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.

ORDER AND OPINION RECEIVING RESPONSE INTO RECORD AND DENYING REQUESTS FOR INTERLOCTORY APPEAL

This matter is before the Commission upon the motion of respondent, filed September 19, 1968, requesting leave to submit a

response to comments filed by Phillips Petroleum Company herein, or for alternative relief, and upon respondent's request for leave to file an interlocutory appeal, filed September 23, 1968, from the hearing examiner's order dated September 13, 1968, extending the time within which Phillips Petroleum Company has to move to quash or limit the subpoena duces tecum served upon it June 27, 1968, and extending the time within which it may comply therewith. This matter is also before the Commission on a request by Phillips Petroleum Company, filed September 25, 1968, to file an interlocutory appeal from the same order of the examiner of September 13, 1968.

Respondent's motion of September 19, 1968, concerns the comments filed by Phillips Petroleum Company with respect to respondent's interlocutory appeal from the hearing examiner's order of July 19, 1968. Phillips Petroleum Company filed its comments pursuant to permission granted by the Commission in its order of August 8, 1968. The Commission, on September 13, 1968, denied a request by the respondent to file a reply to Phillips Petroleum Company's comments. Respondent now seeks the following relief: it requests an order granting it leave to file a response to Phillips Petroleum Company's comments, a copy of which it has attached to its request, or, in the alternative, leave to reargue its cross-motion, filed September 12, 1968, for permission to submit a reply; and upon such reargument, to permit the attached response to be filed.

The Commission has determined, in the circumstances and considering that respondent has attached to its motion its response to Phillips Petroleum's comments, such response should be received into the record. The Commission, however, has already ruled upon respondent's interlocutory appeal filed August 23, 1968, and its order and opinion therein were issued on September 20, 1968 [p. 1602 herein]. Our consideration of respondent's response will be to determine if anything therein might alter the Commission's views as expressed in its order and opinion issued September 20, 1968.

Respondent's first point in its response is that the hearing examiner failed to follow the direction of the Commission as set forth in *Texas Industries, Inc.*, Docket No. 8656 (order issued October 8, 1965) [68 F.T.C. 1195], and that the examiner presently has before him all of the materials necessary to narrow the issues and rule upon Suburban's asserted rights to discovery from Phillips Petroleum Company and other parties. It is claimed that Phillips Petroleum Company embraces a view calling for delay in

compliance with respondent's discovery requests. The Commission, in its opinion and order, made no ruling one way or the other on the proper times for production under subpoenas or for other responses. These were determined to be matters for the examiner's discretion. Our view on this is not changed.

In its second point Suburban argues that Phillips Petroleum Company suggests it has been unreasonable in the drafting of its subpoenas and other related actions, and it submits that this is unjustified. Such an argument seems to present an issue which was not involved in the Commission's prior determination. In its third point respondent contends that Phillips Petroleum Company suggests that Suburban will not succeed in establishing facts as to a cost-justification defense and it submits that it is entitled to the facts to prove such a defense. The question, so far as Phillips Petroleum Company allegedly suggests—whether respondent may or may not succeed in establishing facts as to its defense—likewise concerns an issue which was not before the Commission. Respondent's assertion as to its rights is a reargument of points it previously made to the Commission. We do not believe that these arguments present adequate grounds for revising our views.

Finally, respondent argues that the hearing examiner has abrogated his responsibility by his rulings on the two Phillips subpoenas and denying respondent's application for subpoenas to alleged disfavored competitors and in other respects. Such point in the response seems not to be connected with the comments made by Phillips. Accordingly, no further consideration will be given to it.

In summary, we will hereby receive respondent's response to the comments filed by Phillips Petroleum Company into the record. We have considered respondent's arguments in its response and it is our holding that nothing therein changes our views as set forth in our order and opinion denying interlocutory appeal and requests for permission to appeal, issued September 20, 1968, in which we sustained the hearing examiner in challenged prehearing discovery and precedural rulings. Respondent is not prejudiced from presenting its arguments to the hearing examiner for his further consideration in the matter.

