

In *Deering Milliken, Inc.*, the court in limiting the scope of the District Court's injunction against any further remand hearings by the National Labor Relations Board, stated:

we think a court should not interfere with the Board's processes to the extent that in any view additional hearings and additional evidence might have been reasonably regarded by the Board as of assistance to its administrative procedures and not unduly oppressive (295 F. 2d 868).

In *Weingarten*, the circuit court set aside the injunction obtained by respondent from the District Court against remand proceedings ordered by the Commission holding that:

we think it would be the extremely rare case where a court would be justified in holding—as *Weingarten* urges us to do here—that the passage of time and nothing more presents an occasion for preemptory intervention of an outside court in the conduct of an agency's adjudicative proceedings (336 F. 2d 692).

⁵ The day prior to this pretrial hearing, November 15, respondents filed a motion with the examiner to certify the matter to the Commission for clarification of the remand order. The examiner denied the motion on November 16. On November 23, respondents filed an interlocutory appeal with the Commission from this ruling, which appeal was denied by the Commission on December 6, 1966.

⁶ It should be noted that respondents are raising this issue for the first time before the Commission. Respondents did not question the legality of the remand on their earlier appeal to seek clarification of the remand order.

In setting aside the injunction, the Court specifically held that the Commission's remand did not constitute prejudgment of an issue already tried before the examiner and could not on that ground be held to be illegal. The Court further observed:

it was not prejudgment at that stage for the Commission to indicate some likely, even though tentative views. * * * With the record in this stage of development, the Commission's action shows no prejudgment. On the contrary, it shows the Commission's careful regard for the protection of the rights of both Weingarten and the public in its insistence on evidence which not only pointed the finger accusingly at the respondents, but qualitatively afforded a reliable basis for a final adjudication. 336 F. 2d 395.

No case has ever suggested that a remand may take place only upon a showing that evidence to be adduced on the remand could not have been adduced at the original hearing. Indeed in *Weingarten* the evidence to be adduced was clearly available at the original hearing from witnesses who had testified. In *Deering Milliken, Inc.*, the court specifically stated that an agency may remand for additional evidence which it reasonably regards to be of "assistance" to its proceeding (295 F. 2d 868).

Nor do we find any support for respondents' argument in the two cases relied upon by them.⁷ Neither of these cases involved the action of an administrative agency remanding a proceeding to obtain further evidence on which to render a decision on a pending matter.

In sum, we find no merit in respondents' contention that the remand is illegal.

Respondents' second ground for quashing the subpoenas is that they exceed the scope of the remand order as they go beyond the introduction of the specific documentary evidence referred to by the Commission in its opinion as not having been offered in proper probative form. Respondents also argue that by the same token it is improper and outside the scope of the remand to call any witnesses except those representing Poor's and Moody's which publish the documentary evidence which respondents claim is the sole subject of the remand. Respondents' interpretation of our

⁷ *Southport Petroleum Company v. NLRB*, 315 U.S. 100 (1942) held that it was not error for the Circuit Court of Appeals, from whom the Board had sought enforcement of its order prohibiting certain unfair labor practices, to refuse to remand the matter to the Board to allow Southport to introduce evidence indicating that the original corporation had been dissolved and that the new one was not subject to the order. The court observed that Southport's change in corporate status was nothing more than "a disguise intended to evade the provision" of the order and this was a matter for the Circuit Court to decide in enforcing the order (315 U.S. 106). *Gladstone-Arcuni*, Docket 8664, Order Denying Permission to File Interlocutory Appeal, November 17, 1966 [70 F.T.C. 1831], held that the hearing examiner had not abused his discretion in refusing to reopen a hearing to allow respondents to introduce evidence relating to another case.

opinion and remand order is erroneous. Our opinion is not limited as counsel now argues. In our opinion we stated:

It should be explicitly understood that at this remand hearing the burden is on counsel supporting the complaint to submit in probative form evidence to which reference was made during the appeal *and such other evidence as the hearing examiner may consider appropriate* (Opinion, p. 8; emphasis added) [70 F.T.C. 977, 1010].

It is therefore clear that the remand proceeding is not limited solely to the documentary evidence as respondents are contending.

Respondents further argue that the number and scope of the subpoenas demonstrate that they generally exceed the limited remand intended by the Commission and also cite specific requests in the subpoenas *duces tecum* as being improper. It should again be noted that respondents refused to comply with the examiner's prehearing request that the parties exchange memoranda setting forth the issues in connection with the remand, the names of the witnesses, the nature of their testimony and the documents to be employed. Their refusal has placed complaint counsel in the difficult position of having to assume that respondents are unwilling to agree to any facts whatsoever and that he will be put to his proof on each of the factual issues involved in establishing the corporate history and responsibility of the respondent parent corporation and its various corporate subsidiaries.

The examiner, after hearing arguments for issuance of the subpoenas and considering respondents' objections thereto, concluded that the subpoenas were within the scope of the remand, relevant to the issues involved and that compliance would not be unduly burdensome. The Commission has consistently stated that the conduct of adjudicative proceedings is primarily the responsibility of the hearing examiner whose rulings on evidentiary and procedural matters should not be disturbed in the absence of unusual circumstances. *L. G. Balfour*, D. 8435, Order Directing Disclosure of Documents, May 10, 1963 [62 F.T.C. 1541]; *American Brake Shoe Company*, D. 8622, Order Denying Appeal From Denial of Application for Deposition and Subpoenas, September 1, 1965 [68 F.T.C. 1169]; *Associated Merchandising Corp.*, D. 8651, Order Denying Request for Permission to File Interlocutory Appeal, February 2, 1967 [p. 1616 herein].

The Commission will not under the circumstances of this appeal substitute its judgment for that of complaint counsel in determining which witnesses should be used in the presentation of his case. We feel that on issues which are hotly contested and where the facts must be adduced from respondents' officers, complaint

counsel must be permitted a certain leeway and flexibility in evaluating what proof must be adduced especially where it can be expected, as here, that the witnesses may be hostile.

The witnesses which are the subject of complaint counsel's subpoenas include three of respondents' officers and a former officer who can be expected to have direct knowledge of the respondent corporations' history and relationships, facts which are central to the remand proceeding. The other witnesses consist of persons who in their official or business capacities have knowledge relevant to the purposes of the remand.

Respondents have not demonstrated that the examiner abused his discretion by issuing the subpoenas or denying the motion to quash. The mere issuance of the subpoenas themselves does not support respondents' position. We cannot find any reason to assume that the witnesses which complaint counsel seek to call are not necessary in order to enable counsel to comply with the remand order.

Accordingly, we agree with the examiner's conclusion that the subpoenas are within the scope of the remand order.

Respondents also challenge the subpoenas on the ground that they are vague, unreasonable and oppressive. Specifically, respondents challenge certain items in the subpoenas *duces tecum* issued to the National Better Business Bureau as oppressive insofar as it seeks correspondence from 1950 to the date of the subpoena, between the Bureau and respondents, "relative to the sales approach used in the sale of Collier's Encyclopedia" (Resps. App. Br., p. 6). Assuming without deciding that respondents have standing to challenge a subpoena issued to a third party, we find no validity in respondents' contention. Complaint counsel's theory in this proceeding is that the entire Crowell-Collier complex is a single operation irrespective of the change in the individual corporate identities of subsidiaries and that this is demonstrated by the continuity in the sale of the same publication, under the same name, from the same offices and utilizing essentially the same sales methods. The liability of the various respondents, all of whom are in some way connected to the Crowell-Collier corporate family, for the misrepresentation found to have been made in this case, is the central issue on this remand. Correspondence between the National Better Business Bureau and respondents, transcending the various changes in the corporate identity of the subsidiaries, certainly cannot be said at this stage to be irrelevant to this issue to be determined by the remand. Nor do we construe this subpoena as vague, unreasonable or oppressive. The request is specific as to the data desired, and in our opinion is neither oppressive or un-

reasonable. Further, if compliance with the request presents difficulties, it would appear to be a matter to be raised by the National Better Business Bureau, and not respondents herein.

We do not feel that the examiner erred in issuing this subpoena or in refusing to grant respondents' motion to quash.

Respondents assert additionally that the subpoena *duces tecum* issued to the Secretary of Crowell Collier and Macmillan, Inc., is improper in that the first six items on Schedule A of the subpoena exceed the scope of the "limited remand" and that the last three items are "unreasonable, vague and oppressive."

This subpoena seeks to elicit the history of the parent corporation and its subsidiaries, including changes in name, the establishment and dissolution of the subsidiaries and the identities of certain officers of the corporations. It would appear that such record facts could easily have been stipulated by the parties. Nevertheless, respondents by their own action have refused to comply with the hearing examiner's request to submit a memorandum delineating the fact issues which they will contest and otherwise cooperate in the expeditious disposition of the matter. Complaint counsel has determined apparently, therefore, that the most expeditious way of ascertaining this information is by calling witnesses from respondents' business who have these facts readily at hand.

The enumerated items of the subpoenas *duces tecum* are clearly directly relevant to the purpose of the remand.

We have only respondents' rather vague assertion as part of its argument, that the material called for in the first six items of Schedule A covers a period of 60 years. This assertion in respondents' brief cannot substitute for the specific showing which must be made if allegations of oppressiveness are to be upheld by us. We assume that the evidence will be confined to periods which the examiner believes are relevant to the remand proceeding. We cannot determine this question on this appeal and do not believe respondents have made any showing that the subpoena is outside the remand or will be oppressive.

Respondents challenge the last three items of this subpoena on the ground that they too are "unreasonable, vague and oppressive." In support of their argument, respondents simply call upon the Commission to read the items. We have done so as did the hearing examiner. He concluded that the subpoenas were reasonable. Our attention has not been drawn to any facts which would cause us to interfere with his judgment. Certainly our own reading of these items does not require the conclusion that the subpoenas on their face are unreasonable or oppressive. The material sought appears

to be directly relevant to the issue of successorship, which is one of the central objects of the remand proceeding. Certainly, there is nothing vague in the specification. The information sought is precisely delineated.

We conclude that the subpoena *duces tecum* issued to the Secretary of Crowell Collier and Macmillan, Inc. neither exceeds the scope of the remand nor is "vague, unreasonable or oppressive."

The examiner has demonstrated a desire to implement the Commission's mandate for an expeditious disposition of this proceeding and has made every effort to utilize the usual pretrial procedures to reach agreement where the issues are incontrovertible and to restrict the evidentiary hearing to the contested issues. The reasonableness of complaint counsel's request for subpoenas and the examiner's rulings thereon must be considered in light of the circumstances that exist.

In originally remanding this matter for the limited purpose of determining the liability of the parties involved, it was the opinion of the Commission that this was the most expeditious means of disposing of the proceeding. The issue of deception which had required the bulk of the original hearings, has been resolved and is not involved in this remand proceeding. Should respondents reconsider their prior decision and cooperate with the examiner, it is possible that some parts of these subpoenas might not be necessary. The Commission is confident that the examiner will continue to make every effort to bring this matter to an early disposition through continuous hearings and such other means as appear feasible so that the matter can be expeditiously returned to the Commission for final disposition.

In our opinion, the examiner did not abuse his discretion in the issuance of the subpoenas or in his denial of the motion to quash. We deny the appeal and sustain the examiner in his decision.

An appropriate order will be issued.

Commissioner Elman did not concur, and Commissioner MacIntyre did not participate.

ORDER DENYING RESPONDENTS' APPEAL FROM THE DENIAL BY THE
HEARING EXAMINER OF RESPONDENTS' MOTION TO QUASH
CERTAIN SUBPOENAS*

On September 30, 1966, this matter was remanded for further hearings on the liability of the parties involved. The hearing examiner at the request of counsel supporting the complaint issued certain subpoenas ad testificandum and *duces tecum*.

*Now Crowell Collier and Macmillan, Inc.

Respondents moved to quash the subpoenas. Upon the hearing examiner's denial of this motion, respondents on January 23, 1967, filed an appeal with the Commission. On February 2, 1967, counsel supporting the complaint filed an answer in opposition to the appeal. Counsel for both sides have jointly requested that the Commission consider at this time not only the extant subpoenas, but also certain enumerated subpoenas which counsel supporting the complaint plans to request. We have granted this request and our decision herein is dispositive of all of the subpoenas.

The Commission, for the reasons set forth in the accompanying opinion, has concluded that nothing in the hearing examiner's denial of the motion to quash constitutes an abuse of discretion, and

The Commission being of the opinion that respondents have submitted no basis for quashing any of the subpoenas,

It is ordered, That the appeal of respondents, filed January 23, 1967, be, and it hereby is, denied.

Commissioner Elman not concurring. Commissioner MacIntyre not participating.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Mar. 3, 1967.

Order denying respondent's application for transfer of case to the Department of Justice.

OPINION OF THE COMMISSION

Respondent has filed an application requesting that the Commission transfer this proceeding to the Department of Justice "for such further action as may be just." In support of its application, respondent argues that such a transfer "would purge this proceeding of any taint from the Commission's pretrial publicity, simultaneous industry-wide investigation, promulgation of an enforcement policy and conduct of an adjudicative proceeding * * *."

Respondent's contentions with respect to the alleged prejudicial nature of the Commission's industrywide proceeding were disposed of in our opinion and order of February 6, 1967 [p. 1618 herein], denying respondent's motion to vacate the complaint herein. We adhere to the views expressed in that opinion, and there is no need to repeat them here.

Respondent has added to its previous arguments the claim that the Commission engaged in prejudicial pretrial publicity by issuing

press releases, a staff economic study, and a statement of enforcement policy involving vertical mergers in the cement industry. In our view, none of these documents contains any material prejudicial to respondent. The issuance of appropriate press releases, staff economic reports, and statements of enforcement policy is necessary to inform the public, the bar, and industry members of the Commission's actions and determinations. We find respondent's application wholly without merit, and it is denied.

Commissioner MacIntyre did not participate.

ORDER DENYING APPLICATION FOR TRANSFER OF PROCEEDING

Upon consideration of respondent's application for transfer of this proceeding to the Department of Justice, filed on February 16, 1967; and for the reasons stated in the accompanying opinion,

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

Commissioner MacIntyre not participating.

THE CROWN CORK & SEAL COMPANY, INC.

Docket 8687. Order, Mar. 3, 1967

Order directing General Counsel of FTC to take appropriate action to enforce replies to issued subpoenas.

ORDER DIRECTING ENFORCEMENT OF SUBPOENAS DUCES TECUM

The hearing examiner at the instance of respondent herein having on October 11, 1966, issued subpoenas to Continental Can Company, Inc., National Can Corporation and American Can Company requiring the production of certain information and material necessary to respondent's defense to the charges contained in the Commission's complaint of May 31, 1966, and

The Commission on January 13, 1967 [p. 1610 herein], having denied the appeal of Continental Can Company, Inc., from the hearing examiner's denial of motion to quash said subpoena duces tecum, and National Can Corporation and American Can Company having stipulated with respondent to make returns to the extent required of Continental Can Company, Inc., and

The hearing examiner on January 26, 1967, having ordered that returns be made on February 20, 1967, by Continental Can Company, Inc., National Can Corporation and American Can Company on the above-mentioned subpoenas, and

The hearing examiner on February 24, 1967, having certified to the Commission that Continental Can Company, Inc., National

Can Corporation and American Can Company having failed to comply with his order of January 26, 1967, are in default of making return upon the above-mentioned subpoenas, and

The Commission being of the opinion that the hearing examiner acted properly in refusing to extend to Continental, National and American as a condition precedent to their compliance with the above-mentioned subpoenas a prior commitment to place *in camera* whatever records supplied by them in response to the above-mentioned subpoenas are hereinafter offered in evidence,

It is ordered, That the General Council of the Federal Trade Commission be, and he hereby is, directed to immediately take appropriate steps looking toward the enforcement of said subpoenas.

ROXBURY CARPET COMPANY ET AL.

Docket 7637. Order and Opinion, Mar. 13, 1967

Order denying respondents' motion that the effective date of this cease and desist order be stayed.

OPINION OF THE COMMISSION

This matter is before the Commission upon motion filed by respondents on January 9, 1967, requesting that the effective date of the order issued on February 10, 1964 [64 F.T.C. 787], be stayed. The Director, Bureau of Restraint of Trade, has filed an answer in opposition to the motion.

Respondents are one of a group of ten rug and carpet manufacturers against whom the Commission simultaneously issued complaints on October 28, 1959, charging a violation of Section 2(a) of the Clayton Act. Prior thereto, on February 26, 1959, the Commission had issued complaints charging two other members of this industry with violating Section 2(a). On April 5, 1960, respondents entered into an agreement containing a consent order which was subject to the condition that the initial decision based thereon would not become the decision of the Commission until the Commission disposed of the other eleven related cases by orders to cease and desist in substantially the same form as set forth in the agreement, or by other appropriate order to cease and desist or of dismissal. The Commission issued an order adopting the hearing examiner's initial decision containing the consent order, and on April 2, 1964 [64 F.T.C. 787, 793], it issued an order which,

in effect, stayed the date for filing a report of compliance until January 12, 1967.

In the motion before us, respondents state that they have filed a petition and on information and belief aver that other manufacturers of rugs and carpets have also filed petitions, requesting the Commission to initiate a trade regulation rule proceeding for the rug and carpet industry. The purpose of respondents' present motion is to request the Commission to stay the effective date of the order until the Commission determines whether to initiate the trade regulation rule proceeding and, in the event it decides to proceed, to stay the effective date of the order until conclusion of such proceeding.

As stated by the Supreme Court, the Commission's obligation under the statute is "to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958).

It was in recognition of this statutory obligation that the Commission determined to issue complaints against twelve of the largest manufacturers in the rug and carpet industry in 1959. Respondents were well aware of the initiation of the proceedings against eleven of its competitors and in consenting to an order to cease and desist, agreed to be bound by the order even though the proceedings as to their competitors could be dismissed.

There is no contention in the motion before us that the Commission abused its discretion in enforcing the statute by proceeding against twelve manufacturers in the rug and carpet industry. Respondents' request is grounded on the assertion that price competition is extremely keen and that they and the other manufacturers now under order will have to vary prices in order to meet the competition of the more numerous manufacturers not subject to orders. Respondents further assert that in light of the pricing policies pursued by other manufacturers, they are placed at an extreme competitive disadvantage by the order.

Respondents have submitted no information or documentary evidence in support of their assertion concerning the pricing practices of other manufacturers. They do, however, state in their petition for a trade regulation rule accompanying their motion, that the situation with which they are concerned is due in part to the "drastic change in industry technology in recent years."

In the Commission's opinion, respondents' general assertions are not sufficient to warrant a conclusion that the effective date of their order should be stayed. We think it obvious that one of the several

essential preconditions even to consider whether it would be appropriate to exercise our discretion to stay enforcement of the orders would be specific information as to the nature and extent of the alleged pricing practices of other manufacturers and a showing that enforcement of these orders would place respondents at a serious competitive disadvantage. Moreover, it is to be noted that the trade regulation rule proceeding requested by respondents has been available since June 1962. Respondents have been aware for some time that they would be required to comply with their order. Their failure to raise any issue concerning industry pricing practices until this time militates against a conclusion that an immediate stay of the order is required to prevent serious competitive injury.

As previously noted, respondents and other manufacturers under order have filed petitions requesting a trade regulation rule proceeding. These petitions are presently under consideration. In determining whether a trade regulation rule proceeding should be initiated and in the course of such proceeding, if commenced, relevant facts upon which to base a decision as to the likelihood of competitive injury will be developed. On the basis of these facts, the Commission can then determine, in the exercise of its administrative discretion, whether a stay of the order or other relief is warranted.

For the foregoing reasons, respondents' request that the effective date of the order be stayed is denied. An appropriate order will be entered.

Commissioner Elman did not concur.

ORDER DENYING MOTION TO STAY EFFECTIVE DATE OF ORDER

This matter having come before the Commission upon motion by respondents, filed January 9, 1967, requesting that the effective date of the order to cease and desist be stayed, and upon an answer in opposition thereto filed by the Director, Bureau of Restraint of Trade; and

The Commission for the reasons stated in the accompanying opinion, having determined that the motion should be denied:

It is ordered, That respondents' motion, filed January 9, 1967, be, and it hereby is, denied.

Commissioner Elman not concurring.

THE SEEBURG CORPORATION

Docket 8682. Order, Mar. 27, 1967

Order making available to respondent a list of accepted bottle vending machines issued by Coco-Cola, dated March 1, 1965.

ORDER DIRECTING PRODUCTION AND RULING ON REQUEST FOR
PLENARY CONSIDERATION OF CERTIFICATION

This matter is before the Commission upon the hearing examiner's certification of complaint counsel's refusal to make certain documents available to respondent, filed February 3, 1967, except as that certification has been withdrawn by a subsequent submittal filed by the examiner February 10, 1967. The certification, as amended by the withdrawal, brings to the Commission the solitary issue of whether or not complaint counsel should produce for respondent a document identified as a list of accepted bottle vending machines issued by Coca-Cola, dated March 1, 1965. The hearing examiner has recommended that this document be made available.

The examiner also, without recommendation, has attached to his submission of February 10, 1967, respondent's request for plenary consideration by the Commission of the certification by the hearing examiner concerning Commission policies as to confidential files. This same request was also filed with the Commission February 6, 1967. Complaint counsel, on February 13, 1967, filed a statement with respect to the hearing examiner's February 3, 1967, certification dealing with both respondent's motion for the production of documents and respondent's request for plenary consideration by the Commission.

The Commission originally considered respondent's demand for production of documents in the Commission's confidential files on the examiner's certification of October 3, 1966, recommending denial thereof for failure to make the showing required by § 1.134 of the Commission's Rules of Practice. The request included documents relating to activities of bottlers, soft drink syrup manufacturers and vending machine manufacturers. The Commission, in an order issued October 25, 1966 [70 F.T.C. 1809], denied respondent's request. Respondent appealed this order, and its action for declaratory judgment and relief in the nature of mandamus was dismissed by the court. *The Seeburg Corporation v. The Federal Trade Commission* (U.S.D.C. E.D. Tenn. 1966). Later, on December 15, 1966, respondent filed a renewed motion for the production of documents, which was certified to the Commission

on December 19, 1966. The Commission denied such motion by an order issued February 8, 1967 [p. 1633 herein].

