proceeding in accordance with the views expressed in the Commission's accompanying opinion.

Commissioner Elman dissenting and has filed a statement.

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order and Opinions, Sept. 20, 1968

Order denying respondent's appeal from hearing examiner's denial of respondent's motion to subpoena certain disfavored customers and to limit or quash other subpoenas relating to proof of cost justification.

OPINION OF THE COMMISSION

This matter is before the Commission upon respondent's interlocutory appeal, filed August 23, 1968, from portions of the hearing examiner's order filed July 19, 1968, which, *inter alia*, schedules the hearing in this proceeding to commence October 7, 1968, and otherwise rules on prehearing issues before the examiner. Complaint counsel, on August 30, 1968, filed an answer opposing respondent's appeal. Phillips Petroleum Company, the subject of certain subpoenas in contention, filed on September 12, 1968 a brief commenting on respondent's appeal.

In addition to the interlocutory appeal, respondent has filed two separate requests for permission to file interlocutory appeal from other orders of the examiner. The first, filed August 30, 1968, is a request for leave to file an appeal from the denial of Suburban's application for issuance of subpoenas duces tecum to thirteen alleged disfavored competitors of Suburban that had been noticed as witnesses for complaint counsel in this proceeding. Complaint counsel, on September 4, 1968, filed a brief opposing such request. Respondent filed a further petition for leave to file an interlocutory appeal on September 10, 1968. This last request is for permission to appeal from the hearing examiner's order dated August 30, 1968, extending the time for Phillips Petroleum Company to move to quash or limit a subpoena duces tecum served upon it on June 27, 1968, at the instance of Suburban, to and including September 16, 1968.

Respondent, in its interlocutory appeal filed August 23, 1968, challenges certain portions of the hearing examiner's order of July 19, 1968, as follows: that part which orders the commencement of the formal hearing on October 7, 1968; that part which continues the motion of Phillips Petroleum Company to limit the subpoena duces tecum served upon it on March 10, 1967, to October 28, 1968, and ordering Phillips to continue to respond to

the subpoena in a manner previously agreed to by counsel; that part which denies Suburban's motion to shorten the time within which Phillips Petroleum Company may move to quash or limit the subpoena duces tecum served on it on June 27, 1968 (now set for September 30, 1968); and, finally, that part which denies Suburban's motion to defer cross-examination of complaint counsel's witnesses at the hearing scheduled for October 7, 1968.

The points which respondent raises on its interlocutory appeal, as well as the issues contained in its separate requests for permission to file interlocutory appeal, all concern the hearing examiner's prehearing rulings relating to discovery and discovery procedures. The Commission's policy in such matters, frequently stated in Commission opinions, is that the hearing examiner has a broad discretion therein and the Commission will not interfere with his rulings short of a showing of an abuse of such discretion.[1]

Respondent's first contention is that the examiner's order, by setting the hearing to commence on October 7, 1968, deprives it of "effective" cross-examination. It argues that the hearing will occur in the absence of the production of Phillips Petroleum Company's documents relating to the issues of cost justification and other material and the files of alleged disfavored competitor witnesses (on this latter item respondent, as above indicated, on August 20, 1968 filed a separate request for permission to file an appeal from the examiner's denial of its request for subpoenas to such witnesses). Thus, respondent claims it will be obliged to proceed to hearing without benefit of adequate discovery relating to critical issues in the case. In this connection we refer to the hearing examiner's order of August 15, 1968. In this order the hearing examiner asserts that respondent, under a broad discovery subpoena duces tecum served March 10, 1968, on Phillips Petroleum Company, has had substantial discovery from that company and that such discovery is continuing. In addition to this, the hearing examiner recites the extent of the opportunity, seemingly considerable, which respondent has had in the approximately three years since the issuance of the complaint herein to prepare itself for its defense in this proceeding. More explicitly, respondent has had complaint counsel's brief since September 30, 1966, which sets forth the substance of the testimony of complaint counsel's witnesses. In addition, the hearing examiner asserts that after complaint counsel have completed their case-in-

[1] *Associated Merchandising Corporation*, Docket No. 8651 (order issued November 13, 1967) [72 F.T.C. 1015] and cases cited therein; *The Seeburg Corporation*, Docket No. 8682 (order issued October 25, 1966) [70 F.T.C. 1809].

chief, respondent will be afforded a reasonable time consonant with the Commission's rules to prepare its defense. Thus, we do not believe that the hearing examiner has abused his discretion in thus setting the date on which the trial herein is to commence on October 7, 1968. Nor do we believe a showing has been made that respondent's opportunity for discovery has been inadequate in the circumstances of this case.

Respondent, in its second point, asserts that the hearing examiner's order offends due process in that such order applies Commission Rule 3.41 (b) retroactively, and, in its third point, that if such new rule is applicable the hearing examiner has failed to justify its use in this proceeding. The respondent, under these two points, appears to be challenging the hearing examiner's comments or a ruling to the effect that he would provide an interval at the end of complaint counsel's case-in-chief to permit respondent further time to prepare its defense. The order of July 19, 1968, from which the appeal is made, contains no such statement by the examiner. However, the examiner, in his later order of August 15, 1968, includes the comment that he would provide an appropriate interval.