Respondent, as above indicated, has also filed a request for leave to file an interlocutory appeal from the examiner's order dated September 13, 1968.[1] This order extends the time within

[1] While it is of little significance in the circumstances here, it seems that the examiner's order from which both respondent and Phillips Petroleum Company have requested permission to file appeals sufficiently concerns a subpoena matter to come within the provisions of § 3.35(b)

which Phillips Petroleum Company may move to quash or limit the subpoena duces tecum served upon it on June 27, 1968, to fifteen business days after the Commission has disposed of the matters on appeal and extends the time within which Phillips Petroleum Company may comply with the subpoena to sixty days after the Commission disposes of such matters. Respondent asserts that this order prejudices it in deferring once more the time for Phillips to move with respect to, or comply with, the cost-justification subpoena. We believe that any issue raised by this request has been covered in the Commission's recent order and opinion issued herein on September 20, 1968 [p. 1602 herein]. No showing has been made that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before the completion of the hearing is essential to serve the interests of justice.

Phillips Petroleum Company also has applied for leave to file an interlocutory appeal from the hearing examiner's order of September 13, 1968, claiming, among other things, that it is not certain whether the order was issued with or without prejudice to its right to reapply for the relief requested in its motion filed September 12, 1968, and if it is with prejudice it seeks a reversal; otherwise, a clarification. Phillips Petroleum Company's request borders on the frivolous. If it did not understand the order, it should have sought clarification from the hearing examiner who issued the order and who, furthermore, is responsible for the proceeding. Its request will be denied. Accordingly,

It is ordered, That respondent's motion for leave to submit a response to comments filed by Phillips Petroleum Company, which response is attached to its motion, be, and it hereby is, granted.

It is further ordered, That respondent's response filed September 19, 1968, be, and it hereby is, received into the record.

It is further ordered, That respondent's request filed September 23, 1968 for leave to file an interlocutory appeal from the hearing examiner's order dated September 13, 1968, be, and it hereby is, denied.

It is further ordered, That the request of Phillips Petroleum Company, filed September 25, 1968, for permission to file an interlocutory appeal be, and it hereby is, denied.

Commissioner Elman not participating.

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of the Commission's rules dealing with appeals on rulings relating to applications for compulsory process rather than § 3.23 covering interlocutory appeals, under which the two have proceeded.

MAREMONT CORPORATION

Docket 8763. Order and Opinion, Oct. 3, 1968

Order denying respondent's request to file an appeal from hearing examiner's denial of its motion to dismiss proceeding on grounds that Commission is currently conducting an industry-wide survey of the automotive parts industry.

OPINION OF THE COMMISSION

This matter is before the Commission upon respondent's request, filed September 11, 1968, for permission to file an interlocutory appeal from that part of the hearing examiner's order of August 26, 1968, denying its motion to dismiss the complaint or stay the proceeding. Complaint counsel filed a statement on September 17, 1968, opposing the request. Respondent, on September 23, 1968, filed a reply memorandum.

Respondent, on August 19, 1968, filed a motion, accompanied by a supporting memorandum, with the hearing examiner, requesting (a) that the complaint be dismissed or (b), in the alternative, that all proceedings be stayed until further direction of the Commission upon completion of an investigation into the acts and practices of companies manufacturing automotive parts, accessories and equipment pursuant to its resolution of May 14, 1968, and "the formulation of an appropriate Trade Regulation Rule or other objective standards of general applicability." The respondent, further in the alternative, requested the examiner to certify its motion to the Commission pursuant to § 3.22(a) and § 3.42(c)(9) of the Commission's rules if he concluded that the relief sought, as outlined above, was beyond his authority to grant. Complaint counsel, on August 21, 1968, filed a response opposing respondent's request. The hearing examiner, in his order dated August 26, 1968, denied respondent's motion in the respects here in controversy.[1]

Respondent argues first that the examiner erred in ruling on the motion, which it asserts to be beyond his jurisdiction, and, secondly, that its request is justified on the merits. We agree that the hearing examiner erroneously ruled on the request to dismiss the complaint or stay the proceeding. The motion clearly is addressed to the Commission's administrative discretion and does not concern adjudicative factfinding functions delegated to hearing examiners. *Graber Manufacturing Company, Inc.*, Docket No. 8038 (order issued October 15, 1964) [66 F.T.C. 1548]. The hearing examiner should properly have certified this part of re-

[1] Respondent, in its motion, also asked for an extension of time within which to answer. The hearing examiner, in his August 26, 1968, order, extended such time to September 11, 1968.