In the meantime, the examiner made detailed findings and rulings concerning the production of documents in the possession of complaint counsel. These findings and rulings are attached to the examiner's certification and are identified as Appendixes A and B. Therein the examiner systematically considers each of the documents or categories of documents requested and states his ruling as to whether or not such should be produced. There apparently is no issue before the Commission as to the documents which the examiner ruled need not be furnished.¹ The question of production is now one of narrow scope. The examiner states in his submission of February 10, 1967, partially withdrawing his prior certification, that complaint counsel have made available all the documentation in question except for two lists by Coca-Cola, one of which is reported to be now in the possession of respondent's counsel. The other is the aforementioned Coca-Cola list of accepted bottle vending machines, dated March 1, 1965.

With reference to the latter document, the hearing examiner states in Appendix A attached to his certification of February 3, 1967, that there is no longer anything secret or confidential about it "since public record evidence has already been received without objection relating to such acceptances." He found that the document might serve some purpose insofar as respondent's defense is concerned and he therefore directed production under *in camera* procedures. While it is not clear that respondent has made the requisite showing of "good cause" for the production of the document in question, nevertheless, in the circumstances, we will direct that it be made available.

We see no need at this time to further consider the issues raised by respondent in its request for plenary consideration. We believe that these issues have been largely rendered moot by the later access to records provided by complaint counsel in response to the hearing examiner's rulings. Accordingly,

It is ordered, That complaint counsel make available to the respondent, for its information and use, under such conditions as the examiner may provide, the list of accepted bottle vending machines issued by Coca-Cola dated March 1, 1965.

It is further ordered, That respondent's request for plenary consideration be, and it hereby is, denied.

¹ Respondent's request for plenary consideration of Commission policies as to confidential documents does not seem to raise objections to the rulings of the hearing examiner to date, which rulings, in effect, have granted in part and denied in part its requests for production.

ISRAEL RETTINGER ET AL. DOING BUSINESS AS
RETTINGER RAINCOAT MFG. CO.

Docket 6534. Order and Opinions, Apr. 7, 1967

Order denying respondent's motion to reopen proceeding and modify the order.

DISSENTING OPINION

BY ELMAN, *Commissioner*:

What is involved here is essentially a private controversy between The Goodyear Tire & Rubber Company of Akron, Ohio, a billion-dollar corporation, and a small company that has been using "Goodyear" on its raincoats since 1911. In 1888, in *Goodyear India Rubber Co. v. Goodyear Rubber Co.*, 128 U.S. 598, the Supreme Court held that "Goodyear" is a generic name in the public domain. Subsequent to that decision, many companies (including most of the rainwear industry) have been using the term "Goodyear." Goodyear of Akron is now embroiled in private litigation with respondent and others, claiming infringement of private trademark rights. I do not think it is in the public interest for this Commission to intervene in such essentially private controversies. The point was made more than forty years ago by Gerard Henderson in his classic study, "The Federal Trade Commission" (1924):

The argument is sometimes made that there is a legitimate place for the Federal Trade Commission in cases of this sort, as the protector of the weak against the strong. A large corporation, it is said, can hire eminent lawyers and experts, and prolong the litigation until the strength and resources of the small competitor, whose private brand the corporation is trying to appropriate, have been exhausted. The difficulty with this argument is that, in the cases in which complaints have been issued, the object has as often as not been to protect a large, nationally known company against a small but unscrupulous competitor. Among the companies for whose protection such complaints have been issued are the * * * Goodyear Tire & Rubber Company, * * *. These companies would hardly admit that they were applying, *in forma pauperis*, to have the Government assume the expense of their private litigations.

* * * * *

Where the deceptive brand or name, or the misleading advertisement, is designed to lead customers to confuse respondent's product with the product of a specific competitor, there is a remedy in the courts of law and equity which is more prompt and more efficacious than the cumbersome procedure of the Commission. * * * In such cases it would seem that the person injured should be made to pursue his remedy in a private litigation, and that public funds should not be expended by a governmental agency to relieve him of that burden. (Pp. 174-75, 228.)

More recently, a perceptive observer of the Commission has made the same point:

Where the Commission intervenes in an essentially private controversy, it effectively relieves one of the prospective parties of the financial burden of the litigation and presents the other party with an adversary of practically unlimited means. The public thus subsidizes some private litigants at random to the detriment of others, and sometimes in the pursuit of unmeritorious causes. Moreover, the course of the litigation is distorted. What the Commission may see as an appropriate remedy may well differ from what a court would have imposed or what the private parties would have accepted in settlement. (French, *The Federal Trade Commission and the Public Interest*, 49 Minn. L. Rev. 539, 545 (1965).)

SEPARATE CONCURRING STATEMENT

BY REILLY, *Commissioner*:

I am in agreement with the Commission majority that respondents' petition to reopen should be denied. If the Commission in eliminating deceptive representations incidentally benefits a private party, I can think of no useful purpose being served by focusing attention on the incidental rather than the principal effect and insisting that the Commission has immersed itself in a private controversy.

Simply stated, the Commission in the present instance is fully aware that the Goodyear Tire & Rubber Company of Akron, Ohio, is currently engaged in asserting trademark rights in a series of infringement actions directed against firms using the name "Goodyear" in connection with the sale of rainwear manufactured by them. The Commission as a body has neither stake nor official interest in this litigation. However, if the use by these firms of the name "Goodyear" deceives the public into buying their products in the mistaken belief that they were manufactured by Goodyear of Akron, the Commission has an obligation to act.

Whether or not Goodyear of Akron manufactures raincoats, the brand name "Goodyear" is advertised throughout the United States mainly in connection with tires but also in relation to other products. It is frequently advertised on an institutional basis wherein the name "Goodyear" is alone featured. A notable example of this, familiar to those attending sporting events, is the "Goodyear" blimp which carries no message beyond the name.

This advertising in the case of Goodyear, as indeed in the case of most manufacturers, emphasizes the claim of superior quality and it is not too much to suppose that those who buy a product emblazoned with the name "Goodyear" are responding to the ad-

vertising claim as applying as much to the name as it does to the product. To say "Goodyear" applies only to tires is to ignore the fact that the name "Goodyear" alone may suggest quality, that is, that it conveys an abstract impression of quality.

If the prospective buyer may respond to the name "Goodyear" under the mistaken assumption that the product has been manufactured by Goodyear of Akron, he may have been deceived, and that is what the Federal Trade Commission Act is designed to cure. It makes not the slightest difference that Goodyear of Akron has or has not a valid claim or can successfully press infringement suits against rainwear manufacturers using the name "Goodyear." It even makes not the slightest difference whether or not the name "Goodyear" stands for quality. It makes no difference that Goodyear does not make rainwear. If the public chooses a raincoat because it is led to believe it is made by Goodyear of Akron and it is not so made, the public is injured because it " * * * is entitled to get what it chooses though the choice may be dictated by caprice or by fashion or perhaps by ignorance." *F.T.C. v. Royal Milling Company*, 288 U.S. 212, (1933); *F.T.C. v. Algoma Lumber Company, et al.*, 291 U.S. 67, (1934).

It is not for the Commission to play Big Brother and to pick and choose which material facts are sufficiently crucial to the question of the public's judgment to demand adherence to the truth and which are sufficiently peripheral to permit dissimulation. *Double Eagle Refining Company v. F.T.C.*, 265 F. 2d 246, (C.A. 10 1959), *cert. den.* The Commission has long proceeded upon the principle that the public is entitled to know the facts with respect to a product and make its own judgment whether or not it wants to buy, however capricious and ill-advised that judgment may be. As the Commission said in its "Statement of Basis and Purpose" accompanying its Trade Regulation Rule on Cigarette Advertising and Labeling issued June 22, 1964, p. 89, " * * * Section 5 forbids sellers to exploit the normal expectation of consumers in order to deceive * * *."

ORDER DENYING MOTION TO REOPEN

This matter is before the Commission on respondent's motion to reopen the matter pursuant to the provisions of § 3.28(b) of the Commission's Rules of Practice and to modify the order to cease and desist, entered by consent on July 9, 1956 [53 F.T.C. 132]. The order prohibits respondent from "[u]sing the name 'Goodyear' unless in immediate connection therewith the name of the person, firm, or corporation manufacturing such merchandise and the fact

that such person, firm, or corporation is the manufacturer thereof, is clearly and conspicuously revealed."

The Commission, in an advisory opinion pursuant to the provisions of § 3.26(b), dated December 5, 1966, interpreted the order as prohibiting the use of the name "Goodyear" except where respondent's proper name, "Rettinger Raincoat Mfg. Co.," and the phrase "mfg. by" appeared in conjunction therewith. This interpretation superseded the interpretation given the order in 1956 by a letter from the Commission's General Counsel, wherein respondent was informed that the use of its trade name, "Lucky Rainwair," instead of its proper name constituted compliance with the terms of the order. Respondent, through its motion to reopen the proceeding and to modify the order, requests that the order be altered so that it would state that respondent is prohibited from "[u]sing the name 'Goodyear' unless in immediate connection therewith the name 'Lucky Rainwair' is clearly and conspicuously revealed."

Under § 3.28(b) of the Rules of Practice, a respondent who is subject to an order which has become final may, if he is of the opinion that "* * * changed conditions of fact or law require that said * * * order be * * * modified * * *", or that the public interest so requires," file a petition requesting reopening for that purpose. Respondent alleges that its decision to begin importing rainwear manufactured in Japan, a practice initiated after entry of the order herein, constitutes a change of fact sufficient to require reopening and modification. The change of law allegedly authorizing reopening and modification is the Commission's new interpretation of the terms of the order as expressed in the advisory opinion of December 5, 1966.

The requested modification of the order would alter entirely its basic effect and application. The use of the trade name "Lucky Rainwair" does not adequately reveal the name of the manufacturer of the product and the use of "by" instead of "mfg. by" does not put the purchasing public on notice that respondent is the manufacturer. Where modification of this nature is requested, the alleged changes of fact and law must be such as to render the underlying theory of the complaint inapplicable to the changed circumstances and make the order completely inappropriate. In addition, a change by the Commission in its interpretation of a consent order is not usually grounds for modification and is clearly not grounds in the absence of any indication that the consent agreement was predicated upon the original interpretation.

In the present case, the public interest in requiring disclosure of the name of the individual or company manufacturing the prod-

uct and the fact that such individual or company is the manufacturer has not changed. Thus, the underlying theory of the case is as equally applicable now as it was when the order was entered. The fact that respondent, after consenting to the order, began to import products from Japan does not affect the necessity for requiring the above disclosures on products of domestic manufacture. Thus, this change is not a basis for reopening this proceeding and modifying the order as it applies to domestic products. Moreover, there appears to be no reason to treat imported products differently by permitting respondent to substitute some other name for the name of the true manufacturer. In reply to respondents' objection that it should not be required to disclose the names of its Japanese sources, it should be noted that the order makes such disclosure necessary only when the name "Goodyear" is placed on such products. If respondent omits this name entirely and uses instead its trade name "Lucky Rainwair," the order has no application.

The agreement to entry of a consent order, as executed by respondent, contains no indication that it was predicated upon the understanding that the Commission would interpret the order in a particular manner. To the contrary, the Commission's present interpretation of the order is more nearly consistent with the wording of the order than was the original interpretation. Thus, the change in the Commission's interpretation of the order does not constitute grounds for reopening and modification.

For the foregoing reasons, the Commission concludes that respondent has failed to demonstrate that there are changed conditions of fact or law sufficient to warrant reopening of this proceeding for the purpose of modifying the order in the manner requested, and that the public interest does not so require. Accordingly,

It is ordered, That respondent's motion to reopen the proceeding and to modify the order be, and it hereby is, denied.

Commissioner Elman dissented and has filed a dissenting statement. Commissioner Reilly has filed a concurring statement.

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order, Apr. 7, 1967

Order granting respondent permission to file interlocutory appeals from examiner's order denying joinder of Phillips Petroleum Co.

ORDER GRANTING PERMISSION TO FILE INTERLOCUTORY APPEALS

Respondent having filed, on March 15, 1967, two petitions for leave to file interlocutory appeals, one requesting leave to file an

interlocutory appeal from the denial of its motion for a prehearing order establishing the burden as to cost justification and the other requesting leave to file two interlocutory appeals from the failure of the examiner to certify motions (a) for the joinder of Phillips Petroleum Company in the complaint and (b) for the dismissal of the complaint for the lack of public interest or, in the alternative, for the Commission to decide such motions *de novo* and complaint counsel, on March 22, 1967, having filed answers thereto; and

The Commission having determined that respondent has justified its request to file interlocutory appeals from the denial by the examiner of its aforementioned motions:

It is ordered, That respondent be, and it hereby is, granted permission to file interlocutory appeals from the examiner's order filed March 7, 1967, denying its motions requesting joinder of Phillips Petroleum Company in the complaint, dismissal of the complaint, and a prehearing order covering complaint counsel's burden on the issue of costs.

PACIFIC NORTHWEST COLLECTIONS, INC., ET AL.

Docket 8730. Order, Apr. 7, 1967

Order withdrawing complaint and affording respondents the opportunity to enter into consent order.

ORDER WITHDRAWING COMPLAINT*

Upon consideration of the hearing examiner's certification on March 23, 1967, of respondents' motion to waive the Commission's order of January 6, 1967 (treated by the examiner as a request to waive § 2.4(d) of the Commission's Rules), complaint counsel's answer thereto filed March 22, 1967, and respondents' reply filed March 24, 1967, the Commission has determined that the complaint should be withdrawn to afford respondents a period of thirty days from the service of this order to take advantage of the consent procedures provided for in Part 2 of the Commission's Rules. The complaint is withdrawn subject to immediate reissuance on the expiration of this period if the parties do not submit a satisfactory consent settlement to the Commission. The original notice of a proposed adjudicative proceeding dated September 15, 1966, shall

*See *In the Matter of Pacific Northwest Collections, Inc.*, Dkt. No. C-1287, dated Jan. 16, 1968, 73 F.T.C. 58.

satisfy the notice requirement under § 2.1 of the Rules. Accordingly,

It is ordered, That the complaint in this matter be, and it hereby is, withdrawn subject to reissuance in accordance with the conditions stated above.

It is further ordered, That respondents be, and they hereby are, afforded the opportunity to take advantage of the procedures provided by Part 2 of the Commission's Rules for a period of 30 days from the issuance of this order upon them.

THE CROWN CORK & SEAL COMPANY, INC.

Docket 8687. Order and Opinion, Apr. 10, 1967

Order directing General Counsel to take appropriate steps in the enforcement of the subpoena duces tecum against Continental Can Company, Inc., only.

OPINION OF THE COMMISSION

This matter is before us on memoranda submitted by third parties Continental Can Company, Inc., and American Can Company in answer to certification by the hearing examiner of non-compliance with subpoenas duces tecum served upon them in connection with the hearings herein.

The burden of Continental's memorandum is that the Commission should reexamine the matter before seeking enforcement because (1) the hearing examiner was in error in requiring compliance without a prospective grant of *in camera* treatment of material called for by the subpoena and (2) the Commission should alternatively consider the feasibility of resolving the problem involved herein by ordering the hearing examiner to direct that the Continental data be delivered to an accounting firm selected by the hearing examiner for consolidation with data from other firms comprising the relevant market and the presentation of the resulting aggregate values to respondent's counsel.

American in its memorandum alleges that the hearing examiner was in error certifying noncompliance because American, together with National Can Corporation, with the knowledge of the hearing examiner, has entered into a stipulation with respondent providing that they will produce documents upon the same terms Continental is compelled to produce them, that American Can Company stands ready to produce on these terms and is thus not in default.

In response to the hearing examiner's certification, and prior to the filing of the Continental and American memoranda, the

Commission by order dated March 3, 1967 [p. 1657 herein] directed the General Counsel to proceed for enforcement.

Because of the importance of the questions raised by these memoranda, the Commission is treating them as timely filed pleadings in opposition to the hearing examiner's certification.

The subpoenas to Continental, American and National are three of over 30 directed to third parties at the instance of respondent seeking data showing sales of cans, crowns and closures for purposes of delimiting what in respondent's opinion is the relevant line of commerce in this Section 7 case. The more than 30 other producers have already complied.

Continental originally filed a motion to quash which was denied by the Commission on January 13, 1967 [p. 1610 herein]. The hearing examiner thereafter ordered that return be made by Continental, American and National on February 20, 1967.

On the day appointed, Continental proposed that a stipulation be executed by it and the parties providing in essence that data furnished in response to the subpoenas be treated confidentially and that the parties join with Continental in asking the hearing examiner to enter an order providing that *in camera* treatment will be given any material furnished if and when it is placed in evidence. Although the parties, except for a minor objection by complaint counsel, were agreeable, the hearing examiner refused his consent on the stated ground that § 3.16(h) of the Commission's Rules providing for *in camera* treatment applies only in unusual and exceptional circumstances when good cause is found on the record and does not contemplate granting *in camera* treatment prospectively when the circumstances of its submission in evidence are not known and can only be speculated upon.

In response to the observations made in our opinion of January 13, 1967, accompanying the order denying motion to quash, the hearing examiner considered the feasibility of following the procedure set out in our opinion and order in *Mississippi River Fuel Corporation*, Docket No. 8657, June 8, 1966 [69 F.T.C. 1186], directing that data be submitted by Continental to an accounting firm for compilation and presentation of aggregate industry figures to respondent's counsel. The hearing examiner found this procedure unworkable because the question of relevant product line is at the present stage of the proceedings somewhat fluid, at least as far as its product composition is concerned, and because respondent has returns from 35 of the firms comprising various product universes and an accountant could not therefore effectively mask the sales figures of the remaining three.

The hearing examiner indicated at the hearing that he would

order that the data produced by Continental would be kept confidential prior to introduction into evidence and at the time of introduction he would consider whether to grant *in camera* status under § 3.16(h).

Continental declined to produce on these terms and the examiner's certification followed.

Continental's memorandum substantially restates the position it took at the hearing and still insists upon prospective *in camera* treatment for some of the data required in response to the subpoena. Alternatively, Continental will accept, in lieu of prospective *in camera* treatment, an arrangement of the kind directed by the Commission in *Mississippi River Fuel Corporation*, Order and Opinion of June 8, 1966.

The memorandum presents questions of some importance including the propriety of prospective *in camera* treatment both in the abstract and in this case, the appropriateness to this case of the solution arrived at by the Commission in *Mississippi River Fuel Corporation*, and the primacy of the hearing examiner's ruling.

It can be said at the outset that the readiness of the parties to accept prospective *in camera* treatment in resolution of this impasse is obviously not controlling. Their immediate concern is the trial of the case and they have neither stake nor responsibility in the precedential effect such a ruling might have upon the effective discharge by the Commission of its broader administrative responsibilities.

In camera treatment is not binding on the parties; its purpose is to prevent the incorporation of sensitive data in the public record. The need for it therefore does not arise until the material is about to be submitted in evidence. It is an extraordinary device when applied as provided in the Commission's Rules to material about to be submitted. It is doubly difficult to justify its application prospectively.

The hearing examiner for the reasons set forth in his certification considers it inappropriate in the circumstances of this case, but has agreed that all data submitted will be accorded confidential treatment and that the question of *in camera* treatment will be given full consideration if and when the material is submitted in evidence.

There is no reason to suppose that the hearing examiner will not rule correctly when the time comes, nor that Continental will be prevented from securing Commission or court review of an adverse decision. Thus, Continental is fully protected by the rulings of the hearing examiner to date and the only reason for granting

prospective *in camera* treatment is to allay Continental's fears that the Commission's Rules and Procedures are unreliable. The Commission would be ill-advised to credit such fears by permitting prospective *in camera* treatment in this case. Continental in short is asking for something it neither has a right to nor needs. It asks for "greater protection" which in reality is protection from the Commission itself.

There is moreover an even more compelling reason for not acceding to Continental's demand. That is that while it is entirely appropriate for Continental to request, and for the hearing examiner to consider, the adoption of appropriate safeguards to protect sensitive data, nevertheless, in the present instance Continental has gone further and insisted upon a promise of *in camera* treatment as a condition precedent to its compliance with the Commission's subpoena. We believe that the integrity of the Commission's procedures requires that response to its process be unconditional and that the Commission not permit itself to be placed in the position of negotiating a response to its compulsory process. The determination whether data is deserving of *in camera* treatment must be made by the hearing examiner on the basis of an appraisal of the material itself, the applicable law and the circumstances of the case, free from the coercive effect of conditions precedent imposed by the parties subpoenaed.

We stated in our order of March 3, 1967 [p. 1657 herein], to the General Counsel, directing enforcement, that the hearing examiner acted properly in refusing a prior commitment to grant *in camera* treatment. We see no reason for disturbing that ruling. Certainly there is no abuse of discretion. We think the primacy of the hearing examiner's ruling is exceptionally important in a matter such as this and that the Commission should not substitute its judgment for his when it does not know what data will be introduced into evidence, what form it will be in when it is introduced, and whether, indeed, within the context of this case, it is now of a character to require *in camera* treatment or whether its character will change with the passage of time. Whether *in camera* treatment should be accorded now or in the future should be determined by the hearing examiner, considering all the facts, including the fact that over 30 other firms have submitted corresponding data without requiring *in camera* treatment.

Continental has presented a possible alternative in its offer to accept the sort of safeguard employed in *Mississippi River Fuel Corporation*, Docket No. 8657, Order and Opinion of June 8, 1966, wherein, in order to mask the data secured from respondent, it

was directed that the material submitted in response to the subpoena should be delivered to an accounting firm selected by the hearing examiner for consolidation of aggregate values for presentation to respondent's counsel. [69 F.T.C. 1186.]

