It is ordered, That the appeal of complaint counsel, filed June 20, 1967, and the appeal of respondent, filed June 12, 1967, be and they hereby are, denied.

Commissioner Elman not concurring.

THERMOCHEMICAL PRODUCTS, INC., ET AL.

Docket 8725. Order, Sept. 8, 1967

Order granting respondents' request for leave to appeal from hearing examiner's denial of request for change of hearing dates, and hearing examiner directed to reschedule hearings.

ORDER GRANTING REQUEST TO FILE INTERLOCUTORY APPEAL AND DIRECTING HEARING EXAMINER TO RESCHEDULE HEARINGS

This matter is before the Commission upon respondents' request, filed August 23, 1967, for leave to appeal from the hearing examiner's order of August 16, 1967, and complaint counsel's answer thereto filed August 24, 1967. On August 9, 1967, we denied a similar motion by respondents.[1] It is from the subsequent order of August 16, 1967, by the hearing examiner, denying respondents' motion to change hearing dates,[2] that respondents wish to appeal.

We have carefully reviewed respondents' request for leave to file an appeal and the hearing examiner's order of August 16.

Upon review of this matter we note that hearings had originally been scheduled in the following manner:

August 15 to 16	Greensboro, N.C.	10.00 a.m.
August 17 to 18	Houston, Texas	10:00 a.m.
August 21 to 22	Chicago, Illinois	10:00 a.m.
August 24 to 25	San Francisco, Calif.	10:00 a.m.
August 28 to 30	Los Angeles, California	10:00 a.m.

Respondents' counsel seemed to agree to this schedule.[3] Subsequently, however, he moved[4] to reschedule these hearing dates on the ground that the proximity of the hearing dates and the remoteness of the hearing locations would require air travel which respondents' counsel desires to avoid. In deference thereto, the hearing dates were rescheduled to permit sufficient time to reach by ground travel the various locations at which hearings were to be held. After a number of additional postponements, complaint counsel on August 9, 1967, moved to again reschedule the hearings,

[1] Respondents' request for leave to file an appeal from examiner's order fixing hearing dates, August 7, 1967.

[2] Respondents' answer to complaint counsel's August 9 motion to reschedule hearings, and motion to set aside examiner's order of August 10, 1967.

[3] Tr. 45.

[4] Respondent's motion to reschedule hearings, July 28, 1967.

and the examiner, on August 10, 1967, entered an order adopting *in toto* the schedule proposed in complaint counsel's motion. Pursuant to that order, the hearings are now scheduled to be held as follows:

September 11	Los Angeles, California	10:00 a.m.
September 18	San Francisco, Calif.	10:00 a.m.
September 25	Chicago, Illinois	10:00 a.m.
October 2	Houston, Texas	10:00 a.m.
October 9	Greensboro, N.C.	10:00 a.m.[5]

Complaint counsel's motion of August 9, was not served on respondents' counsel until August 11, 1967—the day after the examiner entered his order granting said motion. On August 15, 1967, respondents moved to set aside the examiner's order of August 10, which motion was denied by the examiner on August 16, 1967. It is from the examiner's order of August 16, that respondents now request leave to appeal.

Respondents' counsel notes in his request that he is a sole practitioner and does not want to absent himself from his office for a period of five weeks, which he claims would be necessary were he to adhere to the present hearing schedule by means of ground transportation. He requests that new hearing dates be fixed to afford him a minimum of two weeks at his own office between the end of hearings at one location and the start of hearings at another.

As stated in our order of August 9, 1967, the hearing examiner is in the best position to reconcile the convenience of the parties with the necessity of bringing the proceeding to an expeditious conclusion. Absent unusual circumstances or a clear abuse of discretion we will not interfere with his decision.

In the matter before us, the Commission concludes that unusual circumstances exist by reason of the fact that the hearing examiner's order scheduling hearing dates was entered before respondents were served with a copy of complaint counsel's motion, and that the present hearing schedule would necessitate respondents' counsel's absence from his office for a period of more than four weeks. Accordingly,

It is ordered, That the respondents' request for leave to appeal from the examiner's order of August 16, 1967, be, and it hereby is, granted.

It is further ordered, That the hearing examiner be, and hereby is, directed to reschedule the hearings in this matter in a manner that will permit respondents' counsel to return to his office for at least one week during the course of the hearings.

[5] Hearing examiner's order of August 10, 1967, postponing and rescheduling hearings.

By the Commission, without the concurrence of Commissioner MacIntyre.

SCHOOL SERVICES, INC., ET AL.

