1968, for leave to file an appeal from the examiner's order extending the time for Phillips Petroleum Company to move to quash or limit a subpoena be, and they hereby are, denied.

Commissioner Elman dissented and has filed a statement.

LAKELAND NURSERIES SALES CORP. FORMERLY KNOWN AS LAKELAND-DEERING NURSERIES SALES ET AL.

Docket 6666. Order, Sept. 23, 1968

Order denying respondents' petition to set aside a consent order of June 25, 1957, 53 F.T.C. 1189, on ground of changed conditions of fact.

ORDER DENYING PETITION TO SET ASIDE ORDER TO CEASE AND DESIST

Respondents, by petition filed pursuant to Rule 3.72(b)(2) on August 14, 1968, request that the Commission set aside the consent order to cease and desist entered herein on June 25, 1957 (53 F.T.C. 1189–91), on the ground that changed conditions of fact require such action.

The specific changes of fact principally underlying respondents' motion are that (1) the individual respondents Lillian Zogheb and Allan Lekus have not been officers or directors of the corporate respondent for approximately the last ten years; (2) the corporate respondent, on July 1, 1968, sold all of its interest in the nursery business theretofore conducted by it and, having changed its name to H.C. Nurseries Sales Corp., exists only to facilitate liquidation of the corporation; (3) both the corporate and the remaining individual respondents, Henry L. Hoffman and Chester Carity, as well as the corporation's other officer, have entered into covenants with the purchaser of the nursery business not to engage in any manner or degree in the nursery business for a period of five years from July 1, 1968, and respondents Hoffman and Carity, individually and on behalf of the corporation, are not now engaged in the nursery business and have no present intention of reentering the nursery business during the five-year term of the above-described restrictive covenant or at anytime thereafter.

The Commission is of the opinion that the foregoing averments, assuming their accuracy, do not provide a sufficient guarantee that none of the respondents will ever enter the nursery business. Moreover, while respondents are not engaged in the nursery business, the order will impose no burden on any party, and should a respondent or respondents, contrary to present intention, re-

enter the nursery business at some future date, then the order would continue to protect the public interest against the deception to which it is directed.

Accordingly, the Commission having carefully considered the petition and the answer thereto and being of the opinion that the allegations in respondents' motion do not provide sufficient grounds to support the conclusion that conditions of fact have so changed since the issuance of the order to cease and desist as to require the setting aside of said order or that the public interest may now require such action:

It is ordered, That respondents' petition be, and it here is, denied.

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order and Opinion, Sept. 23, 1968

Order denying respondent's motion to withdraw proceeding from adjudication for the purpose of considering voluntary compliance.

DISSENTING OPINION
SEPTEMBER 23, 1968

BY ELMAN, *Commissioner:*

I would accept respondent's assurance of voluntary compliance and terminate this proceeding.

This case arose out of an investigation begun almost a decade ago and involves transactions dating to 1957. The complaint alleges that respondent, a purchaser of liquefied petroleum gas (LP gas), violated Section 2(f) of the Clayton Act, as amended, by knowingly inducing and receiving price concessions from Phillips Petroleum Company that were not available to respondent's competitors. Respondent, in a formal affidavit signed by its president, now promises that it will not again engage in this practice.

There are numerous reasons for crediting this promise and accepting the assurance. Respondent has severed its long-term contract with Phillips, and the latter has largely withdrawn from the Northeast market where the alleged violations occurred. There is also reason to believe that sellers of LP gas are now at a bargaining advantage vis-a-vis buyers like respondent, making it difficult if not impossible for buyers to induce unlawful price concessions.

While compliance with the assurance is therefore likely, other factors also weigh in favor of its acceptance. Most important is that rejection of the assurance will prolong this proceeding at least

into the 1970's, and quite possibly for another decade, with the very real possibility that at the end of that time no order will be entered. This proceeding has already been tainted, in my view, by the Commission's erroneous allocation of the burden of proof, shifting to respondent the heavy burden and considerable expense of proving cost justification in disregard of the Supreme Court's decision in *Automatic Canteen Co.* v. *Federal Trade Commission.*[1] Should respondent's position on this question ultimately be vindicated, a not unlikely result, this costly litigation, which is now almost three years old with respondent having barely begun to exercise its right to discovery, will have served no useful purpose. At a time when the Commission should be tightening its belt and allocating its limited resources on the basis of a clearly perceived, rational set of priorities, rejection of this assurance seems to make little sense.

ORDER DENYING RESPONDENT'S MOTION TO WITHDRAW PROCEEDING FROM ADJUDICATION

This matter is before the Commission upon the hearing examiner's certification, without recommendation, filed August 26, 1968, of respondent's motion to withdraw this matter from adjudication for the purpose of considering its "assurance of voluntary compliance" filed August 23, 1968. Complaint counsel filed directly with the Commission, on August 29, 1968, a brief in opposition to respondent's motion.

The Commission has determined that Section 2.21 of its Rules of Practice, pursuant to which respondent has requested consideration of its motion, does not provide for disposition of a matter by the submission of an assurance of voluntary compliance subsequent to the issuance of the complaint. Section 2.21 is limited to the disposition of matters which have not yet reached the adjudicative stage. For this reason respondent's motion for withdrawal will be denied. If the provisions of the proposed assurance of voluntary compliance were contained in a proposed consent order, they would constitute the requisite predicate for the Commission's granting of a motion under section 2.34(d). Nevertheless, respondent has brought its motion under section 2.21, and has not made a sufficient showing to justify the form of relief requested in this motion. Accordingly,

It is ordered, That respondent's motion for an order withdrawing this proceeding from adjudication on the basis of its

[1] 346 U. S. 61 (1953); see *Suburban Propane Gas Corp.*, Docket No. 8672 (June 3, 1968) [73 F.T.C. 1269].

assurance of voluntary compliance be, and it hereby is, denied.

Commissioner Elman dissented and has filed a statement.

S.S.S. COMPANY

Docket 8646. Order, Sept. 26, 1968

Order denying motion by respondent to stay the filing of compliance report.

ORDER DENYING MOTION TO STAY FILING OF COMPLIANCE REPORT

Upon consideration of the motion filed on September 17, 1968, by respondents to stay the filing of a compliance report pending final judicial determination of the validity of the order entered by the Commission in this proceeding, and

It appearing that the motion is based on the mistaken premise that Section 3.61(a) of the Commission's Rules of Practice does not operate to effect such a stay, and

It further appearing that Section 3.61(a), which implements Section 5(g) of the Federal Trade Commission Act, 15 U.S.C. § 45(g), by its terms suspends the time for filing a report of compliance "when court review of an order of the Commission is pending" and provides:

> Thereafter, the time for filing report of compliance shall begin to run de novo from the final judicial determination, except that if no petition for certiorari has been filed following affirmance of the order of the Commission by a court of appeals, the compliance report shall be due the day following the date on which the time expires for the filing of such petition.

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

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order and Opinion, Oct. 3, 1968

Order granting respondent leave to file response to comments filed by Phillips Petroleum Company (involving extension of time to respond to subpoena for cost justification documents) and denying respondent's request and Phillips Petroleum Company's request to file interlocutory appeals.