We have already instructed the hearing examiner that he might properly consider this as an appropriate solution even though in the *Mississippi River* case it was to protect the material from respondent's eyes, while Continental's principal concern at present is protection of the material from publication. The distinction is not important except that protection from respondent would require a ruling in advance of submission such as that made in *Mississippi River Fuel*, while protection from publication could be adequately achieved through *in camera* ruling. In any event the hearing examiner has ruled that this device would be impracticable and unworkable because the relevant product market is being disputed and thus it is difficult to know beforehand what products will constitute the universe to be constructed from the data delivered to the accountant.

We have said repeatedly, most recently in the above-referred to order of January 13, 1967 [p. 1610 herein], denying Continental's motion to quash in this case, that the hearing examiner should decide what safeguards are suitable. We feel in this case, as in most, the Commission is too remote from the issues to intrude into the conduct of the hearing. Certainly, we are not prepared to say that the hearing examiner was clearly wrong in rejecting the *Mississippi River Fuel* solution and thus we see no abuse of discretion.

Finally, on March 7, 1967, American Can Company filed with the Secretary an answer in opposition to the hearing examiner's certification of noncompliance with subpoena duces tecum, stating in substance that American as well as National have each stipulated with respondent that they will comply to the extent Continental is required to and that American is therefore not in default.

Notwithstanding their stipulation with respondent, American and National are technically in default. However, we agree that in view of the stipulations in the record, the Commission should not seek enforcement of the American and National subpoenas at this time.

An appropriate order will issue.

Commissioners Elman and Jones would remand this matter to the hearing examiner with instructions to enter a protective order similar to that entered in *Mississippi River Fuel Corporation*, Docket 8657, June 8, 1966.

ORDER RULING UPON MOTIONS IN OPPOSITION TO HEARING
EXAMINER'S CERTIFICATION

The hearing examiner on February 24, 1967, having certified to the Commission the noncompliance by American Can Company, National Can Corporation and Continental Can Company, Inc., with subpoenas duces tecum issued by the hearing examiner on October 10, 1966, as well as noncompliance with the hearing examiner's order of January 26, 1967, directing that return of said subpoenas be made on February 20, 1967, and

The Commission on March 3, 1967 [p. 1657 herein], having directed the General Counsel to proceed for enforcement of said subpoenas and Continental Can Company, Inc., on March 6, 1967, and American Can Company on March 7, 1967, having respectively filed with the Commission memoranda herein treated as motions in opposition to the hearing examiner's certification, and

The Commission for the reasons set forth in the accompanying opinion being of the view that the motion of Continental Can Company, Inc., must be denied and that of American Can Company be granted,

It is ordered, That memorandum of Continental Can Company, Inc., filed March 6, 1967, herein treated as a motion in opposition to the hearing examiner's certification be, and it hereby is, denied.

It is further ordered, That order of the Commission dated March 3, 1967, directing the General Counsel to seek enforcement of the three subpoenas therein specified, be, and it hereby is, amended so that the General Counsel is directed to take appropriate steps looking toward the enforcement of the subpoena duces tecum served upon Continental Can Company, Inc., only and not those of American Can Company and National Can Corporation.

Commissioners Elman and Jones would remand this matter to the hearing examiner with instructions to enter a protective order similar to that entered in *Mississippi River Fuel Corporation*, Docket 8657, June 8, 1966.

NATIONAL BISCUIT COMPANY

Docket 5013. Order, Apr. 14, 1967

Order directing investigational hearings to determine if respondent has violated the provisions of an order to cease and desist issued April 26, 1954, 50 F.T.C. 932.

ORDER DIRECTING COMPLIANCE HEARINGS

Whereas, pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful

restraints and monopolies, and for other purposes," 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. 13, the Federal Trade Commission on February 23, 1944 [38 F.T.C. 213], after due process and proceedings of record herein and in accordance therewith, issued and served upon the respondent named in the caption hereof, an order to cease and desist under subsection (a) of Section 2, thereof; and

Whereas, by said order to cease and desist the respondent National Biscuit Company, a corporation, and its officers, directors, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of bakery packaged food products in commerce for use or resale, do forthwith cease and desist:

1. From selling such commodities of like grade and quality to competing purchasers at uniform prices and thereafter granting varying discounts therefrom in the manner and under the circumstances found in paragraph four of the aforesaid findings as to the facts.

2. From continuing or resuming the discriminations in price referred to and described in paragraph four of the aforesaid findings as to the facts.

3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality, in any manner or degree substantially similar to the manner and degree of the discriminations referred to in paragraph four of the aforesaid findings as to the facts; or in any other manner resulting in price discrimination substantially equal in amount to the aforesaid discriminations, except as permitted by Section 2 of the Clayton Act as amended.; and

Thereafter, the Federal Trade Commission, on April 26, 1954 [50 F.T.C. 932], having rendered its opinion and order granting motion, and reopening proceeding and modifying order to cease and desist, did order respondent National Biscuit Company, a corporation, its officers, directors, representatives, agents, and employees, in connection with the offering for sale, sale, and distribution of bakery packaged food products in interstate commerce for use or resale, to forthwith cease and desist:

1. From selling such commodities of like grade and quality to competing purchasers at uniform prices and thereafter granting varying discounts therefrom in the manner and under the circumstances found in paragraph four of the aforesaid findings as to the facts.

2. From continuing or resuming the discriminations in price referred to and described in paragraph four of the aforesaid findings as to the facts.

3. From otherwise discriminating in price between purchasers of bakery packaged food products of like grade and quality where said purchasers in fact compete in the sale and distribution of such products.; and

Whereas, the said order to cease and desist has not at any time been modified or set aside and is now, and has at all times since April 26, 1954, been in full force and effect; and

Whereas, the Federal Trade Commission has reason to believe that respondent National Biscuit Company and its officers, directors, representatives, agents, and employees while engaged in commerce in connection with the offering for sale, sale, and distribution of bakery packaged food products for use or resale, may have violated the provisions of the said order to cease and desist as heretofore set forth; and

Whereas, it is deemed by the Commission to be in the public interest to ascertain the extent to which such violations may have occurred;

Now, therefore, it is ordered, That public investigational hearings be conducted for that purpose pursuant to § 1.35 and related provisions of the Commission's published Rules of Practice (16 CFR Chapter I, Subchapter A).

It is further ordered, That Chief Hearing Examiner shall designate the hearing examiner to preside at and conduct such public hearings with all the powers and duties provided in the Commission's Rules of Practice For Adjudicative Proceedings, except that of making and filing an initial decision, and upon completion of the hearing, the hearing examiner shall certify the record to the Commission with his report on the investigation; and that respondent National Biscuit Company shall have the right of due notice, cross-examination, and production of evidence in rebuttal.

It is further ordered, That the hearings shall be held at such times and places as may be necessary to be set by the hearing examiner: *Provided, however,* That the initial hearing shall not be held sooner than the thirtieth (30th) day after service of this order upon respondent National Biscuit Company.

It is further ordered, That the Secretary shall cause service of this order to be made upon respondent National Biscuit Company.

Commissioner Elman not concurring.

MODERN MARKETING SERVICE, INC., ET AL.

Docket 3783. Order and Opinion, Apr. 17, 1967

Order denying petition of Red & White Corporation that this proceeding be reopened and modified.

OPINION OF THE COMMISSION

This matter is before the Commission on a petition to reopen and for other relief filed by Red & White Corporation pursuant to Section 3.28(b)(2) of the Commission's Rules of Practice and

Section 5(d) of the Administrative Procedure Act. Petitioner claims that changed conditions of fact and law and considerations of the public interest require that the order to cease and desist issued against respondents Modern Marketing Service, Inc., and Red and White Corporation in this matter be altered, modified or set aside. Specifically, the petition seeks in the alternative: (a) an order declaring all provisions of the cease and desist order in Docket 3783 which were applicable to respondents Modern Marketing Service, Inc. and Red and White Corporation to be inapplicable to petitioner and vacating and setting aside all such provisions; (b) an order modifying the order in Docket 3783 so that those provisions thereof which are applicable to respondents Modern Marketing Service, Inc. and Red and White Corporation will be "limited to prohibiting them from receiving or transmitting brokerage while under the direct or indirect control of purchasers, or while acting for or in behalf of purchasers"; and (c) an order modifying the order in Docket 3783 to exclude from the prohibitions applicable to respondents Modern Marketing Service, Inc. and Red and White Corporation "the furnishing of promotional services and facilities to purchasers."

The Director of the Bureau of Restraining Trade has filed an answer opposing the petition. We note at the outset that the pleadings raise an issue of fact which we are unable to resolve on the basis of the information before us. Petitioner claims in connection with each request for modification of the order to cease and desist that it is an independent seller's broker, *i.e.*, that it is neither buyer owned, nor directly or indirectly controlled by buyers, nor acting in fact for or in behalf of buyers. The answer to the petition, while in effect conceding that petitioner as presently constituted is probably neither owned nor controlled by buyers, challenges the assertion that petitioner is not acting for or in behalf of buyers. While the factual issue thus raised would be material to a determination of whether petitioner's present or proposed activities may be in violation of the order to cease and desist, we are of the opinion that a ruling on the petition to reopen can be made without resolving this issue.

The proceeding which the petition seeks to have reopened originated with a complaint charging Modern Marketing Service, Inc., and Red and White Corporation and various other concerns, both sellers and buyers, with violating Section 2(c) of the Clayton Act. The pertinent facts concerning this proceeding are as follows:

Respondent Red and White Corporation (hereinafter sometimes referred to as old Red and White) was organized in 1927 by a group of wholesale grocers to act as a purchasing agent for such

wholesalers, as well as for other wholesalers or jobbers subsequently acquiring its stock. Upon its organization old Red and White acquired from its principal incorporator, a wholesaler, an exclusive license to the Red and White brand. It then entered into license or franchise agreements with its stockholders whereby the latter were granted the exclusive right to sell Red and White products within designated territories. These wholesalers in turn licensed retail grocers to deal in goods bearing the Red and White brand. Old Red and White also entered into agreements with numerous manufacturers and packers whereunder the latter agreed to pack commodities under Red and White labels and to pay brokerage to old Red and White on all sales made to that corporation's licensed wholesalers.

Old Red and White provided its wholesaler licensees with marketing and valuable advertising services for the purpose of promoting goods bearing the Red and White label. These promotional and advertising services were paid for primarily from brokerage funds received by old Red and White on sales from sellers to the wholesalers. The corporation continued to operate in this fashion until shortly after the passage of the Robinson-Patman Act. In September 1936 five individuals, including Leo J. Bushey, president of petitioner Red & White Corporation, who were connected with old Red and White, disassociated themselves from any official capacity with that company and formed a new organization known as Modern Marketing Service, Inc. (hereinafter sometimes referred to as Modern Marketing).

The new organization then entered into a licensing agreement with old Red and White whereby the brands, trademarks and labels owned or controlled by the latter were leased to Modern Marketing for a fee of \$30,000 per year. Modern Marketing also entered into working agreements with manufacturers and packers under which the latter agreed to pay brokerage to Modern Marketing upon all purchases made by the wholesaler licensees of old Red and White. It also furnished to these wholesaler licensees substantially the same purchasing, marketing and advertising services which had been previously furnished to them by old Red and White.

On May 6, 1939, a complaint was issued against Modern Marketing, old Red and White and several of its wholesaler licensees, and certain suppliers charging them with violating Section 2(c) of the Clayton Act. On September 8, 1943, the Commission issued its decision holding that Modern Marketing, although not owned by the buyers to whom it sold, was subject to the control of old Red and White and its stockholders, the wholesaler licensees. The Com-

mission specifically found, in this connection, that Modern Marketing was the agent of "Red and White Corporation and its stockholders, who receive, through the payment of the annual license fee of \$30,000 and through substantial and valuable market and advertising services, a large part of the brokerage fees and commissions paid to Modern Marketing Service, Inc., by the sellers."¹ It concluded that the transmission and payment of the brokerage fees by the seller respondents to Modern Marketing upon the purchases of the wholesaler licensees of old Red and White and the receipt and acceptance of such brokerage by Modern Marketing, old Red and White and the wholesaler licensees was violative of Section 2(c) of the Clayton Act and entered an order to cease and desist against all respondents. The provisions of this order which are relevant to the present petition are as follows:

3. *It is further ordered*, That respondent, Modern Marketing Service, Inc., a corporation, and its officers, agents, representatives, and employees, in connection with the purchase of commodities in commerce, as "commerce" is defined in said Clayton Act, as amended, by any of the buyer respondents named in paragraph 1 hereof, or by any other stockholder or jobber licensee of respondent, Red and White Corporation, do forthwith cease and desist from receiving or accepting, directly or indirectly, from the sellers of such commodities, any brokerage fee, commission, or other compensation, or any allowance or discount in lieu thereof; and from paying, transmitting, or delivering any such fee, commission, compensation, allowance or discount to such purchasers or to respondent, Red and White Corporation, either in the form of money or credits, or in the form of services or benefits provided or furnished by respondent, Modern Marketing Service, Inc., to respondent, Red and White Corporation, or to such purchasers through or by means of the use or expenditure of any such brokerage fee, commission, compensation, allowance, or discount.

4. *It is further ordered*, That respondent, Red and White Corporation, a corporation, and its officers, agents, representatives, and employers, in connection with the purchase of commodities in commerce, as "commerce" is defined in said Clayton Act, as amended, by any of the buyer respondents named in paragraph 1 hereof, or by any other stockholder or jobber licensee of respondent, Red and White Corporation, do forthwith cease and desist from receiving or accepting from the sellers of such commodities, or from respondent, Modern Marketing Service, Inc., any brokerage fee, commission, or other compensation on such purchases, or any allowance or discount in lieu thereof; and from paying, transmitting, or delivering any such fee, commission, compensation, allowance, or discount to such purchasers, either in the form of money or credits, or in the form of services or benefits provided or furnished by respondent, Red and White Corporation, to such purchasers through or by means of the use or expenditure of any such brokerage fee, commission, compensation, allowance, or discount.

This order of the Commission was affirmed and enforced on

¹ 37 F.T.C. 386, 406 (1943).

June 13, 1945, by the Court of Appeals for the Seventh Circuit.² Thereafter, old Red and White continued in existence owning various trademarks and trade names but not performing any purchasing service for the wholesaler grocers who owned it. Modern Marketing was formally dissolved as a corporate entity in September 1945. In that same month petitioner herein was organized under the name Bushey, Morea & Wright, Inc. by three of the five individuals who had founded Modern Marketing and who had been officers of that corporation.

According to the report of compliance filed by Modern Marketing, Leo J. Bushey, George O. Morea and Harmon J. Wright, the petitioner was to act exclusively as a seller's broker, entering into written and oral agreements with manufacturers and packers whereby it could be employed to solicit orders on their behalf for "unbranded merchandise, merchandise packed under the labels owned by the said manufacturers * * * and also merchandise packed under labels owned by jobbers, including Red & White brands." For this service petitioner was to receive brokerage from its seller principals. Petitioner was to have no brands of its own, would do no advertising, and none of its income was to be "paid directly or indirectly to any of its customers either in the form of advertising allocations or otherwise." However, petitioner was, at least initially, to solicit orders only from old Red and White jobber licensees inasmuch as "the present acquaintance of the officers and stockholders of the corporation is largely confined to such jobbers."

In 1955 petitioner purchased from old Red and White for \$5,000 the Red and White brand or trademark and the name "Red & White Stores." Thereafter, petitioner entered into franchise agreements with certain wholesaler customers in various parts of the country whereby the latter were granted the exclusive right to utilize the trade name "Red & White Stores" in specified territories, to deal in merchandise bearing the Red and White brand and other brand names subsequently adopted by petitioner, and to sublicense retail food dealers to use such brand names and the trade name "Red & White Stores." Petitioner also engaged in national and local advertising under the Red and White brand.

In 1961 petitioner and old Red and White established an irrevocable charitable trust known as Red & White Foundation.³ Old Red and White contributed to the Foundation all remaining trademarks and brand names which it owned or controlled and

² 149 F. 2d 970 (7th Cir. 1945).

³ Continental Illinois National Bank and Trust Company of Chicago is the trustee and the beneficiary is the University of Chicago.

petitioner sold the Red and White brand to the Foundation for a nominal sum. The Foundation then granted to petitioner a license to use the trademarks and trade names it had thus acquired on a royalty basis.

At the time of the establishment of the Foundation petitioner purchased all of the outstanding shares of stock of old Red and White. Thereafter, petitioner dissolved old Red and White and changed its own name to Red & White Corporation. It also took over several service functions which had been performed by old Red and White, including the sale to its buyers of: (1) advertising mats and art work for use in ads featuring products sold by petitioner; (2) labels and cartons bearing petitioner's trademarks for use by buyers that wanted to use a different source of supply for a particular item carrying one of the brands licensed to petitioner; and (3) signs identifying Red and White stores. Petitioner also sponsored a self-liquidating medical and life insurance plan for its buyers.

On June 30, 1965, petitioner requested, pursuant to Rule 3.26(b) of the Commission's Rules of Practice, that it be advised whether a proposed course of action would constitute compliance with the cease and desist order in Docket 3783. The specific inquiry was whether the order in question would permit petitioner to use part of its general funds (consisting of brokerage fees paid by shippers) to initiate a promotion of merchandise carrying brand names owned or licensed by it, which promotion would entail the furnishing of advertising materials to buyers and advertising materials and merchandise men to buyers' customers. The Commission responded to this inquiry advising that in its opinion the proposed program would "in substance constitute the passing on of brokerage fees in the form of services or benefits in violation of Section 2(c) of the amended Clayton Act and probably the order in Docket No. 3783."

The present petition to reopen is primarily a request for reconsideration of this ruling. Petitioner contends at the outset, however, that it is not bound by the order issued against Modern Marketing and old Red and White since both of these concerns have been dissolved and since neither petitioner nor any of its officers, directors, agents, employees or shareholders were parties to this proceeding. It further states that it was incorporated in 1945, subsequent to Court of Appeals' decree of enforcement of the order to cease and desist, and that it has since operated exclusively as a seller's broker. We find this contention to be without merit.

The Commission's finding of a 2(c) violation in this matter was based principally on the showing of control exercised by old Red

and White over Modern Marketing. Consequently, it was incumbent upon these two respondents to sever their relationship of principal and agent in order to bring themselves into compliance with the order to cease and desist. This was accomplished in part by the dissolution of Modern Marketing. At the time that corporation was dissolved, however, three of its officers and founders organized a new corporation (petitioner herein) to take over Modern Marketing's brokerage business. It is clear that at that time and for a number of years thereafter both old Red and White and the founders of the new corporation considered the latter to be bound by the order as successor to Modern Marketing. In this connection, old Red and White stated in its report of compliance filed September 7, 1945, that "said Respondent would not have connected with it in any capacity any person who is connected with or has any interest whatsoever in Bushey, Morea & Wright, Inc., [petitioner herein] a brokerage firm to be established as set forth in said report of compliance of Respondent Modern Marketing Service, Inc." In a report of compliance supplemental to that submitted by Modern Marketing Service, Inc., Messrs. Bushey, Morea and Wright informed the Commission that they owned all of the capital stock of the new corporation, Bushey, Morea, & Wright, Inc., and that "none of said stockholders are or will be in any way financially interested in the Red & White Corporation, any Red & White jobber or any wholesaler grocer." Inasmuch as these three former officers of Modern Marketing Service, Inc., were not individually liable under the order, as pointed out in petitioner's brief, it is apparent that they considered the new corporation to be bound by the order as the successor to Modern Marketing.

The compliance reports submitted to the Commission also reveal that petitioner did in fact take over and carry on the brokerage business which had been operated by Modern Marketing. It continued to conduct the business at the same localities, Chicago, Illinois, San Francisco, California, and Buffalo, New York, and it continued to solicit the same customers as had Modern Marketing, *i.e.*, the Red and White wholesale grocers. Like Modern Marketing, petitioner has "enjoyed its greatest success in the sale to Red and White wholesalers of merchandise packed under the trademark known as the 'Red & White brand' and the major part of its business has consisted of dealings with respect to such merchandise."⁴

We are of the opinion, therefore, that petitioner became the successor to Modern Marketing when it took over the business affairs

⁴ Supplemental report of Bushey & Wright, Inc., June 15, 1955, pp. 4, 5.

of that corporation. *Walling v. Reuter*, 321 U.S. 671 (1944); *NLRB v. O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445 (9th Cir. 1949); *NLRB v. Tempest Shirt Manufacturing Co.*, 285 F. 2d 1 (5th Cir. 1960). There has been no subsequent changed condition of fact which would indicate that the order should not be enforceable against petitioner as the successor to Modern Marketing. Certainly the acquisition of old Red and White by petitioner, contrary to the assurances of petitioner's president that he would not "be in any way financially interested in the Red & White Corporation," does not support petitioner's argument that there has been such a change. As pointed out in the answer filed by the Bureau of Restraint of Trade, petitioner, under the aegis of its president, has step by step substantially reconstructed the business enterprise conducted by old Red and White prior to the passage of the Robinson-Patman Act and now combines brokerage, licensing, advertising, promotional and service functions in one corporate entity. Despite its attempts to divorce itself from the ownership of the Red and White brand, petitioner still controls that brand and is still in a position to utilize brokerage to confer discriminatory benefits on buyers purchasing merchandise so branded. This is the evil which the order was intended to prevent. Should petitioner in fact act for or on behalf of buyers in its brokerage transactions such activities will be considered to come within the purview of the order to cease and desist.

Petitioner's second alternative request is in effect a request that the order to cease and desist be modified so that it will apply only where petitioner is under the direct or indirect control of purchasers or where it is acting in fact for or in behalf of purchasers. The petition specifically requests in this connection an order "modifying the cease and desist order, for the purpose of clarifying the scope of paragraphs 3 and 4 thereof, by inserting in each of such paragraphs, immediately preceding the words 'do forthwith cease and desist,' a provision stating: 'and while said respondent Modern Marketing Service, Inc. [Red & White Corporation], is under the direct or indirect control of purchasers, or is acting in fact for or in behalf of purchasers.'" As grounds for this relief petitioner argues that it is now operating exclusively as a seller's broker and that this claimed changed condition of fact warrants the requested modification of the order.