Docket 8729. Order, Sept. 12, 1967

Order denying application for permission to file an interlocutory appeal from the hearing examiner's order denying respondents' motion to dismiss and granting respondents' request to elicit testimony from two Commission employees in regard to certain news stories which are allegedly prejudicial to a fair trial.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL AND RULING ON RESPONDENTS' APPLICATION FOR THE PRODUCTION OF DOCUMENTS AND THE APPEARANCE OF COMMISSION EMPLOYEES

Respondents, at the conclusion of complaint counsel's case-in-chief, moved to dismiss the complaint for the reason that complaint counsel have failed to make out a prima facie case for relief under Section 5 of the Federal Trade Commission Act. The motion was aimed not only at the entire complaint, but at particular portions of the complaint. The hearing examiner, by order of July 18, 1967, denied the motion in its entirety. It is from this ruling that respondents wish to appeal. In addition, the examiner has certified, with the recommendation that it be denied, respondents' application for the production of documents and the appearance of Commission witnesses, filed July 25, 1967.

I

In connection with the request for permission to file an interlocutory appeal, respondents contend that the hearing examiner's order does not address itself with sufficient clarity and specificity to respondents' motion to dismiss the complaint. Respondents assert, since complaint counsel have failed to establish a prima facie case, that the hearing examiner should have dismissed the complaint and, failing that, should have articulated more specifically the reasons therefor in order to permit respondents to adequately prepare for their defense.

The determination at this stage of the proceeding of whether complaint counsel have established a prima facie case is one within the peculiar grasp of the hearing examiner and, absent unusual circumstances, we will not interfere with his determination.

The Commission has reviewed the hearing of July 14, 1967,

wherein respondents argued their motion to dismiss. It is evident from the motion itself, which to a considerable extent was concerned with argument about the import or significance of the testimony of the various witnesses, that the examiner did not err by failing to find complaint counsel's case-in-chief clearly insufficient at this stage of the proceeding. In view of the state of the evidence disclosed by the motion to dismiss, it appears this matter should not be disposed of without findings on the basis of a complete record.

Under § 3.23 of the Commission's Rules of Practice, permission to file an interlocutory appeal will not be granted "except upon 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 conclusion of the hearing is essential to serve the interests of justice."

The order here challenged does not affect the substantial rights of respondents. We are unable to conclude from respondents' motion to dismiss or their application to file an interlocutory appeal either that they are under any misapprehension as to the charges made against them or that they misunderstand the thrust of complaint counsel's case-in-chief.

Nor does the order materially affect the outcome of this proceeding. Even if the hearing examiner's ruling were erroneous, respondents would not be seriously prejudiced thereby since it is not a final determination. In ruling on the motion to dismiss for failure to make out a prima facie case, the examiner has construed the evidence in the light most favorable to complaint counsel and resolved all conflicts in his favor. When he finds that a prima facie case has been established he denies the motion to dismiss. When the record closes, however, the standard is different, for a ruling on a motion to dismiss differs from a decision on the merits of the case:

> . . . [A denial of a motion to dismiss] is merely a determination that there is in the record reliable evidence which, when considered in connection with reasonable inferences which may be drawn therefrom, and if not overcome by the respondent's evidence, would support an order to cease and desist. The ultimate decision of whether an order to cease and desist will be issued, even in the absence of further evidence, is not reached; and it could well be that a hearing officer, upon full consideration of a proceeding submitted for final decision, after making appropriate determinations concerning the credibility of witnesses, the weight to be given conflicting evidence, and other pertinent questions involved, would dismiss the complaint even though he had theretofore denied a motion to dismiss for failure of the record to establish a prima facie case.[1]

[1] *Vulcanized Rubber and Plastics Co.*, Docket No. 6222, 52 F.T.C. 533, 534 (1955).

Any of the exceptional considerations that might justify us in permitting an interlocutory appeal are therefore absent. As we said in the *Vulcanized Rubber* case, *supra,* n. 1, 52 F.T.C. at 535, "It is . . . clear that for the Commission to entertain appeals of this nature would be but to encourage the submission of cases for decision piecemeal, with resulting unjustifiable delays."

II

The Commission also has before it respondents' application for production of documents and the appearance of Commission employees, filed July 25, 1967, certified by the examiner. To a considerable extent this request does not differ in substance from the matters dealt with by the Commission's order of June 16, 1967 [71 F.T.C. 1703], denying respondents' request for taking of depositions and production of documents.

Specifically, respondents request that the Commission produce, for their inspection, the minutes of any and all meetings of the Commission held on or before February 13, 1967, during which the Commission determined that it had "reason to believe" that respondents violated the Federal Trade Commission Act and that the issuance of the complaint in this proceeding "would be in the interest of the public." In addition, respondents apply for the production of the minutes of any and all meetings from February 13, 1967, to date "reflecting any discussions or decisions of the Commission with respect to this proceeding or any of the Respondents named herein."