Under the Commission's rule in effect at the time the complaint herein was issued (Section 3.16(d) of the Commission's rules effective August 1, 1963), all hearings were to be held at one place and continue without suspension until concluded, unless the Commission otherwise ordered upon a certificate of necessity. The Commission's current rule permits the hearing examiner, in unusual and exceptional circumstances and for good cause stated on the record, to order hearings at more than one place and "to order brief intervals to permit discovery necessarily deferred during the prehearing procedures" (Section 3.41(b)). Respondent's contention is that the hearing examiner has improperly applied the new rule, to respondent's prejudice, and that even if the new rule does apply the hearing examiner has failed to make a showing of unusual and exceptional circumstances to justify its use.

The hearing examiner has not referred explicitly to Commission Rule 3.41(b) of the Commission's current rules either in his order of July 19, 1968, or his later order of August 15, 1968. No reference is made by the respondent to any part of the record in which the examiner has expressly stated he would follow the new rule, Section 3.41(b). It might be that the examiner, in his statement in the order of August 15, 1968, that he would afford a reasonable time after complaint counsel's completion of their case for respondent to prepare its defense, is therein referring to his

authority under the new rule. This is by no means clear. It is possible that he could so provide even under the old rules by certification to the Commission. In the circumstances we believe it is premature to challenge the hearing examiner on an action which he has not yet taken. The examiner stated in this regard that his order would be in conformity with the Commission's rules. No showing has been made either that he would apply the wrong rules or apply the rules incorrectly. Moreover, we do not believe the respondent has made a showing that it would be prejudiced in any way by the new rule if such were applied by the examiner. In fact, this would seem to be to respondent's advantage.

Finally, respondent argues, in its fourth point, that the order of the hearing examiner assertedly relieving Phillips of its obligation to comply with the subpoenas duces tecum served upon it denies respondent a fair hearing. The reference in this connection is to a subpoena served on Phillips Petroleum Company March 10, 1967, on which the examiner continued Phillips' motion to limit to October 28, 1968, although providing for continuing production by Phillips, and the subpoena served on Phillips on June 27, 1968, relating to cost justification, on which the time for production apparently has been set to take place at an early date. We note, as indicated previously, that the hearing examiner states substantial discovery has been had under the first subpoena and that it is continuing. Furthermore, the statement filed by Phillips Petroleum Company in this appeal indicates that considerable information and materials have been supplied or made available. Production under the second subpoena has been scheduled. It does not appear likely that this production will be completed before the hearing date on October 7, 1968. Respondent, however, has failed to show it will be prejudiced by such delay in obtaining this particular material, if this does happen. Accordingly, we believe that respondent's objections are premature and that no sufficient showing has been made that respondent has been foreclosed from adequate discovery from Phillips.

In summary, it appears that the respondent's appeal and its separate requests for permission to file other appeals all concern issues relating to procedural details, that is, the scheduling of hearings or the setting of dates for compliance with subpoenas, the issuance of subpoenas, actions on motions to limit or quash subpoenas and like matters. Some of the issues are premature in that the examiner has not finally ruled in the matter or in that respondent is not able to show an exhaustion of opportunities for satisfaction of its requests. The questions all concern prehear-

ing discovery or procedure and thus are subject to the wide discretion of the hearing examiner in such matters. We do not believe that a showing has been made that the hearing examiner has abused his discretion or otherwise that the circumstances are so unusual or exceptional that the Commission should overrule the hearing examiner. Moreover, we do not believe that the respondent has made any showing that it has been prejudiced or that it will, under the circumstances, fail to receive a fair hearing. There has been no showing as far as the requests for permission to appeal are concerned that the rulings complained of involve substantial rights and will materially affect the final decision, and that a determination of their correctness before conclusion of the hearing is essential to serve the interests of justice. Accordingly, we will deny respondent's appeal and its requests for permission to file interlocutory appeals in two separate instances. An appropriate order will be entered.

Commissioner Elman dissented and filed a statement.

DISSENTING OPINION
SEPTEMBER 20, 1968

BY ELMAN, *Commissioner:*

If, as I have previously stated in this case, it was error for the Commission to shift to respondent the heavy burden of proving that the prices it was charged were cost justified, that error is compounded by the instant order which denies respondent a reasonable opportunity to prepare its defense.

ORDER DENYING INTERLOCUTORY APPEAL AND REQUESTS FOR PERMISSION TO APPEAL

Upon consideration of respondent's interlocutory appeal, filed August 23, 1968, from the hearing examiner's order of July 19, 1968, and its requests filed on August 30, 1968, and on September 10, 1968, for permission to file interlocutory appeals from other orders of the hearing examiner, the Commission, for the reasons appearing in the accompanying opinion, has determined that the appeal and the requests should be denied. Accordingly,

It is ordered, That respondent's interlocutory appeal, filed August 23, 1968, from the hearing examiner's order of July 19, 1968, be, and it hereby is, denied.

It is further ordered, That respondent's request filed August 30, 1968, for permission to appeal from the examiner's denial of its application for the issuance of subpoenas duces tecum to alleged disfavored customers, and its request filed September 10,

1968, for leave to file an appeal from the examiner's order entered