We agree that the order should be construed in the manner suggested by petitioner but we fail to see the necessity for reopening the matter to so modify the order. As petitioner points out in its brief, it was advised in 1954 by the General Counsel of the Commission that the prohibitions of the order in question apply only

where the broker-respondent is under the control of buyers or is acting in their behalf.⁵ This is the interpretation requested by petitioner and we agree that it is correct. The first portion of paragraphs 3 and 4 of the order prohibits the intermediaries (Modern Marketing and Red and White) from receiving brokerage from sellers in connection with purchases made by buyers who either own or control such intermediaries or buyers in whose behalf such intermediaries are acting. If this part of the order would be interpreted as forbidding either of the intermediaries, Modern Marketing or Red and White, from receiving brokerage on purchases made by buyers other than those for whom it is in fact acting or those by whom it is owned or controlled, it would be prohibiting conduct beyond the reach of Section 2(c) of the Act and would effectively prohibit either of these concerns from engaging in a bona fide brokerage business. Consequently, it cannot be interpreted so broadly nor has it been so interpreted by the Commission. The second portion of each of the above paragraphs merely prohibits the intermediaries from transmitting any "such fee" to "such purchasers." As so worded, it does not prohibit the transmission of brokerage to any buyers other than those referred to in the first provision.

As a third alternative request petitioner seeks modification of the order to cease and desist to permit it to furnish services or facilities to purchasers for the purpose of promoting its trade name and brands when petitioner "is not under the ownership of purchasers, nor functioning under the direct or indirect control of purchasers, nor acting in fact for or in behalf of purchasers." As we have held above, the order applies only to petitioner's operations when it is acting for or in behalf of buyers or is subject to the buyers' control. Consequently, the order does not prohibit petitioner from furnishing services or facilities to buyers when it is acting exclusively as a seller's broker.

By so ruling, however, we do not mean to imply that petitioner's proposed program of furnishing promotional services financed by brokerage fees would not come within the purview of Section

⁵In a letter to petitioner's attorney dated Aug. 23, 1954, the General Counsel stated as follows: "The scope of the Commission's order, as affirmed by the United States Court of Appeals for the Seventh Circuit on June 18, 1945, is confined to those functions of Modern Marketing (hereinafter sometimes referred to as the broker) which are performed by it while under the direct or indirect control of the buyers or while acting in fact for or in behalf of the buyers. The broker is prohibited from the receipt or acceptance of brokerage upon buyers' purchases when acting in that capacity, and is further prohibited from transmitting any part of the brokerage to the buyers whether in the form of money, credits, benefits or services."

2(c) of the Clayton Act.⁶ The principal basis for petitioner's requested modification of the order is that there has been a change in the law since 1945 when this case was decided and that under present law "the furnishing by an independent seller's broker of services and facilities to buyers solely for the purpose of promoting the resale of products bearing the broker's own brands is not within the cognizance and prohibitions of Section 2(c) since its economic justification is brand promotion, instead of brokerage or savings of brokerage, and it is connected with the resale of products." Stated somewhat differently, petitioner contends that some of the more recent decisions, including *Hruby*,⁷ *Empire Rayon*,⁸ *Whitney*,⁹ and *Broch*,¹⁰ establish the principle that a payment, discount, allowance or service is not cognizable under Section 2(c) if its economic justification is something other than brokerage services or savings of brokerage.

In making this argument petitioner concedes that the promotional services and facilities it proposes to furnish would be financed out of income received from brokerage. It also admits that it is unlawful for a seller's broker to pass on brokerage to buyers. It contends, however, that the transmission by a broker of its commission to a buyer in the form of a promotional service or facility is not a "passing on" of brokerage and is therefore not cognizable under Section 2(c).

None of the cases cited by petitioner, nor any other case of which we are aware, even remotely suggests that the practice proposed by petitioner would not be governed by Section 2(c). With the exception of *Broch*, none of the cases relied upon by petitioner involved the issue of whether brokerage may lawfully be transmitted to the buyer. They were concerned only with the *factual* question of whether brokerage or a discount in lieu of brokerage had been transmitted to the other party to a transaction, *i.e.*, was a certain discount, allowance, or price reduction received by a buyer in fact brokerage or a discount in lieu thereof.

As we pointed out in our brief filed as amicus curiae in *Empire Rayon Co., Inc.*, *supra*: "The crucial question in every case brought

⁶ Nor do we mean to imply that the course of action proposed by petitioner may not violate the order to cease and desist in this matter. As stated above, the issue of whether petitioner is in fact acting for or on behalf of buyers cannot be resolved on the basis of the facts presently before us. The Bureau of Restraining Trade claims that there is evidence that petitioner is so acting. It seems obvious that petitioner's proposed program of furnishing services for the benefit of buyers would provide an additional evidentiary basis for concluding that petitioner is in fact acting for or on behalf of such buyers.

⁷ *Hruby Distributing Company*, D. 8068, 1962 [61 F.T.C. 1437].

⁸ *Empire Rayon Co., Inc. v. American Viscose Corp.*, 364 F. 2d 491 (2d Cir. 1966).

⁹ *In re Whitney & Co.*, 273 F. 2d 211 (9th Cir. 1959).

¹⁰ *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166 (1960).

under Section 2(c) is whether the buyer is receiving preferential treatment effected through the payment of 'brokerage, or other compensation, or any allowance or discount in lieu thereof.' The answer requires the resolution of a question of fact and must be determined on the basis of all the circumstances prevailing in each case." If it is determined that brokerage or a discount in lieu thereof has been transmitted to the other party to a transaction, 2(c) is applicable. We attempted to make this crystal clear in *Hruby, supra*, by stating the issue in the following manner:

If the payments or discounts received by Hruby were in actual fact what they were labeled by some sellers, i.e., brokerage or discounts in lieu of brokerage, Section 2(c) would come into play. If, on the other hand, the payments, despite their labels, were in actual fact no more than functional discounts designed to permit Hruby to resell to wholesalers, they would not be barred by Section 2(c).

Under the plan proposed by petitioner herein, the advertising and promotional services and facilities furnished to buyers would be paid for by brokerage commissions. Thus the practice would be governed by Section 2(c).¹¹

As stated above, of the various cases cited by petitioner, only *Broch* involved the issue of whether a seller's broker can lawfully transmit or pass on brokerage to the buyer. The Commission stated in that case that "subsection (c) was intended not only to reach 'dummy' brokerage payments made to a buyer or his representative, but also to prevent a so-called 'pure' broker, who represents only the seller in the transaction, from splitting his commission, directly or indirectly, with the buyer in the transaction." 54 F.T.C. 673, 687. The Commission also concluded "that Section 2(c) prohibits an independent broker who represents a seller from splitting with, or passing on to, the buyer any part of the commission or brokerage to which he is entitled under his agreement with the seller." *Id.* at 689. In upholding the Commission's decision, the Supreme Court stated that if the respondent broker had "merely paid over part of his commission to the buyer, he clearly would have violated the act" and the Court concluded that "the statute clearly applies to payments or allowances by a seller's broker to the buyer, whether made directly to the buyer or indirectly through the seller."

This holding applies squarely to the program proposed by petitioner. The transmission of all or part of a broker's commission

¹¹ As one leading authority has stated: "The prohibitions in paragraph (c) extend not only to cash payments or credits but also to anything of value made available for the beneficial use of the buyer by means of the brokerage commissions. Obviously, even an independent broker cannot split his commissions with the buyer." Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act*, 8 Geo. Wash. L. Rev., 511, 544.

to a buyer in the form of advertising or promotional services and facilities would come within the purview of Section 2(c), not 2(e) as petitioner seems to suggest.¹² Since the "evil" at which 2(c) was directed was the "transmission of brokerage commissions to the buyer * * * to permit the buyer to get the same thing under [2(e)] in another form and name would be to deprive 2(c) of all substance."¹³

For the foregoing reasons, the Commission is of the opinion that petitioner, Red & White Corporation, has failed to establish that changed conditions of fact or law or public interest considerations warrant reopening of this proceeding for the purpose of altering, modifying or setting aside the order to cease and desist. The petition to reopen will therefore be denied. Petitioner's request for oral argument is also denied.

Commissioner Elman dissented.

ORDER DENYING PETITION TO REOPEN

This matter having come before the Commission on the petition of Red & White Corporation filed July 29, 1966, pursuant to Section 3.28(b)(2) of the Commission's Rules of Practice requesting that this proceeding be reopened for the purpose of altering, modifying or setting aside the order to cease and desist, and the Director, Bureau of Restraint of Trade, having filed an answer in opposition to said petition; and

The Commission for the reasons set forth in the accompanying opinion having determined that the petition should be denied:

It is ordered, That the petition to reopen filed by Red & White Corporation be, and it hereby is, denied.

Commissioner Elman dissenting.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Apr. 17, 1967

Order granting complaint counsel's motion that complaint be amended by adding a new allegation of violating Section 7 of the Clayton Act.

OPINION OF THE COMMISSION

This matter is before the Commission on the hearing examiner's certification of complaint counsel's motion to amend the complaint

¹² *Brief in Support of Petition to Reopen and For Other Relief*, pp. 17-21.

¹³ *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 173 n. 14 (1960).

herein to add a new paragraph alleging that sometime after July 1965, respondent acquired the stock or assets of Cement Block Industries of Miami, Inc. (CBI), a corporation alleged to be a substantial consumer of Portland cement, engaged in the production and sale of ready-mixed concrete, cement blocks, and masonry materials in the greater Miami area, and operating a ready-mixed concrete plant there.

Complaint counsel's motion seeks also to add to the complaint allegations that the effects of the acquisition of CBI by Lehigh may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of Portland cement and ready-mixed concrete in the United States as a whole and various parts thereof, including the State of Florida and the Miami area in that, *inter alia*, Lehigh's competitors may be foreclosed from a substantial segment of the market for Portland cement, the ability of Lehigh's non-integrated competitors to compete in the sale of Portland cement and ready-mixed concrete may be substantially impaired, the entry of new Portland cement and ready-mixed concrete competitors may be inhibited or prevented, and the production and sale of ready-mixed concrete, now a locally controlled, small business industry, may become concentrated in the hands of a relatively few manufacturers.

Complaint counsel's motion seeks to amend the allegations of the complaint further by adding to the complaint's delineation of the alleged marketing areas Broward County and Palm Beach County after Dade County in describing "the Miami area," and by adding Brevard County to Orange and Seminole Counties in describing "the Orlando area."

Respondent filed an answer to complaint counsel's motion arguing that the hearing examiner must certify the motion to the Commission and that counsel's motion to amend the complaint's definitions of the Miami and Orlando areas does not state the grounds therefor. The hearing examiner has certified the motion to the Commission. On the basis of the matters alleged in complaint counsel's motion, the Commission finds reason to believe that the alleged acquisition of Cement Block Industries of Miami, Inc., was in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act and that the addition of that alleged acquisition to the complaint herein is in the public interest. Respondent has not yet filed an answer to the original complaint, and thus will have sufficient time in which to respond to the amended complaint.

The CBI acquisition is alleged to be similar in type to those challenged in the original complaint and in the same geographical

location as the Acme Concrete Corp. acquisition. Complaint counsel allege that evidence adduced with respect to this acquisition will be related to evidence bearing upon the acquisitions challenged in the original complaint. Clearly, in these circumstances, it would not be in the public interest, nor would it be in respondent's interest, for the Commission to issue a separate complaint embracing the alleged CBI acquisition.

Amendment of the alleged relevant market areas is in no way prejudicial to respondent at this early stage of the proceeding and appears necessary to facilitate trial of the case. We find sufficient grounds for amendment in complaint counsel's motion and supporting memorandum.

We deny complaint counsel's motion for an order requiring respondent to answer the complaint within ten (10) days. In view of our amendment of the complaint, respondent is entitled to have the usual thirty (30) days after service of the amended complaint within which to file an answer thereto.

Commissioner MacIntyre did not participate.

ORDER AMENDING COMPLAINT

Upon consideration of the hearing examiner's certification, dated March 27, 1967, of complaint counsel's motion to amend the complaint by adding a new allegation charging that an acquisition by respondent of Cement Block Industries of Miami, Inc., violated Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, and by adding to the complaint's designation of alleged market areas specified adjacent counties; and of complaint counsel's motion for an order requiring respondent to answer the complaint within ten (10) days after the examiner's ruling on these motions, and for the reasons set forth in the accompanying opinion of the Commission,

It is ordered, That complaint counsel's motion to amend the complaint be, and it hereby is, granted; and that the complaint be, and it hereby is, amended accordingly.

It is further ordered, That complaint counsel's motion for an order requiring respondent to answer be, and it hereby is, denied.

It is further ordered, That respondent shall have thirty (30) days from the date of service upon it of the amended complaint within which to file an answer thereto.

Commissioner MacIntyre not participating.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Apr. 17, 1967

Order denying respondent's motion that complaint be dismissed or suspended on grounds that Commission's broad survey of cement industry prejudices respondent's right to a fair hearing.

OPINION OF THE COMMISSION

The hearing examiner has certified to the Commission respondent's motion to dismiss the complaint or suspend the proceeding with the recommendation that the motion be denied. Respondent's motion presents essentially the same arguments which it has made to the Commission in support of two prior motions in this case. In our opinion of February 6, 1967 [p. 1618 herein], denying respondent's motion to vacate the complaint herein, we rejected its claim that the Commission acted improperly by conducting a general industrywide inquiry into vertical mergers in the cement industry while the complaint against respondent was pending. We made clear in that opinion that the background information acquired by the Commission as a result of its broad survey of vertical mergers in the cement industry would in no way prejudice respondent's right to a fair hearing and decision. We also said in that opinion, and we reiterate here, that the burden of proving the allegations of the complaint remains with complaint counsel, and that adjudication by the hearing examiner and the Commission will be made on the record, in accordance with due process and the Administrative Procedure Act. We see no reason either to dismiss the complaint or to suspend this proceeding. Accordingly, respondent's motion is denied in its entirety.

Commissioner MacIntyre did not participate.

ORDER DENYING MOTION TO DISMISS COMPLAINT

Upon consideration of the hearing examiner's certification of respondent's motion to dismiss the complaint or suspend this proceeding, and for the reasons set forth in the accompanying opinion of the Commission,

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

Commissioner MacIntyre not participating.

WINN-DIXIE STORES, INC.

Docket C-1110. Order and Opinion, Apr. 17, 1967

Order denying respondent's petition that this proceeding be reopened and the order modified.

OPINION OF THE COMMISSION

This matter is before the Commission upon respondent's petition, filed February 17, 1967, requesting modification of the order which issued on September 14, 1966 [70 F.T.C. 611].

The order provides "that for ten (10) years from the effective date of this order, respondent shall not, without the prior approval of the Federal Trade Commission, make any acquisition, directly or indirectly, of any retail food or grocery stores in the United States." This order is based upon a consent agreement which provides, in part, that "* * * [I]n the event that the Federal Trade Commission issues any Order or Rule which is less restrictive than the provisions of this Order, in any proceeding involving mergers or acquisitions by a grocery store chain, then the Commission shall, upon the application of respondent, pursuant to Rule 3.28 of the Commission's Rules of Practice, reopen this proceeding in order to make whatever revisions, if any, are necessary to bring the restrictions imposed upon respondent herein into conformity with those imposed upon its competitors."

Respondent contends that the Commission's statement setting forth its "Enforcement Policy With Respect To Mergers In The Food Distribution Industries," dated January 3, 1967, constitutes an order or rule within the meaning of the provision in the consent agreement. It argues that the stated policy is less restrictive than its order and that therefore the order should be modified to incorporate three announced enforcement criteria. In substance, the requested modification would permit respondent to make certain types of food or grocery store acquisitions without the prior approval of the Commission.

In answer to this petition, the Chief, Division of Mergers, requests that it be denied for the reason that the desired modification does not require that a future acquisition meet *each* of the three criteria, as specified in the policy statement. However, he further states that were respondent to indicate its willingness to conform its proposed modification to this requirement the staff would not oppose the petition. In its reply, filed March 22, 1967, respondent agrees to amend its petition to meet the staff's objection.

It is the Commission's position that modification of the order is not warranted on the grounds of the stated enforcement policy.

In the first place, it is very doubtful that the policy statement constitutes an "Order or Rule * * * in any proceeding involving mergers or acquisitions by a grocery store chain," within the language of the provision in the consent agreement.

More importantly, even if the enforcement policy could be considered such a "Rule," it is not "less restrictive" than respondent's order upon any grocery store chain. The statement does not itself impose any restrictions. The purpose of the policy statement is to set forth the Commission's intentions as to future actions with respect to mergers in the food distribution industries and to describe what actions will likely be taken. With respect to the three criteria which respondent would have us incorporate in its order, the policy statement simply points out that mergers satisfying these criteria do not ordinarily require specific Commission review. This does not constitute permission to any competitor to make acquisitions fulfilling these criteria either with or without prior Commission approval. Any restrictions that may be imposed on competitors with respect to obtaining Commission approval prior to making an acquisition must result from a proceeding involving those competitors and not from the policy statement.

Finally, the fallacy inherent in respondent's argument that the enforcement policy is "less restrictive" than its order is best reflected in its requested modification. Respondent asks to be relieved of obtaining prior Commission approval for certain categories of acquisitions. However, it is obvious that if there were any substance to respondent's argument, modification would extend to relief from prior approval for *all* acquisitions since the enforcement policy does not require prior Commission approval for any acquisition.

We do not believe that the language of the proviso can be so construed as to require modification of the order here on the basis of a policy statement which, in fact, merely articulates the standards the Commission intends to follow in dealing with future mergers in the food distribution industry.

For the foregoing reasons, respondent's petition is denied and an appropriate order will be entered.

Commissioner Elman did not concur.

ORDER DENYING PETITION FOR MODIFICATION OF FINAL ORDER

This matter having come before the Commission upon respondent's petition, filed February 17, 1967, requesting that this proceeding be reopened and that the order issued on September 14, 1966 [70 F.T.C. 611], be modified; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the petition should be denied:

It is ordered, That respondent's petition, filed February 17, 1967, be, and it hereby is, denied.

Commissioner Elman not concurring.

BEST & CO., INC.

Docket 8669. Order Apr. 21, 1967

Order denying remand but directing parties to explore possibility of stipulating matters in respondent's motion for remand.

ORDER DENYING MOTION FOR REMAND AND EXTENDING TIME FOR
FILING APPEAL BRIEF

This matter is before the Commission on respondent's motion for an extension of time within which to perfect its appeal and its motion to remand. The Commission has determined that the motion for remand should be denied. It is of the view that counsel may be able to stipulate with respect to all or most of the facts which respondent wishes to adduce on the transfer of certain assets to the McCrory Corporation. Accordingly, the Commission will direct counsel for both sides to explore the possibility of a stipulation with respect to these matters. In the event counsel are unable to stipulate with respect to any or all of the matters alleged in respondent's motion for remand, the respondent may file affidavits to cover those points not agreed to in the stipulation. The Commission will consider a stipulation, if any, entered by counsel and/or respondent's affidavits on these points in connection with respondent's appeal. Accordingly,

It is ordered, That the motion for remand be, and it hereby is, denied.

It is further ordered, That counsel for both sides be, and they hereby are, directed to explore the possibility of stipulating with respect to any or all of the matters alleged in respondent's motion for remand.

It is further ordered, In the event that counsel are unable to agree on a stipulation covering any or all of the points alleged in respondent's motion for remand that respondent be, and it hereby is, authorized to file affidavits with respect to those points not so covered, and that complaint counsel be authorized to file reply affidavits.

It is further ordered, That respondent's time within which to file its appeal brief be, and it hereby is, extended until twenty (20) days after the service upon the parties of this order.

Commissioner Elman would grant the motion for remand.

SEACREST INDUSTRIES CORPORATION ET AL.

Docket C-719. Orders, May 19, 1967

Order denying motion of Eugene Lissauer that this consent order be reopened for the purpose of dismissing it as to him. Motion for hearing denied May 23, 1967.

ORDER DENYING MOTION TO REOPEN

The Commission on February 28, 1964 [64 F.T.C. 1279], issued a consent order against respondents herein requiring them to discontinue certain practices in connection with food purchasing plans.

Petitioner Eugene Lissauer, on May 1, 1967, filed with the Secretary a motion pursuant to Section 3.28(b) of the Commission's Rules asking that this matter be reopened and that the consent order entered into by him be dismissed. In support of his motion, petitioner states: (1) that he has resigned as president of Seacrest Industries Corporation, (2) that Seacrest is out of business, (3) that he knows of no violations of the order, and (4) that he executed the consent order herein in reliance upon representations by the Commission's investigating attorney, who is no longer in the Commission's employ, that "* * * if the alleged acts had not been committed the entry of such an order was of no consequence, had no importance and would not affect me in any way."

The first three grounds set forth are obviously lacking in merit. The status of the corporate respondent and petitioner's relation thereto are wholly irrelevant to the question of petitioner's obligation to comply with the order as an individual. Moreover, the fact that the order may be currently being complied with is no such assurance as to future compliance as to warrant reopening and setting aside.

The fourth ground cited by petitioner, although it requires somewhat fuller consideration than the first three, is similarly insufficient to warrant reopening.

If there is reasonable likelihood that the statement petitioner alleges was in fact made by a Commission representative and petitioner in fact relied upon it in executing the consent order,

the matter should be reopened and referred to a hearing examiner for the limited purpose of establishing what in fact transpired.

The Commission is not, however, warranted in reopening the matter on the basis of a bald averment by petitioner alluding to a somewhat ambiguous statement by a Commission representative which in practical effect says that the Commission's consent settlement process is a pointless charade.

Although petitioner's motion is subscribed and sworn to, no affidavit has been submitted setting forth the precise circumstances surrounding the making of the statement and petitioner's reliance upon it. Nor has petitioner explained how he could have been under so vital a misapprehension when he had the advice of counsel and when the order to which he consented required of him a report of compliance within 60 days of the execution of the consent order setting forth in detail the manner and form of his compliance with the order.