In support of their application for these documents, respondents cite the denial in their answers that the Commission in fact had "reason to believe" that respondents had violated the Federal Trade Commission Act, or that a Commission proceeding against them would be in the public interest. In this connection, respondents also cite the defenses averred in their answers—that the Commission lacks jurisdiction since it had no basis to conclude that respondents violated the Act, or that a proceeding against them would be in the public interest; that the Commission is legally incapable of rendering a fair and impartial trial in this case, and that if there is any public interest, it is obviously *de minimis.* Respondents concede that these reasons given in support of their application have already been dealt with by the Commission's order of June 16, 1967.[2]

Since the date of that order, respondents contend, however, that there has been testimony in the proceeding affirming respondents'

[2] *School Services, Inc.,* Docket No. 8729, Order Denying Request For Taking Of Depositions And Production Of Documents (June 16, 1967), pp. 3, 4 [71 F.T.C. 1703, 1705].

contention with respect to the "reason to believe" issue which now makes this defense "more meaningful than ever." Respondents allege that two witnesses whose testimony they contend is crucial to certain charges against them were not contacted prior to the issuance of complaint. This circumstance, they argue, supports their contention that the Commission had no information at the time complaint was issued providing "reason to believe" that these allegations of the complaint had any basis. Assuming the two witnesses in question were the ones best qualified to testify on these particular issues, it does not follow there arises a presumption that the Commission's precomplaint investigation failed to bring to light information sufficient to give the Commission "reason to believe" that these charges were well founded. In short, respondents have failed to show that there are any unusual circumstances in this case requiring us to deviate from our previous determination that the preservation of the integrity of the administrative process precludes their proposed inquiry.[3]

In addition to their application for the Commission minutes relating to this proceeding respondents have also requested that the Commission direct the appearance of four of its employees at the hearings, namely, Janet Saxon, an attorney in the Bureau of Deceptive Practices; June L. Greene,[4] an attorney in the Bureau of Field Operations; Charles Sweeny, Director, Bureau of Deceptive Practices; and Sheldon Feldman, described in respondents' application as Director, Special Consumer Protection Program.

Respondents desire the appearance of Miss Saxon on the ground that she was involved in the negotiation and formulation of the consent decree in *Patricia Stevens, Inc.,* Docket No. C–840 (1964) [66 F.T.C. 908]. Respondents state: "According to the theory of the case-in-chief, there is a connection between the advertising in this proceeding and the advertising of Respondent Patricia Stevens, Inc., in Docket No. C–840." They contend that Janet Saxon has "conferred with and passed upon the advertising in Docket No. C–840 and, indeed has expressed opinions concerning it." In further support of their request for the appearance of Miss Saxon, respondents assert that complaint counsel has suggested that Patricia Stevens, Inc., was the reason for bringing complaint against School Services, Inc., in this proceeding. They allege that in order to place into its proper perspective the adver-

[3] *Ibid.; The Seeburg Corp.*, Docket No. 8682, Order Ruling On Hearing Examiner's Certification (October 25, 1966), p. 11 [70 F.T.C. 1818, 1826]. See also *Modern Marketing Service, Inc.*, Docket No. 3783, Order Ruling On Questions Certified (January 7, 1966) [69 F.T.C. 1077].

[4] Presumably respondents desire the appearance of Jean F. Greene, an attorney in the Commission's Washington area field office.

tising in this case and to meet the theory of complaint counsel with respect to School Services, Inc., it will be necessary to have the testimony of Miss Saxon concerning the advertising involved in Docket No. C–840.

The request for the appearance of Miss Saxon in this proceeding will be denied. Neither the vague allusion to complaint counsel's "theory of the case" nor the equally vague contention that the appearance of Miss Saxon would enable respondents to place this advertising "into a proper perspective" gives the Commission sufficient information to make a determination as to the validity of respondents' application on this point. Since respondents have failed to demonstrate the pertinence of Miss Saxon's testimony to their defense, they have not met the relevance requirement of § 3.36 of the Commission's Rules of Practice.

With respect to the appearance of Miss Greene, respondents allege that she is the principal investigator in this proceeding. Respondents further allege that in conversation with one of the respondents "she made various statements with respect to the advertisements of the respondents. Some of these statements have been placed expressly in issue by virtue of the Answers of [three of the] Respondents . . . particularly the Seventh Defense." The Seventh Defense of these respondents seems to be essentially that they relied upon the "clearly implied assurances" of Commission representatives that as a result of certain revisions their practices were in accordance with the law and "could and would never be subject to attack or complaint by the Commission." In addition, respondents contend that witnesses called during the case-in-chief have made references to the statements of Miss Greene. Respondents allege that it will be impossible to prove their defense without the testimony of this witnesses and that her presence at the hearing is essential to their defense.

