

stances or a clear abuse of discretion the Commission will not interfere.³ No such showing has been made in the instant matter and for the foregoing reasons United's motion to dismiss the complaint will be denied.

Also before the Commission is United's application, dated January 16, 1970, for permission to take an interlocutory appeal and for consideration of this appeal, together with United's motion to dismiss. Since this request is grounded upon the same set of circumstances as the motion to dismiss, it will be denied for the same reasons.

Finally, the examiner, on January 14, 1970, under the title "Second Supplement To Certification Of Motion To Dismiss," certified United's motion seeking an instruction by the examiner to the Secretary of the Commission that a letter of November 19, 1969, written by complaint counsel and dealing with the document in question, was not properly filed. The examiner, to whom this motion was addressed on December 29, 1969, by order of January 8, 1970, declined to so instruct the Secretary. Since the motion is intimately connected to the motion to dismiss, the examiner certified it to the Commission, along with his recommendation that it be denied. We agree, and for the reasons outlined above that motion will also be denied. Accordingly,

It is ordered, That respondents' motion to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That respondents' request for permission to file an interlocutory appeal be, and it hereby is, denied.

It is further ordered, That respondents' motion to instruct the Secretary of the Commission that complaint counsel's letter of November 19, 1969, was not properly filed be, and it hereby is, denied.

STERLING DRUG INC.

Docket 8797. Order and Opinion, Feb. 12, 1970

Order denying permission to file an interlocutory appeal from hearing examiner's order striking two of respondent's affirmative defenses.

OPINION OF THE COMMISSION

This matter is before the Commission upon respondent's application, filed January 23, 1970, for permission to file an interlocutory appeal from a ruling of the hearing examiner. This application was filed pursuant to Section 3.23(a) of the Commission's Rules of Practice for adjudicative proceedings. Respondent seeks to appeal the hearing

³ *Topps Chewing Gum, Inc.*, Docket 8463, 63 F.T.C. 2196 (1963).

examiner's order of January 14, 1970, in which the examiner, on his own motion, struck two "affirmative defenses" from respondent's answer and, on the basis of such action, further denied respondent's motion for the issuance of a subpoena seeking documents pertaining to the stricken defenses. Although not required by the Commission's rules, a response to respondent's application was filed by complaint counsel on January 26, 1970.

Section 3.23(a) of the Commission's Rules of Practice requires that any request for permission to file an interlocutory appeal from a ruling of a hearing examiner shall be filed within five days after notice of the ruling. Permission 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.

Respondent's application fails to make the showing required by Section 3.23. The hearing examiner is responsible for framing the issues to be tried and permitting discovery based upon those issues. At present, the examiner is in the process of defining and delineating the issues prior to discovery. By striking respondent's "affirmative defenses" as separate issues, the examiner has not eliminated the substance of those alleged defenses from the hearing. Nothing in the examiner's ruling has foreclosed respondent from arguing any point he wishes to raise concerning the Commission's action in approving Miles Laboratories' acquisition of SOS.

At this juncture, respondent has not satisfied the requirements for permission to file an interlocutory appeal. Accordingly, respondent's application for permission to appeal is denied. An appropriate order accompanies this opinion.

ORDER DENYING APPLICATION FOR PERMISSION TO FILE INTERLOCUTORY
APPEAL

Upon consideration of the Application for Permission to Appeal from the hearing examiner's order of January 14, 1970, filed by respondent on January 23, 1970, and for the reasons stated in the accompanying opinion,

It is ordered, That the Application for Permission to Appeal be, and it hereby is, denied, without the concurrence of Commissioner MacIntyre.