Finally, respondent, Lissauer, has made no attempt to explain to the Commission why it is that he has filed a petition in May 1967 because of a misapprehension he was under in connection with an order issued on February 28, 1964.

We think the motion must be denied. Accordingly,

It is ordered, That Motion to Reopen filed by Eugene Lissauer on May 1, 1967, be, and it hereby is, denied.

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order, May 25, 1967

Order denying respondent's request to join Phillips Petroleum and to dismiss complaint, and returning case to hearing examiner for further consideration of cost justification.

ORDER RULING ON INTERLOCUTORY APPEALS

This matter is before the Commission upon respondent's interlocutory appeals from the examiner's order denying its motions (a) to join Phillips Petroleum Company (Phillips) as a party respondent, (b) to dismiss the complaint and (c) to render an order establishing the burden of proof in connection with an asserted cost justification defense, upon complaint counsel's answer thereto, and upon respondent's reply.

The Request to Join Phillips as a Party Respondent

Respondent's request to join Phillips was denied by the examiner in his order of March 7, 1967. The examiner should have certified

the question to the Commission with his recommendation. The request to name in the complaint a new additional respondent and to allege a violation by such new respondent of a section of law different from that pleaded in the complaint as issued, clearly constituted a question on which the examiner had no authority to rule. The requested allegations would concern a different practice which would require a different determination as to the belief that a violation has occurred and as to the public interest. It was, therefore, not "reasonably within the scope of the proceeding initiated by the original complaint." See §§ 3.7(a) (1) and 3.6(a) of the Commission's Rules of Practice. Cf. *Capital Records Distributing Corporation*, 58 F.T.C. 1170 (1961); *Standard Camera Corporation*, Docket No. 8469 (November 7, 1963) [63 F.T.C. 1238]; *Hafner Coffee Co.*, 54 F.T.C. 1917 (1958). Nevertheless, there has been no prejudice to respondent since the matter is now before the Commission for *de novo* consideration and determination.

Respondent's argument is that the absence of Phillips in this proceeding will unfairly prevent Suburban from obtaining and presenting evidence which would establish its defenses such as cost justification and the meeting of competition in good faith. More specifically, respondent argues that should Phillips not be joined in this proceeding and should complaint counsel come forward with some evidence of the lack of cost justification, respondent will be faced with having to present evidence on the issue of Phillips' cost savings arising from its dealings with Suburban without the affirmative cooperation of Phillips.

Respondent, although asserting that it would be inconvenienced in making its defense, has not shown that it could not without Phillips make an adequate defense on the matter of possible cost justification or any other issue. It has available to it all the investigative and discovery techniques provided by the Commission's Rules, including the use of subpoenas, if necessary. Thus, it is not dependent upon the voluntary cooperation of the seller in the preparation of its defense. Furthermore, Phillips, if it were charged with a Section 2(a) violation as urged by respondent, might not seek to defend itself under the cost justification proviso and so the naming of Phillips, in that event, would be of no help to respondent. Finally, the Commission issues a complaint only when it believes that a section of the laws it administers has been violated and that a proceeding in respect thereto would be in the interest of the public. The Commission would not consider it an appropriate exercise of its discretion to issue a complaint primarily as a matter of convenience to another charged with a

law violation. For such reasons respondent's request to name Phillips in the complaint will be denied.

Request to Dismiss Complaint

On March 7, 1967, the examiner denied respondent's request to dismiss the complaint, which request was on the ground that in view of the alleged discontinuance of the practice and changed circumstances there is no public interest in the continuation of the proceeding. The examiner recognized that the question involved the Commission's administrative discretion in issuing a complaint and that it presented an issue on which he had no authority to rule. Nonetheless, he denied the motion. The matter should have been certified to the Commission with the examiner's recommendation. Section 3.6(a), Commission's Rules of Practice; *Drug Research Corp.*, Docket No. 7179 (October 3, 1962) [63 F.T.C. 998].¹ Respondent, however, has not been prejudiced, since the matter is now before the Commission for *de novo* consideration and determination.

Respondent argues, as it did before the examiner, that the complaint should be dismissed because the practice complained of has been discontinued and because there assertedly is no reasonable likelihood that these or similar practices will arise in the future. Among the grounds for this argument is the claim that Phillips has withdrawn from the Eastern market, which assertedly indicates that there is no reasonable likelihood that the contractual arrangements complained of or any similar arrangements between Phillips and Suburban will arise again. Respondent also argues that the developments in the industry have made it unlikely that the practice will be renewed. It is claimed, for instance, that the markets for LP gas have changed; that whereas formerly it was a seasonable market in which supply exceeded demand, now new marketing developments and new uses—particularly the use in the petrochemical industry—has reversed this situation. Respondent urges that as a result of the different circumstances referred to, a cease and desist order, if obtained, would accomplish nothing constructive, and it requests, therefore, that the complaint be dismissed.

Complaint counsel argues, among other things, that Suburban's abandonment of purchases from Phillips, which they claim was forced, offers no assurance that the public interest will be pro-

¹ Compare *The Drive-X Company, Inc.*, Docket No. 8615 (June 10, 1964), in which the Commission held that the examiner had authority to rule on such a motion since there the motion challenged the Commission's legal power to issue the complaint rather than its discretion or judgment on whether or not a proceeding would be in the public interest.

tected as to respondent's future conduct with its other suppliers (or with Phillips, if Phillips reenters the Eastern market in the future). Such counsel also aver, in effect, that certain of respondent's factual assertions are not correct.

Respondent, in its reply brief filed May 1, 1967, sharply challenges the assertion that its statements are untrue and presents asserted facts in defense of its position.

The question of discontinuance is one which, in the Commission's view, should not be decided upon the claims and arguments of counsel in interlocutory appeal briefs. This is an issue which, if further raised, should be resolved, not in a piecemeal way, but on the basis of the whole record to be made in this proceeding. Therefore, respondent's request to dismiss the complaint will be denied.

Request for Pretrial Order on Burden of Proof

Respondent, in its motion to the hearing examiner filed February 28, 1967, additionally requested the examiner to issue an order establishing the burden on complaint counsel in connection with the cost justification issue. Respondent asked for an order which in substance would state (a) that complaint counsel would have the burden of showing that the difference in methods by which Suburban was served by Phillips and the different quantities involved, compared with alleged disfavored competitors, could not give rise to sufficient savings to cost justify the alleged differential in prices and that Suburban knew or should have known that the differences involved as to methods and quantities could not have given rise to sufficient pertinent savings to justify such differentials, and (b) require that complaint counsel amend their previously filed trial brief and therein allocate exhibits and otherwise specify in indicated detail the evidence to be offered on the cost justification issue.

The examiner denied respondent's motion, stating that he had noted the cases referred to by respondent, including *Automatic Canteen Co. of America v. Federal Trade Commission*, 346 U.S. 61 (1953), and "assumes that complaint counsel are familiar with the legal precedents which respondent has cited and will interpret them correctly with reference to the evidentiary burden imposed upon complaint counsel to prove the absence of cost justification."²

² If this statement of the examiner means that complaint counsel has the initial burden of proving that the alleged discriminations in price are, in fact, not cost justified, it is incorrect. The rule in *Automatic Canteen*, to the extent it can be reduced to a mechanical formula, is as follows: (a) Where a buyer knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer, the Commission need only show, to establish its prima facie case, that the buyer

On a question of such importance as this, it seems to us that the examiner erred in failing to clearly resolve it. It is his responsibility to properly regulate the course of the hearing and to rule upon, as justice may require, procedural and other motions. This means that at times he may have to construe case law precedents so that the parties will know how to proceed. Moreover, the examiner ruled on the motion and denied it without first hearing from complaint counsel. Insofar as respondent's requested order is concerned, it is conceivable (though we do not draw a conclusion on this one way or the other) that complaint counsel and respondent might have found an area of agreement.³

It seems clear that one of the issues herein will be the nature and the extent of the proof which complaint counsel must adduce to comply with their burden on the matter of defenses such as cost justification in a Section 2(f) proceeding. Cf. *Automatic Canteen, supra*; *Fred Meyer, Inc.*, Docket No. 7492, *aff'd*, 359 F. 2d 351 (9th Cir. 1966), *cert. denied on this ground*, 87 S. Ct. 851 (*cert. granted on other grounds*, 87 S. Ct. 853 (1967).) Respondent, under the Commission's Rules requiring continuous hearings, will need to know complaint counsel's intended evidence on the cost justification issue to allow it to adequately prepare its defense. Complaint counsel, to the extent they have not already done so, can and should specify as nearly as possible what this proof will be.⁴ Therefore, the appeal on this motion is partially granted, as

knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor; and (b) if the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings.

In a matter where the methods or quantities differ, which is frequently the case, the evidence to be adduced by complaint counsel initially will vary from case to case. We do not propose to state, nor could we in this instance, what complaint counsel's exact burden would be until all the facts are available on the record. However, assuming the matter to involve different methods or quantities, if complaint counsel show such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden. For the application of such rule to specific cases see *Fred Meyer, Inc.*, *infra*; *National Parts Warehouse, et al.*, Docket No. 8039 (December 16, 1963) [63 F.T.C. 1692], *aff'd*, *General Auto Supplies, Inc. v. Federal Trade Commission*, 346 F. 2d 311 (7th Cir. 1965); *D & N Auto Parts Co., Inc.*, 55 F.T.C. 1279 (1959), *aff'd*, *Mid-South Distributors v. Federal Trade Commission*, 287 F. 2d 512 (5th Cir. 1961), *cert. denied*, 368 U.S. 838 (1961).

³ To this time we do not know whether or not complaint counsel in fact object to the order on cost justification requested by respondent in its motion of February 28, 1967. We do not find in their answering brief on this appeal a discussion of such specific requests.

⁴ It is noteworthy that complaint counsel, in the course of filing briefs in connection with this appeal, have not denied the burden upon them as set out in *Automatic Canteen* and, in fact, have delineated the proof which they believe is necessary as part of their case-in-chief. For instance, on page 7 of their answer to the appeal, they state as follows: "We reiterate our statement in the trial brief filed by us that in a Section 2(f) proceeding, counsel supporting

indicated, and otherwise denied. The examiner is instructed to hear complaint counsel in answer to respondent's motion on this issue and to dispose of this matter in such a way as to provide respondent with sufficient knowledge of the evidence complaint counsel will adduce on the cost justification issue to allow respondent adequately to prepare its defense. Accordingly,

It is ordered, That respondent's request to join Phillips Petroleum Company as a party respondent in this proceeding be, and it hereby is, denied.

It is further ordered, That respondent's request to dismiss the complaint in this proceeding be, and it hereby is, denied.

It is further ordered, On respondent's request for a pretrial order on the burden of proof on cost justification, that the matter be, and it hereby is, returned for further proceedings in accordance with the Commission's instructions in this order.

Commissioner Elman concurs on the basis of his understanding that the Commission's order, although somewhat opaque, in effect directs the hearing examiner to grant respondent's request for a pretrial order on the allocation of the burden of proof on the cost-justification issue.

A. & M. KARAGHEUSIAN, INC.

Docket 7636. Order, June 2, 1967

Order denying petition of J. P. Stevens, Inc., that this case be reopened for the purpose of setting aside the order.

ORDER DENYING PETITION TO REOPEN THE PROCEEDING FOR THE PURPOSE OF SETTING ASIDE THE ORDER

J. P. Stevens, Inc., has petitioned the Commission pursuant to the provisions of § 3.28(b) of the Rules of Practice for Adjudicative Proceedings to reopen this proceeding for the purpose of

the complaint need only show that a 'reasonable and prudent businessman' on the basis of the facts known to him, should have believed that a favorable price granted to him could not have been cost-justified by his supplier." Elsewhere, on page 13, such counsel further state that "Once it is established that Suburban should have known that no cost justification defense could have been maintained by its supplier, the burden of coming forward with evidence as to this issue shifts to respondent. The respondent may then either choose to rebut the showing of knowledge made by complaint counsel or show that any price preferences it received were, in fact, cost justified by its suppliers." This seems to us to be a reasonably clear statement of the evidence complaint counsel proposes to adduce on the issue. Respondent, however, in its requested order, seeks specific information and detailed identification of such evidence. Whether or not this further request is appropriate is a matter which should be passed on by the examiner after he considers the response, if any, of complaint counsel to respondent's request.

setting aside the order. The Director of the Bureau of Restraint of Trade has opposed the petition and Stevens has filed a document entitled "Memorandum Re Answer To Petition."

The Commission's order in this case was issued on February 10, 1964. The petition states that all of the stock of respondent Karagheusian was acquired by petitioner Stevens on February 18, 1964 [64 F.T.C. 781]. Prior to that date, Stevens held no interest in Karagheusian and Karagheusian held no interest in Stevens. Karagheusian was operated as a wholly owned subsidiary of Stevens until February 1, 1965, at which time it was dissolved by merger into Stevens. Since that date, the business formerly carried on by Karagheusian has been continued by Stevens through its Gulistan division.¹

In support of its position that the above change of fact is one which is sufficient to warrant reopening of the proceeding for the purpose of setting aside the order, Stevens relies upon a recent action of the Commission in which the order entered against Karagheusian in another case was set aside. See *A. & M. Karagheusian, Inc.*, Docket No. 4305; Order Granting Request To Reopen Proceeding and Vacating Order to Cease and Desist (Sept. 13, 1965) [68 F.T.C. 452]. The order originally issued in that case required Karagheusian to cease and desist from using words connoting Oriental origin or characteristics to designate or describe rugs or carpets which were not in fact made in the Orient and which did not possess all of the essential characteristics and structure of Oriental rugs.² In concluding that there had been a change of fact sufficient to warrant reopening the proceedings in that case for the purpose of setting aside the order, the Commission noted, *inter alia*, that there was no reason to believe that the acquisition was made for the purpose of evading the order, or that Stevens had participated with Karagheusian in violation of the order.

The posture of the instant matter differs significantly from that in Docket No. 4305. In the present matter, the Commission's final order was amended on April 2, 1964, after respondent Karagheusian had become a wholly owned subsidiary of Stevens, to extend the period of time within which respondent Karagheusian would be required to file a report of compliance.³ Thereafter, the practice prohibited by the order to cease and desist—that of granting cumulative annual volume discounts—was continued not

¹ Petition, pp. 3-5; Answer To Petition, pp. 9-10; Memorandum Re Answer To Petition, p. 3.

² 36 F.T.C. 446, 456 (1943).

³ *A. & M. Karagheusian, Inc.*, Docket No. 7636, Superseding Order As To Time Within Which Respondents Shall File Report Of Compliance (April 2, 1964) [64 F.T.C. 781, 787].

only during the period when Karagheusian was operated as a wholly owned subsidiary of Stevens, but after Karagheusian was dissolved and became a division of Stevens.⁴ Thus, it appears that Stevens itself has actively participated in the prohibited practice. Under the circumstances, the Commission's conclusion in Docket No. 4305 that the change of ownership was a change of fact sufficient to warrant reopening for the purpose of setting aside the order does not require a similar conclusion in the present matter. Moreover, as emphasized in the petition, the practice prohibited by the order is a current problem of industrywide proportions. In this setting, therefore, and for both of the above reasons, the Commission concludes that neither the acquisition by Stevens of respondent Karagheusian nor its subsequent dissolution is a change of fact sufficient to warrant reopening the present matter for the purpose of setting aside the order.

Petitioner alleges also that the public interest requires reopening of the proceeding for the purpose of setting aside the order on two theories. First, the petition states that industry conditions have changed since the institution of the proceeding and, because of this change, it is argued that Stevens, which had nothing to do with the original violation, should not be in a worse position than its competitors who are not under Commission order. This is not an allegation of a change of fact occurring subsequent to the issuance of the order, but is instead an assertion that the equities of the situation require vacation of the order. However, Stevens has not alleged that it was unaware of the Commission's order when it acquired Karagheusian or advanced any other reasons which would justify granting to it special treatment by vacating the instant order at a time when the Commission has similar orders outstanding against a large number of its competitors.⁵

Secondly, Stevens asserts that the public interest requires vacation of the order because, in its opinion, the order is ineffective as a matter of law against a successor corporation in a situation where there has been a bona fide discontinuance and a true change of ownership. See *Southport Petroleum Co. v. N.L.R.B.*, 315 U.S. 100 (1942). However, the petitioner has not stated the conditions under which the discontinuance was effected and, as previously noted, the discontinuance did not occur until after Karagheusian was dissolved. In addition, although the law relative to the application of administrative orders to successor corporations is not

⁴ Answer To Petition, pp. 2, 4, 5, 8; Memorandum Re Answer To Petition, pp. 3, 6.

⁵ Stevens has joined with a number of its competitors in requesting the promulgation of a Trade Regulation Rule designed to put all members of the industry on an equal footing. Memorandum Re Answer To Petition, p. 3.

entirely settled, the courts in considering this question have on several occasions indicated that the fact that the successor continued the prohibited practice was of significance. See *N.L.R.B. v. Birdsall-Stockdale Motor Co.*, 208 F. 2d 234 (10th Cir. 1953); *N.L.R.B. v. Lunder Shoe Corp.*, 211 F. 2d 284 (1st Cir. 1954); *N.L.R.B. v. New Madrid Mfg. Co.*, 215 F. 2d 908 (8th Cir. 1954). In any event, the ultimate decision as to whether a particular administrative order is applicable to a successor corporation must finally be made by a court of competent jurisdiction in the proper circumstances. It is the Commission's conclusion, however, that the alleged inapplicability of an order to a successor is not grounds for setting aside such order in circumstances where the successor has, as in this case, participated in and continued the practice prohibited by the order and where such practice is a current problem in the industry. As a result, the Commission concludes that the public interest does not require that the matter be reopened for the purpose of setting aside the order on either ground advanced by the petitioner. Accordingly,

It is ordered, That the Petition To Reopen The Proceeding For The Purpose Of Setting Aside The Order be, and it hereby is, denied.

SCHOOL SERVICES, INC., ET AL.

Docket 8729. Order, June 16, 1967

Order denying respondent's request for an order directing the taking of depositions of Commission employees and production of Commission documents.

ORDER DENYING REQUEST FOR TAKING OF DEPOSITIONS AND
PRODUCTION OF DOCUMENTS

This matter is before the Commission on the hearing examiner's certification of respondents' application for an order directing the taking of depositions and production of documents, filed June 13, 1967, and complaint counsel's answer thereto filed June 15, 1967. Respondents desire to take depositions from Joseph W. Shea, Secretary of the Commission, Charles Sweeney, Director of the Bureau of Deceptive Practices, and Sheldon Feldman, an attorney of the Commission, and, in addition, request that Mr. Shea be required to produce certain documents.

The order which respondents seek would require the Commission Secretary to produce the following:

A. All memoranda, directives, orders and other documents of the Federal Trade Commission ("Commission" hereinafter), initiating and creating the Special Consumer Protection Program on or about July, 1965, in the District of Columbia.

B. All minutes of meetings of the Commission on or before February 13, 1967 concerning findings or rulings that the Commission had "reason to believe" that the Respondents were or are presently using any unfair methods of competition or unfair or deceptive acts or practices in commerce and that the issuance of a Commission Complaint, Docket No. 8729 ("Complaint" hereinafter) "would be in the interest of the public."

C. All memoranda, directives, orders and other documents of the Commission initiating any and all investigations pertaining to the Respondents resulting in the issuance of the Complaint.

D. All memoranda and other documents from Commission officers, employees or agents to the Commission and/or any of the individual Commissioners prior to February 13, 1967 summarizing the results of investigations of the Respondents and all recommendations accompanying said memoranda.

E. All investigative reports, statements of witnesses and summaries of statements of witnesses relating to the investigation of the Respondents prior to February 13, 1967 resulting in the issuance of the Complaint.

In addition, respondents state that the Secretary of the Commission will be expected to testify about the duties and responsibilities of the officers and employees of the Commission and the procedures followed by them in making investigations and reporting to the Commission thereon.

Respondents assert this testimony and the documents in question are relevant to certain issues raised by their answer to the complaint.¹ In this connection, respondents deny the allegation in the complaint that the Commission has reason to believe the Federal Trade Commission Act has been violated or that a proceeding by this agency would be in the public interest. In addition, they assert that the documents in question and Mr. Shea's testimony are relevant to certain defenses which they have raised in this proceeding.² In essence, respondents assert that the Commission lacks jurisdiction to prosecute this case and to issue the complaint on the ground that it could not have had a basis to believe or to conclude that respondents had engaged in unfair methods of competition or unfair or deceptive acts or practices in commerce. They also contend that the Commission lacked jurisdiction because it had no basis to conclude that the proceeding against respondents would be in the public interest. Further, respondents state that the Commission lacks jurisdiction to decide this case or to grant relief against respondents on the ground that it is legally incapable of rendering a fair and impartial trial

¹ Paragraph 2 of respondents' application.

² *Id.*

in disposition of this case. Finally, respondents assert that the testimony in question and the documents requested would be relevant to their defense and that if there is any public interest involved in this proceeding it is obviously *de minimis*.

In the case of Sheldon Feldman, respondents state that he will be expected to testify about the Commission's Special Consumer Protection Program and its relationship to the investigation of respondents prior to the filing of the complaint. According to the application, respondents also expect that he will testify with respect to his cooperation in the publication of news stories which "‘polluted the atmosphere of justice and impartiality’ in these proceedings." Respondents also assert that Mr. Feldman's testimony is relevant to the issues set forth in paragraph 2 of their application.

In the case of Charles Sweeney, respondents expect that he will testify about the investigations of respondents prior to the issuance of complaint as well as with respect to the recommendations made to the Commission concerning such investigations. He also, according to respondents' application, will be expected to testify concerning his cooperation in the publication of news stories which "‘polluted the atmosphere of justice and impartiality’ in these proceedings."