The request for this witness, too, is couched in general terms making it difficult for the Commission to evaluate its validity and lending support to the view that the request is merely a dilatory tactic. Since the testimony sought from Miss Greene concerns the substance of conversations which she had with respondents, it is reasonable to assume that they already have in their possession any information that she might provide. We conclude that respondents have failed to show good cause for requiring Miss Greene's appearance; the application shall therefore be denied.

In the case of Charles Sweeny, respondents desire his testimony with respect to the issues of jurisdiction, prejudice and *de minimis* public interest. In short, it appears that respondents desire the

appearance of Mr. Sweeny to probe again the question of whether the Commission had "reason to believe" that respondents were violating the law and whether the proceeding is in the public interest. The request for Mr. Sweeny's appearance on these grounds will be denied for the reason set forth in the Commission's order of June 16, 1967 [71 F.T.C. 1703].

Respondents also seek the testimony of Mr. Sweeny and Mr. Feldman with respect to statements attributed to Commission employees in the public press. Respondents, it appears, seek this testimony to document their assertion that these stories demonstrate bias and prejudice and to furnish support for their further contention which charges, in effect, that such stories have created a climate prejudicial to a fair trial. The Commission has determined that respondents should be permitted to elicit the testimony of Messrs. Sweeny and Feldman on their contact with the press allegedly giving rise to the articles of which respondents complain. The appearance of Messrs. Sweeny and Feldman will be limited to that purpose.

III

In view of the foregoing, respondents' application for permission to file an interlocutory appeal will be denied as will be respondents' application for the production of confidential documents and the application for the appearance of the Commission employees Janet Saxon and Jean F. Greene. Respondents' application for the appearance of Messrs. Sweeny and Feldman will be granted within the context indicated above. Accordingly,

It is ordered, That respondents' application for permission to file an interlocutory appeal from the hearing examiner's order denying respondents' motion to dismiss be, and it hereby is, denied.

It is further ordered, That respondents' application for the production of Commission documents and the appearance of Commission employees Janet Saxon and Jean F. Greene be, and it hereby is, denied.

It is further ordered, That respondents' application for the appearance of the Commission employees Charles A. Sweeny and Sheldon Feldman be, and it hereby is, granted.

It is further ordered, That Messrs. Sweeny and Feldman be, and they hereby are, directed that their appearance is limited to the elicitation of testimony relating to their alleged contact with the press resulting in the articles of which respondents complain.

INTER-STATE BUILDERS, INC., ET AL.

Docket 8624. Order and Opinion, Oct. 23, 1967

Order denying petition for reconsideration of two provisions of the final order and toll the time for appeal.

OPINION AND ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION

On September 18, 1967, respondents petitioned for reconsideration by the Commission of certain sections in the order entered in the instant matter. The decision and order in this matter were served upon respondents by registered mail. Service was completed on August 21, 1967. On September 6, 1967, the Commission granted to respondents an extension of the time until September 18, 1967, for filing a petition for reconsideration.

The first issue respondents bring before the Commission for reconsideration involves paragraph 8(d) of the order which in effect requires respondents to advise customers that they may cancel contracts within a designated period if in executing them they relied in whole or in part on any oral representations not contained in the contract.[1] Respondents argue that no evidence was presented and no findings were made dealing with or supporting the provision of paragraph 8(d), that the particular section extends far beyond the violation charged and that it is vague and ambiguous and beyond the authority of the Commission. Respondents ask that the Commission withdraw its order and remand the case to the hearing examiner "to take evidence, hear argument and make appropriate findings and conclusions" upon what respondents call the "new issues" described above.

Rule 3.55 of the Commission's Rules of Practice for adjudicative proceedings limits reconsideration to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission.

Respondents have raised no new questions nor have they adduced any grounds in the instant petition as to why issues with respect to the illegality of these practices and the scope of the order dealing with them should now be relitigated. The issues were fully explored at the hearing and on appeal before this Commission.

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[1] Respondents are ordered to cease and desist from failing:

"8(d) Prior to the acceptance of any contract, to deliver to the customer who has executed the contract a copy of the contract and a separate written statement clearly and conspicuously advising the customer (1) that no oral representation which may have been made by any salesman or representative of respondents and which is not contained in the contract is binding upon respondents; and (2) that such customer may, within a designated period which shall in no case be less than ten days after receipt of such statement from respondents, elect to cancel this contract if in executing it he has relied in whole or in part upon any oral representation not contained in the contract."