Respondents' application will be denied. Clearly the testimony and documents which respondents seek from the Secretary of the Commission, in paragraph 1 of their application, as well as the testimony of Messrs. Feldman and Sweeney insofar as it relates to the issues raised in paragraph 2 of their application, are an attempt to probe the mental processes of this agency in investigating respondents and the decision leading up to the complaint in this matter.³ Data of this nature is ordinarily privileged since they relate to an integral part of the decision-making process of this agency. *Walled Lake Door Company v. United States*, 31 F.R.D. 258, 260 (E.D. Mich. S.D. 1962). In addition, many of the documents sought would be privileged as an attorney's work product.⁴

Respondents may not seek internal documents and information relating to matters within the Commission's administrative dis-

³ " . . . the Commission's decision on whether to issue complaint is within its discretion. Preservation of the integrity of the administrative process precludes an inquiry into this Agency's mental processes leading up to that decision." (Footnote omitted.) *The Seeburg Corporation*, Docket No. 8682 (order and opinion issued October 25, 1966) [70 F.T.C. 1818, 1826].

⁴ " . . . Documents coming within that category will not be released without a strong showing of special circumstances, good cause or necessity. . . ." *Graber Manufacturing Company, Inc.*, Docket No. 8038 (order and opinion issued December 13, 1965) [68 F.T.C. 1235].

cretion in instituting investigations and issuing complaints merely to satisfy their curiosity. Respondents have not demonstrated the good cause required to justify release of the confidential information they seek. Certainly, if an administrative agency could be required to disclose the information sought here on the basis of the showing made in respondents' application, "The function of deciding controversies might soon be overwhelmed by the duty of answering questions about them." See *NLRB v. Botany Worsted Mills, Inc.*, 106 F. 2d 263 (3d Cir. 1939).

Nor is the application saved by respondents' bare assertion of bias presumably linked to the controversy of whether the Commission has the authority to issue press releases after complaint. Respondents must make a more concrete showing of prejudice on the part of the agency or its employees than they have made here, for subpoenas probing the internal decision-making process of an administrative agency will not be issued on bare suspicion or to "[license] extended fishing expeditions in waters of unknown productivity in the vague hope of 'catching the odd one'." See *Coro, Inc. v. Federal Trade Commission*, 338 F. 2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). See also order and opinion of the Commission ruling on question certified and denying motion to strike certification in *R. H. Macy & Co., Inc.*, Docket No. 8650 (issued September 30, 1965) [68 F.T.C. 1179]. During the course of the hearings in this case on the merits, testimony may be required on behalf of the respondents concerning their allegation that there has been cooperation in the publication of news stories which "'polluted the atmosphere of justice and impartiality'" to the extent that such proffered evidence is found to be relevant and material to the issues therein. The Commission does not permit the use of depositions as a substitute for the continuous hearings required by the Rules of Practice. See *Topps Chewing Gum, Inc.*, Docket No. 8463 (opinion and order disposing of motions issued July 2, 1963) [63 F.T.C. 2196].

Finally, in requesting confidential information from the Commission, respondents have not complied with the requirements laid down in § 1.134 of the Rules of Practice. Accordingly,

It is ordered, That respondents' application for an order directing the taking of depositions and production of documents be, and it hereby is, denied.

Commissioner Elman concurring in the result.

NATIONAL BISCUIT COMPANY

Docket 5013. Order and Memorandum, June 26, 1967

Order denying respondent's motion of May 12, 1967, that Commission's order of April 14, 1967, p. 1674 herein for compliance hearings in this case be rescinded.

MEMORANDUM OF COMMISSIONER MACINTYRE

JUNE 12, 1967

Approximately 23 years ago the Federal Trade Commission entered an order directing the respondent, National Biscuit Company, to cease and desist from engaging in certain discriminatory pricing practices deemed to be in violation of Section 2(a) of the Clayton Act, as amended (38 F.T.C. 213). Between that date and April 26, 1954, questions arose as to whether the respondent was violating that order. Respondent disputed arguments that the practices it was using were violative of the terms of the order to cease and desist. Arguments on this point were resolved when the Commission, on April 26, 1954 (50 F.T.C. 932), ordered that the record of the proceeding be reopened and that the order be modified, making it clear that the practices in question would thereafter be covered by the provisions of the order to cease and desist.

Since April 26, 1954, it has been claimed a number of times that the respondent is violating the order to cease and desist as thus modified. Counter claims have been made by the respondent that it is not violating the order. These claims and counter claims have continued for a period of almost thirteen years without resolution.

It is obvious to me that the respondent and the Commission are well aware of the facts and that the relevant facts cannot be in dispute. The differences in the views of the respondent and of the Commission stem from their conclusions based upon the same facts. It has not appeared to me that the respondent and the Commission are likely to resolve the differences evidenced by their conclusions. Only the appropriate United States Court of Appeals is authorized to make the judicial determination of which conclusion is correct. Therefore, it has appeared to me that the proper course would have been for the Commission to have decided whether to refer the matter to the appropriate court for a judicial determination. The Commission has not done that. Instead, it has undertaken proceedings which will delay for a long time any such decision on the part of the Commission.

This matter is now before the Commission on the request of counsel for the respondent that the order directing the investigational hearings be rescinded. I have decided to refrain from participation in the decision of the Commission on the respondent's pending motion and its pursuit of the particular proceedings now in progress.

Reluctantly, I have reached the decision to refrain from participation with the Commission in its pursuit of these particular proceedings. I would not have hesitated to have participated with the Commission in any consideration and decision it would have undertaken on the question of whether it should or should not refer this matter to the appropriate United States Court of Appeals for decision. In my view, that would have evidenced clearly an act of the Commission in its administrative capacity. However, the Commission didn't choose to make its decision in that way; instead, it has undertaken proceedings which perhaps the respondent may undertake to describe as adjudicative. However, if they should be so described by the respondent and should my participation with the Commission be challenged on the ground, then the court may become confused over the question as to whether my participation would contravene the Administrative Procedure Act. I say that because in the past, long ago, and before the Commission entered its modified order on April 26, 1954, I participated as a member of the staff in urging that the order be modified as the Commission then modified the order. I wish to avoid the possibility of any possible confusion over the question of my having participated in a matter as a staff member and later as a member of the Commission in any judicial capacity.

I always have been of the opinion, and I am now of the opinion, that investigational proceedings leading up to enforcement under Section 11 of the Clayton Act prior to its amendment by the so-called Finality Act are inherently investigational procedures, irrespective of whether the indicia of adjudicative proceedings are engrafted thereon. The Commission's function here is strictly an administrative one; it is in the same position as the Justice Department or a United States attorney in seeking enforcement of a court order.

As heretofore stated, it is my view that this proceeding is essentially an investigative proceeding and, although the courts have judicially approved in prior cases what the Commission is doing here, it is obvious that the engrafting of adjudicatory procedures on the Commission's essentially investigative function in this instance may lead to confusion and delay. This case and similar cases, I believe, could be disposed of more expeditiously

if the Commission proceedings were kept purely investigative in form as well as substance prior to assumption of jurisdiction by the courts in enforcement proceedings.

In any event, I intend to refrain from participating further in this proceeding, either in ruling on respondent's motion or ultimately on the question of whether the Commission should apply to a court of appeals for affirmance and enforcement. Recent developments have made it clear to me that putting a hearing examiner in charge of investigative hearings tends to compromise both his position and the nature of the proceeding. As I have noted above, this essentially administrative matter has now taken on the appearance of adjudicatory proceedings to such an extent that as a result many persons might be misled as to their true character. I would not wish my participation used as an excuse for another delay in a case which has been plagued by too many procedural pitfalls since its inception.

ORDER DENYING RESPONDENT'S MOTION TO RESCIND ORDER
DIRECTING COMPLIANCE HEARINGS

This matter has come before the Commission upon certification by the hearing examiner of respondent's motion, filed May 12, 1967, requesting that the Commission's "Order Directing Compliance Hearings," issued herein on April 14, 1967 [p. 1674 herein], be rescinded, and upon Commission counsel's answer in opposition thereto.

The Commission's order of April 14, 1967, directs that public investigational hearings be conducted for the purpose of ascertaining the extent to which respondent may have violated the provisions of a modified order to cease and desist issued under Section 2(a) of the Clayton Act on April 26, 1954.

Respondent states that upon issuance of the modified order in 1954, it revised its price structure and filed a comprehensive compliance report describing its new price structure. Respondent further states that it had every reason to believe that the Commission was satisfied with its report and refers to a request from the Commission in 1956 for a supplemental report, which request "suggested" that the report be limited to reflect any changes since the 1956 report. Moreover, respondent states that in response to Commission requests, it has submitted supplemental reports in 1960 and 1964, with supporting data, in which it advised that the 1954 price structure was still in effect.

Respondent contends that while the Commission has never explicitly "approved" its 1954 price structure, it has never been

advised of a single alleged deficiency therein either legal or factual. It is on this basis that respondent requests that instead of an order directing compliance hearings, the Commission issue an informal directive requiring the staff to reveal any alleged deficiencies in respondent's reports and to endeavor to work with respondent in good faith to develop a voluntary compliance program.

There is no question here as to the Commission's authority to conduct the subject investigational hearings. Rather, the question is one of alleged unfairness to respondent in view of the compliance history and whether, as further urged by respondent, the Commission's action in directing compliance hearings is contrary to § 3.26 of its Rules of Practice. This section provides, in part, that "The Commission will review such reports of compliance and will advise each respondent whether the actions set forth therein constitute compliance with the Commission's order."

With reference to § 3.26 of the Rules, the sentence relied upon by respondent was not included in the Rules prior to the revision thereof in 1963. As the prior Rules did not contain a similar provision, respondent's argument could only relate to its report of current compliance filed pursuant to Commission order issued April 10, 1964. However, Commission counsel states in his answer to this motion that after receipt of that report, respondent was advised by letter of October 5, 1964, that its report failed to provide sufficient information for the Commission to make an informed determination as to the nature and extent of respondent's compliance with the order. Additional data was requested and subsequently a field investigation was initiated to secure further information. Respondent was aware of this investigation and, in 1966, conferred with the staff concerning the scope and conduct thereof.

On this basis, it is obvious that the Commission has not acted contrary to its Rules but has, in fact, attempted to develop sufficient data to determine the extent to which respondent's present practices constitute compliance with the order. It was after review of the facts thus far developed that the Commission decided that additional data is required to make a decision. In the exercise of its administrative discretion, the Commission determined that such data could best be developed through investigational hearings. In short, respondent's apparent assumption that the Commission is presently in possession of all the facts upon which to determine compliance with the order is erroneous. These facts will be developed in the course of the hearings and respondent will be

fully apprised as to whether its current practices constitute compliance.

Respondent's reliance on the language of the court in the *Vanity Fair* case¹ is misplaced. In that case, the court stated that "* * * it is scarcely likely that if respondent proposes a method of compliance which the Commission accepts, and thereafter follows it, the Commission will subsequently and without notice claim a violation. * * *" As Commission counsel properly points out, the court concluded this sentence with the language "* * * entailing the civil penalties of 15 U.S.C. § 21(1)." Thus, the court was not referring to investigational hearings such as that here involved but had reference to Commission action in prosecuting suits to recover civil penalties. The modified order in this case issued prior to the enactment of the Finality Act of 1959, 73 Stat. 243. Therefore, if there is a presently existing violation of the order, it would not subject respondent to civil penalties at this stage but could result in application to the Court of Appeals for an order affirming and enforcing the modified order to cease and desist. It is only after a court has ordered enforcement and proof of a further violation has been established that respondent would be subject to the penalties with which the court was concerned in *Vanity Fair*.

On the basis of the foregoing, the Commission has determined that its order directing public investigational hearings should not be set aside. Accordingly,

It is ordered, That respondent's motion, filed May 12, 1967, and certified to the Commission by the hearing examiner, be, and it hereby is, denied.

Commissioner Elman not concurring. Commissioner MacIntyre did not participate.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order, June 26, 1967

Order denying respondents' appeal from various rulings of the hearing examiner and his denial of oral argument on their appeal.

ORDER DENYING INTERLOCUTORY APPEALS AND REQUEST FOR ORAL ARGUMENT

This matter is before the Commission upon respondents' appeal pursuant to § 3.17(f) of the Commission's Rules of Practice, filed

¹ *Vanity Fair Paper Mills v. Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962).

May 15, 1967, which appeal is from the hearing examiner's ruling on various motions to quash or limit subpoenas duces tecum, filed April 27, 1967, and from the hearing examiner's order denying respondents' motion for reconsideration and other relief, filed May 5, 1967; the answer of complaint counsel in opposition to the appeal; respondents' motion filed May 16, 1967, requesting oral argument on their appeal; answers to the appeal, filed separately by Royal Typewriter Company, Inc., SCM Corporation, Gibson Greeting Cards, Inc., and Protex Products Company, Inc., all of whom were served with the subpoenas duces tecum at issue; respondents' reply, filed May 29, 1967, to the various briefs filed in opposition to their appeal; and the appeal of SCM Corporation, filed May 8, 1967, from the examiner's ruling denying in part its motion to quash subpoena duces tecum.

The contention is made by some of the persons subpoenaed, though not by complaint counsel, that respondents, who have five days to appeal after service under § 3.17(f), have not filed their appeal in time. In their motion to the hearing examiner for reconsideration of his order of April 27, 1967, respondents requested, among other things, that he defer the effective date of that order until the motion had been ruled upon. The examiner denied such motion without extending the effective date as requested. Respondents, who have not requested an extension of time from the Commission, failed to file their appeal within five days of the time they were served with the examiner's order of April 27, 1967. Although they have filed their appeal within five days from the date they were served with the examiner's denial of their motion for reconsideration, there is some doubt, in the circumstances, whether they have preserved their right to appeal from the examiner's order of April 27, 1967, and, also, whether they may appeal under § 3.17(f) from the denial of the later motion. We do not believe it is necessary to decide such questions, however, since we have otherwise determined that respondents' appeal should be denied.

Respondents' main contention on this appeal appears to be that the hearing examiner's grounds for granting the motions to quash or limit subpoenas duces tecum are inappropriate or inadequate. They claim that under the examiner's ruling they have been deprived of documents which they need to try their case. Respondents seem to further claim that the examiner, having originally approved the issuance of the subpoenas, could not thereafter, under the Commission's Rules, reconsider the merits of such issuance upon motions to limit or quash except in extraordinary circumstances. This latter contention, which we will consider first,

is without substance. The right of a party named in a subpoena duces tecum to move that such subpoena be quashed or limited is inherent in the Commission's Rules and it is not limited to cases of an extraordinary showing of error. See § 3.17(b) of the Commission's Rules of Practice. It was proper, therefore, for the examiner to consider the merits of the requests upon the motions to quash or limit.

As to respondents' main argument, the Commission has stated many times in past cases that the hearing examiner is vested with broad discretion in matters relating to evidentiary and procedural questions, particularly in the area of discovery, and that his ruling on such questions will not be disturbed unless there is a clear showing of an abuse of discretion. *American Brake Shoe Company*, Docket No. 8622 (order issued September 1, 1965) [68 F.T.C. 1169]; *Graber Manufacturing Co., Inc.*, Docket No. 8038 (order issued December 13, 1965) [68 F.T.C. 1235]; *Crowell-Collier Publishing Company*, Docket No. 7751 (order issued March 3, 1967) [p. 1648 herein]. No such showing has been made here.

In this instance the examiner considered in detail each of the specifications in the requested subpoenas duces tecum. He concluded that specification No. 1 as limited by his order was justified. He quashed the other specifications in their entirety. As to the latter, he found generally a lack of relevance and undue burdensomeness. He also found as to some that compliance would unduly delay the proceeding and that the requests were unduly broad in scope. The examiner indicated that the respondents will be permitted to renew their request to the extent necessary at the proper time during the course of the hearing and so respondents will not be deprived by his ruling of evidence they may need for their defense. It appears that the examiner has carefully considered the issues, and we do not believe that there is any justification shown for disturbing his ruling.

The respondents, under the Commission's Rule 3.17(f), have failed to make a showing that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before the conclusion of the hearing will better serve the interests of justice. Therefore, their appeal will be denied. The appeal of SCM Corporation from the part of the examiner's action denying its motion to quash subpoena duces tecum will be denied for the same reason. Additionally, the Commission has determined that oral argument would serve no useful purpose, and that request will likewise be denied. Accordingly,

It is ordered, That the respondents' appeal from the hearing

examiner's ruling on various motions to quash or limit subpoenas duces tecum and from the hearing examiner's order denying respondents' motion for reconsideration and other relief be, and it hereby is, denied.

It is further ordered, That respondents' request for an oral argument on their appeal be, and it hereby is, denied.

It is further ordered, That the appeal of SCM Corporation from the ruling of the hearing examiner on the motion to quash or limit subpoena duces tecum be, and it hereby is, denied.

Commissioner Elman not concurring.

THE CROWN CORK & SEAL COMPANY, INC.

Docket 8687. Orders and Opinion, June 26, 1967

Orders denying appeal of Consolidated Cork Company and Armstrong Cork Company from the hearing examiner's decision not to treat records furnished by them as *in camera*.

OPINION OF THE COMMISSION

This matter is before us on appeals by Consolidated Cork Company and Armstrong Cork Company from refusal by the hearing examiner to grant *in camera* treatment to 1960-1964 sales data furnished by the appellants to and at the behest of the parties herein. The hearing examiner has reserved his decision as to 1965-1966 data because it has not as yet been offered in evidence.

As to Armstrong, the examiner's refusal was both on the merits and upon his finding that Armstrong's motion was untimely and moot. Nevertheless, because of the importance of the question involved we will entertain Armstrong's appeal on the merits.

The hearing examiner has denied the motion for *in camera* treatment essentially on the ground that he could not see how appellant would be hurt by disclosure of the material. We think his ruling was correct.

These appeals present in somewhat acute form the conflicting interests represented on the one hand by the necessity for public hearings and a public record and on the other by the desirability that a heavy handed bureaucracy be prevented from needlessly compromising business information to the injury of innocent bystanders.

We have taken the position and it is reflected in our Rules that our proceedings should, as far as possible, be open and that those seeking instruction and guidance should have access to the testi-

monial and documentary evidence upon which our decisions rest. The principle of open proceedings and public records is, of course, so integral to our judicial system as not to admit of serious dispute. Here, on the other hand, petitioner's plea warrants special solicitude coming as it does from a third party bystander in no way involved in the proceedings whose records, if *in camera* treatment is denied, will be open to the scrutiny of its competitors including respondent herein. Moreover, as petitioner points out, neither of the parties to the proceedings raises any objection to the receipt of the material *in camera*.

Notwithstanding these compelling considerations, however, we think as we noted above that the hearing examiner acted correctly in refusing *in camera* treatment. Certainly we see no abuse of discretion.

The Commission Rules Section 3.16(h) authorize the granting of *in camera* treatment " * * * only in those unusual and exceptional circumstances where good cause is found on the record * * *."

The records herein involved range in age from two and one-half to six and one-half years. Assuming arguendo that they are otherwise of a character warranting *in camera* treatment we fail to see, nor has petitioner demonstrated how, despite the fact that they are old or at least aging records, their exposure even to the prying eyes of competitors will result in the clearly defined and serious injury required by the criteria set forth in *H. P. Hood & Sons, Inc.*, D. 7709, March 14, 1961, 58 F.T.C. 1184, and incorporated by reference into the Commission Rules.

More recent or current records may require different treatment. As to these, although injury may not be demonstrated, it might be more readily inferred since injury flowing from their disclosure would be more immediate and palpable. And we think the hearing examiner was correct in reserving his decision as to 1965 and 1966 records.

In an effort to meet the good cause requirement in the Commission's Rules, petitioner in addition to citing its status as an innocent bystander, notes *inter alia*, the high degree of security the firm has traditionally accorded its records and the fact that denial of *in camera* treatment will expose them to the scrutiny of competitors. These statements illustrate the precatory character of petitioner's appeal and fall considerably short of a showing of good cause based upon possible injury. The records in question are obviously records which petitioner would prefer to keep confidential but their disclosure would hardly create any " * * * probability of concrete injury." *H. P. Hood, supra*.

It may be argued as indeed petitioner has in effect done that where no one cares one way or the other and no demonstrable benefit accrues from disclosure other than vindicating the abstract ideal of public hearing and public record, it is foolishly punctilious to insist upon disclosure. We think not.

The fact that neither of the parties involved in this proceeding objected to *in camera* treatment in this instance suggests only that in their judgment the prosecution of their respective cases in the matter at hand will be unaffected by the hearing examiner's ruling. Their indifference is thus wholly irrelevant to the larger question whether the integrity of the principle of public records is important enough to be preserved, except for good cause, regardless of the ephemeral preferences of individual litigants. Moreover, the principle of open records and open hearings cannot be contingent in its application upon a demonstration of the utility to subsequent litigants or to the public at large of the material placed in the record. This would require a degree of foreknowledge which the Commission does not possess.

In support of its appeal Consolidated cites a recent opinion of Judge Wyatt of the District Court for the Southern District of New York arising out of another interlocutory ruling of the Commission in this same case. In that matter, *Continental Can Company, Inc.*, had received a third party subpoena requiring production of sales data for the years 1963 through the first 6 months of 1966. As a condition precedent to complying with the subpoena, Continental sought a prior commitment from the hearing examiner to accord *in camera* treatment if and when the material was submitted in evidence. Upon his refusal which was upheld on appeal to the Commission, Continental refused to comply. The District Court's opinion arose out of the Commission's suit for enforcement. The question before the Court was the propriety of insistence upon promises of *in camera* treatment as a condition of compliance with the Commission's subpoenas. The Court implied that a prior commitment of *in camera* treatment was unnecessary. However, "* * * to avoid further expenditure of time and money" it was directed that *in camera* treatment be accorded the material.

Whatever the merits of that case and it appears the Court was clearly persuaded that the data involved therein was of a character warranting *in camera* treatment, neither of the appellants herein has shown why records which are two and one-half to six and one-half years old should be protected.

In sum, in the interests of a policy of public hearings and

public records the Commission has required that anyone seeking *in camera* treatment be granted it only in those unusual and exceptional cases where good cause is shown. We have set forth criteria in *H. P. Hood & Sons, supra*, to the effect that where good cause in the nature of a clearly defined and serious injury is shown an exception in unusual circumstances may be made. Although the request of a third party bystander is deserving of special solicitude the principle of public hearings and public records would obviously be subverted were the Commission to accede to the request for *in camera* treatment by third parties upon their mere affirmation that their records should not be subjected to exposure. In such circumstances the Commission would be abdicating its responsibilities and substituting the tendentious judgment of the petitioner in place of its own disinterested ruling.

Appropriate orders will issue.

ORDER DENYING APPEAL FROM RULING OF HEARING EXAMINER

Armstrong Cork Company, having on May 25, 1967, filed an appeal from the ruling of the hearing examiner denying its motion for *in camera* treatment of records furnished by respondent in response to subpoena and thereafter offered in evidence, and

The Commission being of the opinion that Armstrong Cork Company has made no showing of good cause pursuant to Section 3.16(h) of the Commission's Rules why the data should be given *in camera* treatment, and

The Commission therefore being of the opinion that the ruling of the hearing examiner does not reveal a clear abuse of discretion,

It is ordered, That the appeal of Armstrong Cork Company, filed May 25, 1967, be, and it hereby is, denied.

ORDER DENYING APPEAL FROM RULING OF HEARING EXAMINER

Consolidated Cork Company, having on May 15, 1967, filed an appeal from the ruling of the hearing examiner denying its motion for *in camera* treatment of records furnished by them to complaint counsel in response to subpoena and offered in evidence by complaint counsel, and

The Commission being of the opinion that Consolidated has made no showing of good cause pursuant to Section 3.16(h) of

competing customers on a nondiscriminatory basis, which means that if the supplier furnishes promotional assistance to one customer he must make that assistance available on proportionally equal terms to all competing customers. The court have also held that the supplier must comply with these provisions of the law irrespective of whether the promotional assistance is furnished to the retailer directly or through an intermediary."

Commenting upon specific features of the plan, the Commission said that it contained two features which would probably violate the law:

(1) "The Commission is of the opinion that the standard of payment to retailers, which you contemplate basing upon floor space, does not meet the statutory standard of 'proportionally equal terms' as required by Sections 2(d) and (e) of the Robinson-Patman Act. The proposed standard bears no ascertainable relation to the volume of business which any of the retailers involved might conduct with any of the participating suppliers. Moreover, the proposed standard could result in a situation in which retailers who have a small volume with the participating suppliers would receive more than competing retailers with a much larger volume solely because of larger floor space.

(2) "The Commission is of the opinion that the feature of the plan which induces customers to view the projected ads constitutes the sale of merchandise by means of a lottery or by means of a chance or gaming device contrary to public policy and the provisions of Sec. 5 of the FTC Act."

The Commission's opinion also pointed out that, if the plan is revised so as to eliminate the two foregoing objections, it would still be necessary for the following four conditions to be met:

(1) All competing retailers must be notified of their right to participate in the plan on a nondiscriminatory basis.

(2) It must be made available to all competing retailers within a given marketing area and to those who, geographically, are on the periphery of that area if they in fact compete with the favored retailers.

(3) It must be made available to all retailers who compete in the resale of the supplier's product, irrespective of their functional classification. Therefore, if the items involved in the plan are also sold by non-grocery stores, they must be accorded the same opportunity to participate in any promotional assistance given by the suppliers to competing grocery outlets.

(4) An alternative plan on proportionally equal terms must be offered to those retailers who, for practical business reasons,

find the film projector not to be usable and suitable. (File No. 673 7036, released Jan. 7, 1967.)

Modified July 11, 1968, 69 F.T.C. 1211.

No. 107. Labeling of product composed of leather fibres

The Commission was requested to furnish an advisory opinion with respect to the use of the terms "Reconstituted leather" and "Man-made leather" to describe a material composed of 70 percent leather fibre with bonding agents added and a vinyl backing resembling leather.

In its opinion, the Commission advised that neither term would be considered as a satisfactory description of the material. The word "leather" has long been held to constitute a representation of top grain leather, unless properly qualified to show otherwise. In this connection, the terms "reconstituted" and "man-made," which at best create inferences of leather which has been in some manner reprocessed, were not considered by the Commission as adequate qualifications when the material in question is nothing more than ground leather or leather fibres held together by bonding agents.

The Commission advised that if the seller wished to show the leather fibre content of this material, it would be necessary to use such terms as "shredded leather" or "pulverized leather," together with a disclosure of the vinyl backing, in order to give the consumer a truthful description of the true nature of the material.

Further, if the seller decided not to disclose the ground leather or leather fibre composition of the material, the Commission stated that it would be necessary to disclose that the material was "Not leather" or "Imitation leather" or "Simulated leather," the reason being that the consumer is entitled to a disclosure that the material before him which has the appearance of leather is not actually what it appears to be. (File No. 673 7033, released Jan. 13, 1967.)

No. 108. Holding company ownership of both auto parts warehouse distributor and auto parts jobber

The Commission recently advised a requesting party that his proposed reorganization of properties which he owns or controls would not appear to violate the Clayton Act, as amended by the Robinson-Patman Act.

The requesting party proposes to establish a holding company which would control two operating companies, one an automotive

parts warehouse distributor, the other an automotive parts jobber. Two officers of the operating companies will initially hold a minority interest in these companies, an interest which might become a majority interest at some future date. The warehouse distributor will equitably sell to all jobbers who wish to buy from it, except that this distributor will not sell to the jobber with which it has common ownership except on a limited emergency basis. (File No. 673 7042, released Jan. 13, 1967.)

No. 109. Use of manufacturer's list prices to denote value

A concern engaged in the distribution of premiums for sellers who make premium offers on the labels of their merchandise recently requested an advisory opinion concerning the legality of using manufacturers' list prices as the value of the items so offered.

After advising that it is impossible to give a categorical answer to such a question since the answer is wholly dependent upon facts which are unknown to the Commission, the Commission advised that in no case could the company or its accounts rely completely upon manufacturers' list prices as an absolute indication of the value of the products offered as premiums. Instead, since these prices will be described as the value of the premiums on labels and in advertising, they must meet the test of Guide II of the Commission's Guides Against Deceptive Pricing, which provides that whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area.

The Commission advised that if the sales history of any particular product can meet this test then the list price can be used as the value of the product on labeling and in advertising. If it does not meet this test, then the list price cannot be used. The important point to remember here is that the mere fact that a manufacturer has asserted that a given amount is his list price does not constitute a license to others to use that price as a representation of value. The concept of value is not abstract, but must instead be based upon concrete selling prices. Certainly, the Commission stated, if the list price for any particular product can meet the test of substantial sales in the seller's trade area, it can be used as a representation of value even though substantial sales are also made at less than that price by other dealers in the same area.

Additionally, the opinion pointed out that since the company was handling what was described as self-liquidating premiums, there was also the possibility that some of the list prices being employed were old in point of time and did not represent current values. In such a situation, it would not be permissible to use the list price as a basis for a representation of current value.

Finally, the Commission noted that the company was not itself engaged in advertising these prices, but was instead expected to furnish values for the products to the accounts which they could use in their own advertising and labeling. The responsibility for the truthfulness of the price representations made under these circumstances was held to be twofold, being shared by the sellers which actually use the prices in their advertising and labeling and by the distribution company as well under the principle that one who places in the hands of others the means and instrumentality of deception is himself guilty of deceit. Thus it was stated to be important for both to make certain that the prices used to represent the values of these premiums comply with the criteria of the Guides. (File No. 673 7044, released Jan. 24, 1967.)

No. 110. Agreement among retailers for uniform store hours

The Commission was requested to furnish an advisory opinion with respect to a proposal by a retail trade association to conduct an informal survey of a number of grocery operators in the area to determine their individual preferences as to hours of doing business. Upon completion of the survey, the association plans to announce the results thereof. Although a majority of store operators may elect thereafter to operate on uniform hours, as determined by the survey, no sanctions are planned nor will there be any attempt to enforce or insure uniformity of closing hours. There are a number of stores which will not subscribe to such a suggestion and will remain open at other times.

The Commission stressed its understanding that while a majority may voluntarily elect to subscribe to uniform hours of doing business as a result of the survey of individual preferences, those who do not wish to do so will not be subject to any form of coercion or compulsory process and, indeed, it was expected that many will not so subscribe for business reasons of their own. On the basis of this understanding and assuming that the agreement or plan will relate to nothing other than hours of doing business, the Commission advised that it did not believe the plan would

violate any laws it administers. (File No. 673 7034, released Jan. 24, 1967.)

No. 111. Functional discounts unlawful whenever an adverse effect on competition results therefrom

The Commission recently issued an advisory opinion to the effect that the 14 percent discount which would be offered under the plan outlined below probably would result in violation of Commission administered law.

At present, the manufacturer sells his product to manufacturers of a complementary product exclusively. The purchasing manufacturers resell the product to independent distributors and to ultimate consumers.

The selling-manufacturer proposes to sell independent distributors direct, charging them approximately 14 percent more than the purchasing-manufacturers would be charged on shipments to the warehouses of the latter. On drop shipments to purchasers buying through the purchasing-manufacturers, the manufacturers would be charged the independent-distributors' price. On drop shipments to consumers of the product, the independent-distributor price would be charged. Drop shipments could be ordered by any customer and would be openly available to all on the same terms.

There would be no agreement between purchasing-manufacturers or distributors and the manufacturer as to prices the former would charge; however, the manufacturer does now suggest and would continue to suggest prices to be charged consumers. No other form of control over resale of the product is now or would be exercised by the manufacturer.

The Commission pointed out that the price difference which would result from the proposed discount is within the purview of Section 2(a) of the Robinson-Patman amendment to the Clayton Act. Section 2(a) provides, in essence, that it is unlawful for a seller in commerce to discriminate between different purchasers of goods of like grade and quality where the effect may be substantially to lessen competition or to tend to create a monopoly.

The Commission added that the 14 percent discount to be offered to purchasing-manufacturers is a functional discount and that such discounts are not prohibited by the applicable law or judicial interpretations thereof unless the discounts result in the adverse competitive effects the law proscribes. The Commission was of the view that such adverse effects were likely to result due to the fact that purchasing-manufacturers would compete against

distributors in selling to ultimate consumers and the manufacturers would enjoy a 14 percent price advantage on such sales. The Commission pointed out that unless the 14 percent only made due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which the tile cement would be sold or delivered to the manufacturers, substantial anticompetitive effects probably would result from implementation of the plan. Such a result would be violative of Section 2(a) of the Robinson-Patman amendment to the Clayton Act. (File No. 673 7045, released Feb. 2, 1967.)

No. 112. Foreign origin disclosure not required on outside of packaged badminton sets

In response to a question involving the sale of badminton sets which will be sold in an opened display case with the foreign country of origin marked on each imported component readily visible to prospective purchasers, the Commission ruled that it would not be necessary to disclose the foreign origin of each imported component on the outside of the package.

The company which requested the advisory opinion intends to merchandise badminton sets to various department stores throughout the United States. The package, instructions for use and the steel poles will be manufactured here in the United States. The remaining three items in the sets will be imported from three different foreign countries and each will be marked as to its specific country of origin. For example, the rackets will be imported from Japan, the shuttlecocks from England, and the net from Pakistan. The badminton sets will be sold in an opened display case with the country of origin marked on each imported component readily visible to prospective purchasers. (File No. 673 7048, released Feb. 2, 1967.)

No. 113. Premerger clearance

The following is a digest of an advisory opinion issued by the Federal Trade Commission regarding a pre-merger clearance matter.

A small manufacturer of a product used in the paper industry applied for clearance of the sale of 67 percent of its stock to another small company in the same line of business. There was strong competition in the line of business, a few companies dominated the market, and the selling company had had net losses for a number of years.

The Commission advised the applicant proceedings would not be initiated if the acquisition was made. (File No. 673 7057, released Feb. 14, 1967.)

No. 114. Retail discount selling organizations

The Commission recently advised the promoter of a membership organization of retailers which would grant discounts on purchases and services except where prohibited by law that the plan was unobjectionable.

More specifically, the plan provided—

The promoter would set up a discount program for independent retailers such as auto dealers, appliance, furniture and clothing stores. Chainstores and other discount houses would not be admitted to membership.

For \$5 per week for 26 weeks or six months, the retailer would become a member of the organization. There would be no fee for consumer-members to join. The promoter would guarantee retailers 30,000 discount member/customers. The retailers would be listed in a book showing the discount each had decided to give on purchases and services except on "fair traded" items or where prohibited by law. There would be no coordination or combination on prices by participating retailers. A free book with customers' membership card as the cover would be mailed to all residents in the area in which the plan is tried.

Although all competing retailers would be offered the opportunity, only one retailer, the first participant in an area, in each category of business would be allowed to join in each of the various areas in which the plan is tried. Participating retailers would "co-operate" only in the sense that all give discounts to member/customers; however, if a group of retailers wished to purchase an item several sold, the promoter would order the item direct from manufacturers, distributors or importers with whom the promoter has business connections.

The Commission advised the applicant that the plan itself is unobjectionable. The Commission added however that:

a. The participating retailers should grant the discount off the manufacturer's suggested price, where there is one and where a number of the principal retail outlets in the area are regularly engaged in making sales at that price; or off the usual trade area price so that the consumer will in fact receive a discount.

b. The booklet listing participating retailers should note that listing does not imply that other businesses in the community do

not offer similar or even greater discounts and that the listing of the retailer is done for a fee.

c. If participation in the plan results in agreement as to prices, discounts, terms of sale and the like, such agreement or agreements would be violative of Commission administered law.

d. If the literature you use in seeking to persuade retailers or consumer-members to participate actually does or has the capacity to mislead or deceive, it would be actionable under Commission administered law.

e. If implementation of the plan results in discriminatory acts which may substantially affect competition, same would violate the Robinson-Patman Amendment to the Clayton Act.

(File No. 673 7031, released Mar. 1, 1967.)

No. 115. Trade association code of ethics governing pricing and selling practices

The Commission recently rendered an advisory opinion to a trade association of jobbers advising that while some of the submitted Code provisions appear innocuous, the Code as a whole is shot through with anticompetitive implications.

The Commission pointed out, by way of examples, that the question of establishing fair and adequate profit levels is not an appropriate trade association exercise; the use of price as an economic weapon is integral to the competitive process and becomes anticompetitive only when used destructively; urging the frequent checking of competitive prices suggests an attempt of achieving price uniformity; complaining to a competitor about his practices could be construed as an unfair method of competition depending upon the practice involved for if the "practices" were low prices, the complaint could be construed as an appeal for price maintenance.

In disapproving the Code of Ethics as submitted the Commission advised that because the effect of issuance of such a Code would be coercive upon the members, the cumulative effect of its provisions could well operate to reduce or eliminate price competition and impair the right of each member to price and promote his products as he sees fit. (File No. 673 7053, released Mar. 8, 1967.)

No. 116. Advertising claim: "America's most warranted * * *"

The Commission recently advised a manufacturer who wished to use the advertising claim "America's most warranted * * *"

that it would be inappropriate and impracticable for it to give the desired advisory opinion.

Citing Rule 1.51 of its Rules of Practice, the Commission stated that the proposed claim was such that an informed decision thereon could be made only after extensive investigation, clinical study, testing, or collateral inquiry.

If the statement in question is true, the Commission added, then of course there is nothing in the statutes which it administers to prohibit its use. The question, however, is enormously complicated and to answer it would require both quantitative and qualitative determinations which could only be made after extensive investigation. While the Commission must of necessity investigate the use of extravagant claims, such investigation should not be initiated in support of an advisory opinion.

Moreover, because of the nature of the proposed claim, Commission approval could be construed and exploited as Government endorsement. (File No. 673 7058, released Mar. 8, 1967.)

No. 117. Misrepresentation of hand cream

The Federal Trade Commission recently advised a marketer of hand cream that it would be improper and a violation of Commission administered law to represent, contrary to fact, that the product had been "medically prescribed."

There are many precedents for the proposition that it is an unfair trade practice to misrepresent approval or endorsement of products by medical associations, doctors, dentists and related professional groups. (File No. 673 7067, released Mar. 21, 1967.)

No. 118. Reduced price on shopper's guide advertising for radio advertisers

The Federal Trade Commission recently advised a radio station that it might properly give reduced advertising rates in a printed shopper's guide which it plans to publish to those advertisers buying radio time at regular station rates.

The Commission was informed that radio advertisers would not be required to buy shopper's guide space, and that shopper's guide space could be purchased at regular shopper's guide rates by those not buying radio time.

Three other radio stations and two newspapers are available to advertisers within the market area in question. (File No. 673 7071, released Mar. 28, 1967.)

No. 119. Trade association code of ethics

The Commission recently advised a trade association that the objectives sought by its proposed Code of Ethics appeared to be unobjectionable and that adherence to the Code should not operate to effect an unreasonable restraint of trade. Accordingly it is the Commission's view that the mere act of becoming a member of the association and joining in its activities for the purposes outlined will not in itself violate any statute administered by the Commission.

The association was advised, however, that if enforcement of the Code, operated so as to effect an unreasonable restraint of trade, serious questions would be raised as to the plan's validity. The general test, the Commission stated, is whether concerted action by competitors unreasonably affects a businessman's ability to compete. Thus, if association membership is an important competitive factor, arbitrary or discriminatory refusal of membership to a qualified applicant because of alleged failure to abide by the Code would raise serious questions under Commission-administered law, as would arbitrary or discriminatory expulsion of association members.

In conclusion, the Commission noted that it confined itself in its answer to so much of the question as falls within Commission jurisdiction. The extent, if any, to which another Government agency may be concerned with the association's activity is a matter to be determined by reference to that agency. (File No. 673 7029, released Apr. 6, 1967.)

No. 120. Permissible period of time during which new product may be described as "new"

The Commission was recently requested to render an advisory opinion as to the permissible period of time during which an advertiser could continue to describe a new product as being "new."

The Commission pointed out that the word "new" may be properly used only when the product so described is either entirely new or has been changed in a functionally significant and substantial respect. A product may not be called "new" when only the package has been altered or some other change made which is functionally insignificant or insubstantial.

Assuming that a particular product could truthfully be described as "new" in the first instance, the opinion noted that there is little precedent for determining how long an advertiser may truthfully continue to describe it as "new." The Commission

stated it was aware, of course, that the word has been frequently abused and that it is in the interest of all advertisers to have established ground rules for its use. However, the time period during which a particular product may be called "new" will depend upon the circumstances and is not subject to precise limitations; any selection of a fixed period of time or a rigid cut-off date would have to be arbitrary in nature. Further, any such attempt would not only fence in all advertisers without regard to the circumstances, but would fence in the Commission as well, and deprive it of all flexibility in dealing with individual situations.

Instead, the Commission felt it would be preferable, considering the absence of precedents, to establish a tentative outer limit for use of the claim, while leaving itself free to take into consideration unusual situations which may arise. Thus, the Commission's position was that until such a time as later developments may show the need for a different rule, it would be inclined to question use of any claim that a product is "new" for a period of time longer than six months. This general rule would apply unless exceptional circumstances warranting a period either shorter or longer than six months were shown to exist. (File No. 673 7068, released Apr. 15, 1967.)

No. 121. Resale price maintenance of books held on consignment

The Commission was recently requested to render an advisory opinion concerning the legality of an agreement between a university press and a scholarly association that the press would not sell the annual publication of the association, which it held on consignment, at less than the minimum resale price stipulated by the association. The book normally sells by mail order for the same amount as is charged by the association for annual dues. Members of the association are entitled to receive a copy of the book at no extra charge. The association wishes to include a provision in the contract prohibiting the press from selling to educational institutions, mainly libraries, at any discount below the usual retail price, its purpose being to prevent such buyers from obtaining the book at a lower price than they could by joining the association. This would mean that the press could not give libraries the normal trade discount.

In addition, the Commission was assured that the relationship between the press and the association was strictly one of agency. The press does not print the books for the association, which subcontracts the printing and simply wishes to use the selling facilities of the press to handle sales to nonmembers. Legal title

to the books remain in the association, which owns the copyrights, and the books are being handled by the press on a consignment basis.

The Commission advised that it could see no objection to the inclusion of this provision under the precise factual situation presented. In arriving at this conclusion, the Commission stated that it was mindful of the fact that consignment agreements can, under certain circumstances, be used as a device for illegal resale price maintenance, even where patented or copyrighted articles are involved. However, it was of the opinion that this proposal would not fall within that category in view of the fact that the contemplated consignment agreement containing the clause in question will be with only one consignee and there will be no other outlets competing in the distribution of these books. This view of the law was limited solely to the factual situation involved. Hence, generalizations from this opinion or its extension to other factual situations would not be warranted. (File No. 673 7074, released Apr. 22, 1967.)

No. 122. Propriety of publishing marketing area price lists

The Federal Trade Commission recently advised a manufacturer who had requested an advisory opinion that there is nothing inherently illegal about area price lists which make only due allowance for differences in the cost of shipment and delivery.

The Commission advised the manufacturer further that price discriminations in sales to customers located in different areas who in fact compete with each other could amount to conduct in violation of Section 2(a) of the Clayton Act, unless cost justified or unless the lower price is a good faith meeting of a competitor's equally low price.

The Commission also pointed out that it could be unlawful if area price lists permitted sales producing monopoly profits in one area to subsidize sales at much lower prices in another area or to a particular customer or group of customers to the competitive injury of a competitor of the seller. (File No. 673 7081, released Apr. 22, 1967.)

No. 123. Selling merchandise by lottery methods condemned by Commission

The Commission issued an advisory opinion in which it ruled that a proposed plan calling for the sale of merchandise by means of a lottery would be contrary to the provisions of Section 5 of the Federal Trade Commission Act.

"Moreover," the Commission said, "the fact that the purchaser receives something of value for his consideration does not negate the existence of a lottery."

Under the terms of the proposed plan which was the subject of the advisory opinion, the promotion would consist of a store display carton containing 36 \$1 plastic scale model kits, with a different number to be marked on the end of each kit box. The display header would announce to prospective purchasers they could win a \$2 chrome plated model if the number on the end of the box corresponds with the number to be posted by the store manager in 4 weeks. (File No. 673 7085, released May 5, 1967.)

No. 124. Agricultural cooperatives may market their products through a common sales agent

In an advisory opinion made public today, the Federal Trade Commission stated that agricultural cooperatives formed under pertinent provisions of the Capper-Volstead Act may establish and market their members' products through a common sales agent.

Counsel for the requesting parties described his clients as cooperative associations of milk producers representing some 361 farmers and dairymen who produce about 2 million pounds of milk per month in excess of that consumed in their trading area. Counsel said that formation of the sales agency by his clients will enable them to dispose of this excess through bidding on Government contracts to supply milk to military bases in competition with milk now imported from other milk marketing areas for that purpose.

The Capper-Volstead Act (7 U.S.C. 291, 292) permits persons engaged in agricultural pursuits to associate in the collective marketing of their products. Under its provisions cooperative associations formed thereunder may make contracts or agreements as will effect such purpose, and they may have marketing agents in common. The Act has been construed as a grant of immunity from the antitrust laws insofar as collaboration among members of cooperative associations are concerned. This immunity ends, however, at the point where they act, either by themselves or with other persons or entities not in this category, to restrain trade or otherwise eliminate competition at successive stages in the marketing process.

In approving the formation of a common sales agency by cooperative associations of milk producers to market the products of their members the Commission advised Counsel for the requesting parties that its action "is not to be construed as approval for any practice which may be predatory in nature, may result in unlawful

monopolization, may restrain commerce to the extent that milk prices are unduly enhanced thereby, nor to conspiracies or combinations between your clients "and persons or entities not in this category." (File No. 673 7082, released May 5, 1967.)

No. 125. Agreement among retailers as to uniform store hours

The Commission was asked to render an advisory opinion as to whether it would be lawful for a trade association, after making a survey of retailer preferences as to store hours, to recommend that all stores observe the same hours, but that no sanctions would be imposed upon nonconforming retailers. The request was prompted by Advisory Opinion Digest No. 110, which the Association interpreted as having stated that the Commission found nothing unlawful in an agreement among retailers to observe uniform hours of business.

The Commission pointed out that its previous opinion advised merely that there would be nothing unlawful in a retail trade association conducting an informal survey intended to determine its members' individual preferences as to hours of business, followed by an announcement by the association of the results of the survey. The Commission emphasized that its opinion was based on the premise that any number of individual retailers may elect unilaterally to adopt common hours of business. The Commission did not intend to suggest that an agreement among competing retailers with respect to uniform hours of business would be lawful. On the contrary, it was the Commission's opinion that such an agreement among competitors, while perhaps not illegal *per se*, would be fraught with grave risks of illegality. Conceivably, there might be some rare and most unusual circumstances in which such an agreement among competing sellers could be justified as a reasonable restraint of trade, but this seems unlikely. The fact that no sanctions or coercion are imposed upon noncomplying retailers cannot legitimize an otherwise unlawful agreement in restraint of trade.

In sum, it was the Commission's opinion that the conduct of a survey as to its members' business hours and an announcement of the results of that survey by a trade association, would not be unlawful so long as no agreement among competing sellers was involved. (File No. 673 7066, released May 16, 1967.)

No. 126. Proposed advertising for portable oxygen administrator

The Commission rendered an advisory opinion as to the legality of certain proposed advertising for a portable oxygen administrator designed for individual use.

The advertising would represent that there are many emergencies that call for an immediate supply of oxygen, such as sudden heart attacks, coronary occlusions, respiratory defects, gas and smoke poisoning, drowning, electric shock, asthmatic seizures, and more. Providing oxygen the instant it is needed can, according to the advertising, make the difference between prolonging life and losing it or between complete and partial recovery. When needed, oxygen must be supplied within 5 to 8 minutes to prevent brain damage. Until recently, if an emergency oxygen deficiency occurred, one had to wait for professional medical assistance and there was no way of knowing how long that would take. Now one can have a low cost portable administrator so simple to operate that anyone can administer it, even to themselves. While the literature would caution in some places that all heart and respiratory conditions are not alike and thus the need for oxygen may vary widely in its application so that your doctor will have to be your guide, it would also add that the advertiser knows of no emergency situation where oxygen can do harm and it may save a life under many circumstances.

The opinion pointed out that the matter presented a difficult problem to treat under the advisory opinion procedure, for the Commission has not conducted its own tests of this particular unit and hence is not in a position to comment upon every question raised by the advertising. Hence, its opinion has to be based upon such general medical knowledge as is available and be directed at the main themes of this advertising rather than at specific details.

Based upon what is known of the capabilities of similar devices, the Commission advised that it could not place its stamp of approval upon advertising which holds this device out to the general public as suitable for use and capable of saving lives under all conditions specified without its having been recommended for use by a doctor familiar with the patient and without the individual for whom it has been prescribed, or his family, having been given instructions for its use. This is particularly true when it is considered that in some cases of asthma and emphysema there is a danger in the administration of oxygen without a doctor's prescription and instruction because an over supply in these conditions can actually cause the patient to stop breathing.

The opinion further added that aside from the question of danger in this specific situation of use and the general fire hazard when oxygen is improperly used or stored, the scientific evidence available indicates that without a positive-pressure apparatus, this device will accomplish little more than will mouth-to-mouth resus-

citation in situations where emergency oxygen is indicated. In fact, the emergency resuscitator attachment appears to require mouth-to-mouth techniques in conjunction with the device and the evidence indicates this would only increase the oxygen a patient would receive by an insignificant amount. Positive pressure, which can only be administered by trained personnel without grave danger to the patient, is indicated for use when a patient is not breathing. If the patient is breathing he will usually inhale sufficient oxygen from the air by himself until medical help can be obtained.

The fault of this advertising, as the Commission views it, is that while beneficial results can be achieved by the skilled administration of the proper amounts of oxygen when that treatment is indicated, it is deceptive to hold out to the unskilled person that he can by himself properly diagnose the patient's condition and administer oxygen in the required amounts and in the proper manner through use of this device so as to achieve the results claimed in the advertising. (File No. 673 7088, released May 26, 1967.)

No. 127. Description of raised printing as embossing

The Commission was recently requested to render an advisory opinion concerning the use of the terms "embossing" and "embossed" to describe raised printing or printing by the verkotype process.

The process used would consist of printing the copy with a printing or lithographic press, placing it on a conveyor to send it through a verkotype machine that sprinkles powdered rosin on the wet ink and carries the copy under gas heaters which would fuse the rosin and ink, thereby creating a raised surface.

The Commission advised that since embossing is generally understood to involve the distension of paper with the use of a die, the description of raised printing, including products of the verkotype printing process, as embossing would be inappropriate. (File No. 673 7040, released May 26, 1967.)

No. 128. Trade association code of ethics

A group of producers of products sold by door-to-door salesmen employed by independent sales agencies has requested a Commission opinion with respect to the legality of a proposed code of ethics to govern the practices of the agencies and the salesmen. The opinion was rendered following the second submittal of the code, which had been substantially modified as a result of confer-

ences with the Commission's staff pursuant to Commission direction.

The modified code provides for the appointment of an Administrator who will be empowered to impose fines against any of the agencies if he finds that they have authorized, condoned or in any way supported deceptive practices by their sales and collection representatives. The maximum amount of fines has been limited to an amount which in the Commission's judgment will not operate anticompetitively or in a confiscatory manner but sufficient to constitute a deterrent.

Further, in the modified code the agreement between signatory agencies not to employ a person found to be a willful violator by the Administrator in a sales capacity for a period not to exceed one year was eliminated. In its place it is now provided that the Administrator, upon finding that a person has willfully violated the code, shall recommend that he not be employed in a sales capacity for a period not to exceed one year. However, it is further provided that an agency shall use its own discretion in deciding whether to follow such recommendation of the Administrator.

In order for a person to be found to be a willful violator it must be determined that on three separate occasions he violated the code with knowledge that his representations were in violation of the code. Moreover, if an agency repeatedly condones or authorizes violations of the code, it may be subject to expulsion from participation in the code.

Finally, in order to insure greater participation in the administration of the code by the agencies than was the case in connection with the original submittal, the code now provides that the Administrator will be responsible to a Board of Directors composed of six agencies and one producer. Of the six agencies, at least two must not be affiliated with any producer. Also, the one producer must not be affiliated with any agency. Appeals from actions of the Administrator may be taken as a matter of right to a committee composed of representatives of at least three participating agencies, at least one of which is not to be affiliated with a producer. A new committee is to be appointed each month and its members are to be rotated from among signatory agencies.

The Commission advised that it had given this matter very careful consideration in view of the magnitude of the problems which confront the industry and the obvious sincerity of the industry in attempting to devise ways to cope with those problems. Even taking all these factors into consideration, however, the Commission was unable to give its approval to those sections of code which apply

to the salesmen as those sections are now written. While the code now provides the action to be taken with respect to the salesmen found to be in violation would be on the basis of a recommendation by the Administrator rather than by agreement among the signatory agencies, the Commission believes the probable result of that recommendation would be to substantially interfere with those individuals' right of employment and their right to have their fate decided by their individual employers uninfluenced by virtually mandatory recommendations from the Administrator.

However, the Commission advised that it did not believe that this would call for outright rejection of the code, since it believed the code could be amended so as to achieve the legitimate objectives of the industry without running afoul of the antitrust laws. Thus the Commission stated it was prepared to advise the industry that it could see no objection to the maintaining by the Administrator of a public record of the names and circumstances respecting a finding of a willful violation. If this modification was agreeable to the industry, so that a provision to that effect could be inserted in the code in place of the present section applying to salesmen, the Commission would have no further objection on that score.

The Commission was further of the opinion, now that greater participation of the agencies had been assured, that it was possible to apply the code as now written to the producers and agencies in such a manner as not to do violence to the antitrust laws, particularly if the element of coercion could be truly eliminated insofar as the agencies were concerned when they were arriving at their decision as to whether to join or whether to remain under the code after having joined. The Commission made it clear, however, that this conclusion was a tentative one since there was little recorded experience upon which to predicate such a judgment. Therefore, the opinion was based on the understanding that there will be no coercion of any agency to subscribe to the plan, no coercion of any agency to remain in it after it has subscribed and no retaliation of any kind against any agency which does not choose to join or which subsequently elects to leave after having joined.

The industry was also advised that the Commission approval extended in the opinion was given for a three year period, following which the industry should resubmit its request, and, in the meantime, the Administrator must submit reports to the Commission of each complaint which was received, considered or investigated and of each action taken. Further, the opinion was rendered with instructions to the staff of the Commission to initiate periodic

inquiries after the plan had been put into effect to determine and report to the Commission as to how it is actually working.

DISSENTING OPINION

BY ELMAN, *Commissioner*:

With the best of intentions, a trade association has proposed, and the Commission now approves, the establishment of a Code which provides for the exercise of the powers of government by a private group.

It is one thing to encourage businessmen to promote voluntary compliance with the law. It is something else to approve a private scheme of law enforcement, where investigations are conducted by private "policemen" and where violations of privately-decreed "laws" are punished by fines and penalties imposed by private "judges" after privately-conducted "trials."

The Code's Administrator and his staff will apparently function like a small version of the Federal Trade Commission. But there is a big difference between such an administrator and the Commission, which is a public agency of government, with powers and duties that are defined and circumscribed by specific statutory provisions enacted by Congress. The decisions and orders of the Commission are subject to judicial review. Commission proceedings are public and must be conducted in conformity with the requirements of due process, the Administrative Procedure Act, and other applicable provisions of law. Findings of fact must be supported by substantial evidence on the record. In short, all our actions are subject, substantively and procedurally, to the basic safeguards and restraints established by law.

It is fundamental that the regulatory powers of government are too awesome to be turned over to private policemen, prosecutors, and judges—no matter how well-intentioned. Regulation of business—at least when it involves the imposition of fines and penalties for violations of prescribed standards of conduct—is the job of government agencies and officials bound by the limitations of due process and the rule of law. It runs against the basic grain of American society to permit private "vigilantes" to act as policemen and to allow private judges to hold "kangaroo courts" where punishment is imposed. The fundamental safeguards and restraints which protect the public against arbitrary or lawless official action are absent when the powers of government are sought to be exercised by private individuals or groups.

I think the Commission is taking a long step backward in approving the usurpation by a trade association of the law-enforce-

ment powers and duties of an agency of government.* (File No. 673 7038, released May 23, 1967.)

No. 129. "Solid" and "karat" used together in describing articles composed of gold

The Commission recently advised an association that the word "solid" could be used in conjunction with the karat indication of gold of 10 or more karats in fineness. For example, it would be proper to use the expression "14 karat solid gold" or "solid 14 karat gold" to describe an article which was both in fact solid and in fact made of gold 14 karat in fineness. The use of such descriptions, or appropriate abbreviations therefor, provided both factors in the description were given adequate prominence, would be unobjectionable. (File No. 673 7084, released June 13, 1967.)

No. 130. Use of words "National" and "Association" in name of proposed trade association

The Commission was recently requested to render an advisory opinion concerning the legality of the use of words "National" and "Association" in the name of an association in the process of formation.

The Commission was advised that a group of members of the industry had cooperated in the founding of the association, an

*Cf. "The Precious Ounce of Prevention," an address by Honorable Paul Rand Dixon, before the Advertising Association of the West, Spokane, Washington, June 28, 1966, pp. 11-12:

"The question then arises as to whether an industry is privileged to crack the whip on the illegal few within it. What kind of discipline is acceptable? Who is to be the judge and jury? What assurance is there that the assessment of the facts will be impartial? And will the accused have a fair chance to defend himself? These are serious questions. We are no longer living in the days of the Old West when punishment was dealt out with more speed than accuracy. We are living instead, thank Heaven, under a government of law for which many generations of free men have fought. Although legal process sometimes may be frustratingly slow, it is the safeguard of our liberty. Thus, should any industry interpret self policing as conveying the privilege to mete out justice to offenders without due process of law, far more would be lost than gained. That is why I say that self policing must be reinforced by governmental authority. For the advertising industry to set up high ethical standards, as you already have done, is all to the good, and to adhere to the standards is even better. Indeed, such self restraint serves to focus attention on those few who are out of step. They may even become so uncomfortably conspicuous that they will mend their ways. But if they don't, and persuasion fails, it is not your privilege to discipline them. Such is the sole responsibility of governmental authority—local, state or national."

Cf. also Donald F. Turner, "Cooperation Among Competitors," *Northwestern Univ. L. Rev.* 865, 870-71 (1967):

"In discussing collaboration among competitors which regulates or limits their competition in particular ways, I have been considering only *voluntary* adherence by the competitors themselves to agreements of one sort or another. I have not been discussing the question of sanctions that might be imposed within the group for failure to comply with the agreement; the more so, I have not been discussing sanctions effected through pressure on outside parties with whom the group deals. For good reasons, the law has always been suspicious of the potential abuse in private government of economic activity enforced by sanctions. Therefore, the use of sanctions within and without the group raises quite separate questions. . . . In short, the imposition of sanctions is indeed an assumption of legislative power by a private group which is likely to be intolerable under all but the most extreme circumstances."

unincorporated group. These members were active in several different states. They are now soliciting memberships from every industry member known in the United States, which exceed twenty-five hundred in number. The purpose of the association will be to foster the well-being and growth of the industry, as is common with trade associations. Within a short time, the group expects to achieve substantial and widespread representation.

The opinion advised that the Commission had considered the facts presented and the steps which the group planned to take and that it had no objection to the use of either word in the name of the proposed association. (File No. 673 7089, released June 13, 1967.)

No. 131. Acceptance of free merchandise by grocery retailer

The Commission was recently requested to render an advisory opinion with respect to the legality of the acceptance by a grocery retailer of offers of free merchandise from some of its suppliers. Basically, the retailer was interested in the legality of accepting an offer, in connection with the purchase of merchandise, of one case of free goods for every location the purchaser operates. According to information supplied by the requesting party, such offers are often introductory in nature, and are used by manufacturers to acquire new customers or to introduce new products. Only one free case of goods is given and the offers are generally not repeated.

Under well-settled principles, the Commission advised that it was of the opinion that where a seller gives his customers free merchandise without expecting any promotional performance in return, the retailer having advised that no such performance was expected, he has in effect and in law granted a reduction in price to the extent of the value of the free merchandise. This being so, the practice of making such offers would be governed by the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which, in brief, provides that it shall be unlawful for a seller to discriminate in price between different purchasers of goods of like grade and quality where the effect may be to substantially lessen competition or to create a monopoly and where none of the defenses afforded by the Act are present.

As the buyer, the Commission advised that the retailer was governed by the provisions of Section 2(f) of the Act, which would make it unlawful knowingly to induce or receive a discrimination in price which is prohibited by Section 2(a). Thus the suppliers could give and the retailer could accept free merchandise under

these circumstances to the same extent and in the same amounts as lower prices would be lawful.

Considering the nature of the statute involved, the Commission stated that it was difficult to rule categorically with respect to any particular proposal such as presented in the context of an advisory opinion. This is especially true when it comes to measuring the competitive effects of a proposal which has not yet been placed into effect. Despite the presence of these unknown factors, the Commission felt it could offer certain comments of a cautionary nature which might be helpful to the retailer in determining whether or not to accept such offers.

Under the formula which the suppliers proposed to use for determining the amount of free goods to be given each customer, namely, one free case for every location the purchaser operates, the Commission felt it was very unlikely that any of the defenses made available by the Act could be established. The only ones which seemed to have any possible application to this situation would be good faith meeting of competition and cost justification. The very statement of facts seemed to negate any question of meeting competition, for the suppliers obviously would not be reacting to any competitive situation but would instead be motivated solely by their own marketing purposes.

Additionally, it was difficult for the Commission to visualize how these offers could be cost justified since cost factors obviously do not enter into the determination of the amount of free goods to be given. Quite the contrary, the amount is to be determined solely by the number of outlets which the purchaser operates, without regard to quantities ordered or differences in the cost of manufacture, sale or delivery.

If the offer is made to obtain new customers, the Commission felt price discriminations could result as between new customers who would receive varying amounts of free goods depending upon the number of outlets which they operate, or between any given new customers and competing old customers who would receive nothing under the proposal. Even if the offers were made to all customers for the purpose of introducing a new product, price discriminations could result because of the varying amounts of free goods depending upon the number of outlets which they operate. The question of whether such price differentials would have the probability of anticompetitive effect requisite to a finding of illegality under the statute would depend on the specific circumstances of the individual case. This determination cannot be made with certainty at this time. In view of the possibility of a violation of Section 2(a) of the Clayton Act as amended by the Robinson-

Patman Act, the Commission is unable to give its approval to this plan. (File No. 673 7099, released June 27, 1967.)

No. 132. Giving free merchandise to obtain new customers

The Commission was recently requested to render an advisory opinion with respect to the legality of a proposal by a seller to give free merchandise in order to obtain new customers among retail food outlets not presently selling the products of the seller. According to information supplied by the requesting party, such offers are often introductory in nature, and are used by manufacturers to acquire new customers or to introduce new products. Only one free case of goods is given and the offers are generally not repeated.

Under the proposal, for each such outlet which has from one to six check-outs, both inclusive, the seller will give one free case of each product which is purchased by or for sale through such outlet. The requisite purchase must be in case lots. For each such outlet which has seven or more check-outs, the seller will give two free cases of each product which is purchased by or for sale through such outlet and the requisite purchase again must be in case lots. For the purpose of this offer, the term "check-outs" means cash registers or other places in the outlet at which customers regularly pay for food purchases made in said outlet.

The Commission advised that it was of the opinion that where a seller gives his customers free merchandise without expecting any promotional performance in return, he has in effect and in law granted a reduction in price to the extent of the value of the free merchandise. This being so, the practice would be governed by the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, which, in brief, provides that it shall be unlawful for a seller to discriminate in price between different purchasers of goods of like grade and quality where the effect may be to substantially lessen competition and where none of the defenses afforded by the Act are present. Thus the seller was advised that it could give free merchandise under these circumstances to the same extent and in the same amounts as it could grant lower prices to the recipients thereof.

Considering the nature of the statute involved, the Commission went on to advise that it was difficult to rule categorically with respect to any particular proposal in the context of an advisory opinion. This is especially true when it comes to measuring in a prospective manner the competitive effects of a proposal which has not yet been placed into effect. Despite the presence of these un-

known factors, the Commission did feel that it could offer certain comments of a cautionary nature which might prove helpful to the seller in determining whether or not to embark upon this program.

Under the formula which the seller proposed to use for determining the amount of free goods to be given each customer, namely, one free case for each outlet with up to six checkouts and two free cases for each outlet with more than six, it appeared unlikely to the Commission that any of the defenses made available by the Act could be established. The only ones which would seem to have any possible application to this situation would be good faith meeting of competition and cost justification. The very statement of facts seemed to negate any question of meeting competition, for the seller obviously would not be reacting to any competitive situation but would instead be motivated solely by its own marketing purposes.

Additionally, it was difficult for the Commission to visualize how these offers could be cost justified since cost factors obviously do not enter into the determination of the amount of free goods to be given. Quite the contrary, the amount is to be determined solely by the number of checkouts per outlet which the purchasers operate, without regard to quantities ordered or differences in the cost of manufacture, sale or delivery.

If the offer is made to obtain new customers, the Commission felt that price discriminations could result as between new customers who would receive varying amounts of free goods depending upon the number of outlets which they operate, or between any given new customers and competing old customers who would receive nothing under the proposal. Even if the offers were made to all customers for the purpose of introducing a new product, price discriminations could result because of the varying amounts of free goods depending upon the number of outlets which they operate. The question of whether such price differentials would have the probability of anticompetitive effect requisite to a finding of illegality under the statute would depend on the specific circumstances of the individual case. This determination cannot be made with certainty at this time. In view of the possibility of a violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, the Commission is unable to give its approval to this plan. (File No. 673 7100, released June 27, 1967.)

