

ORDER REMANDING PROCEEDINGS TO HEARING EXAMINER

This matter having been heard by the Commission upon complaint counsel's appeal from the hearing examiner's initial decision and upon briefs and oral argument in support of and in opposition to said appeal; and

The Commission having determined that the issues involved in this case cannot be decided on the merits because of the manner in which the hearings herein were conducted;

It is ordered, That the initial decision be, and it hereby is, vacated and set aside.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for a trial *de novo* in conformity with views expressed in the accompanying opinion of the Commission.

AVNET, INC.

Docket 8775. Order and Opinion, Dec. 18, 1970

Order returning respondent's request for issuance of subpoena directed to Maurice H. Stans, Secretary of Commerce, to the hearing examiner for further proceedings.

ORDER AND OPINION RULING ON CERTIFICATION OF REQUEST FOR
SUBPOENA TO GOVERNMENT OFFICIAL

This matter is before the Commission upon the hearing examiner's certification filed November 18, 1970 of respondent's motion for issuance of a subpoena *duces tecum* addressed to Honorable Maurice H. Stans, Secretary, United States Department of Commerce, which motion and certification is made pursuant to Section 3.37 of the Commission's Rules of Practice. The information which respondent seeks to have the Secretary produce consists of a list of the names and addresses of "respondents" from whom the Bureau of Census requested information compiled in certain product codes in the 1967 Census of Manufacturers, with an indication of those who in fact furnished the information compiled in the report thereon.¹

The examiner in his certification recommended that the request be denied on the ground that the Census Bureau cannot release the requested information under the law, *i.e.*, the provisions of Title 13 U.S.C. § 9, and therefore no useful purpose would be served by the

¹ On November 20, 1970, respondent filed with the examiner a motion for reconsideration of his recommendation on this certification, which motion was denied by the examiner by order filed November 23, 1970.

issuance of the subpoena.² The hearing examiner made no express findings on such questions as the relevancy and need for the information sought. He mentions in a footnote that complaint counsel have indicated they have no intention of using the Census report in question to carry their initial burden of proof and that its only significance is in anticipation of an expected counter definition of the market which respondent may assert.

Respondent filed with its motion a memorandum of points and authority in which it asserts that it needs the Census material for two purposes: (1) cross-examination and rebuttal of the report which complaint counsel is expected to offer in evidence and (2) discovery of evidence necessary for preparation of its defense. In arguing its claimed right to the production sought, respondent states that it does not ask that "the data furnished by any particular establishment or individual under * * * title [13] * * * be identified." (13 U.S.C. § 9) All it seeks, it states, is the Bureau's mailing list which it avers will not violate the confidence of "any particular establishment" supplying the Bureau with information. According to the respondent the names and addresses of the establishments surveyed were not obtained by the Bureau from the establishments themselves; they were assertedly compiled by the Bureau from information made available to it by the Internal Revenue Service and the Social Security Administration.

The hearing examiner erred in certifying respondent's motion to the Commission without having first made his determination on respondent's need for the data and the appropriateness generally of the request. If it is in fact true as he found here that a specific law bars the production of such information, that circumstance would seem to be the beginning of his consideration of the discovery issue presented, not the end.

Although Section 3.37 requires certification of a request for a subpoena directed to another government official and withholds from the examiner authority to rule directly on such an application, the Commission nevertheless looks to the examiner for an initial determination. An application of this kind will usually, if not always, concern basic issues of discovery and evidence, areas in which the examiner has broad discretion and responsibility. The purpose of Section 3.37 is not to relieve the examiner of his essential role in this regard, it is mainly to provide a means of informing the Commission of any such action

² 13 U.S.C. § 9 provides in part:

"(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

* * * * *

"(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified * * *."

to prevent the possibility of abuse.³ The examiner who has broad authority over the conduct of the trial generally should consider a request to a government official on the basis of its merits in the context of the particular proceeding. His determination will be given substantial weight although the Commission in such instances reserves the right to reject his views if plainly in error. For reference, see our decisions on motions for subpoenas to government officials in *Ash Grove Cement Co.*, Docket No. 8785, (order issued October 22, 1970 [p. 1660 herein]) and *Missouri Portland Cement Company*, Docket No. 8783, (order issued simultaneously with the order issued herein [p. 1688 herein]).

The fundamental issue here is not one as the examiner in effect holds of whether or not another government agency may, pursuant to law, withhold data sought by respondent; rather, it is whether or not respondent has established a discovery right to the information it seeks. The examiner, as we have indicated above, should determine this question and he should arrive at his decision by reference to rules on evidence and discovery in the context of the whole proceeding and also by reference to the showing required by Section 3.37. He might also consider the seeming premature nature of the request which suggests the possibility of reservation of judgment until some later appropriate time in the trial.

We will return this to the examiner for his reconsideration and decision in light of our views herein expressed. Accordingly,

It is ordered, That the matter be, and it hereby is, returned to the hearing examiner for further proceedings consistent with the views herein expressed.

Commissioner Dennison not concurring for the reason that he would deny issuance of the subpoena for the reasons set forth by the hearing examiner.

MISSOURI PORTLAND CEMENT COMPANY

Docket 8783. Order and Opinion, Dec. 8, 1970

Order denying respondent's motions for issuance of subpoenas *duces tecum* directed to the Acting Director, Bureau of Mines, and Director, Bureau of Census.

ORDER AND OPINION DENYING MOTIONS FOR SUBPOENAS TO GOVERNMENT OFFICIALS

This matter is before the Commission upon two certifications from the hearing examiner both of which were filed November 6, 1970.

³ A further purpose of Section 3.37 is to give the Commission an opportunity to work out appropriate arrangements with other agencies involved if a request is found to be justified.

The first is a certification of respondent's motion filed October 8, 1970, for the issuance of a subpoena *duces tecum* to Dr. Earl T. Hayes, Acting Director of the Bureau of Mines, United States Department of the Interior. The other is the certification of respondent's motion also filed October 8, 1970, for the issuance of a subpoena *duces tecum* to Dr. George H. Brown, Director of the Bureau of Census, United States Department of Commerce. On both motions the hearing examiner recommends denial. Other papers filed are respondent's brief on the certifications filed November 13, 1970, and complaint counsel's reply to such brief filed November 23, 1970.

The requested subpoena to Dr. Hayes of the Bureau of Mines, seeks certain documents and data concerning tables in Bureau of Mines Year Books and other publications as well as documents disclosing the identities of the persons preparing the specified tables and documents. The hearing examiner in certifying the matter states that the request relates to documents contained in certain Commission exhibits admitted into evidence May 10, 1970. He states further that the purpose of respondent's immediate request had been presented to him in various different forms previously and rejected by him. He concludes that this subpoena would require a lengthy and burdensome production task "not necessary to any appropriate discovery purpose" in the proceeding.

The requested subpoena to Dr. Brown of the Bureau of Census would require the production of certain data and information relative to a proposed Commission exhibit entitled "Concentration Ratios in Manufacturing Industry (1963)" a document which the hearing examiner states was prepared for the Senate Subcommittee on Antitrust and Monopoly by the Bureau of Census. The examiner reserved his ruling on the receipt of the proposed exhibit in evidence at respondent's request. He expressed the view however on a provisional basis that the specifications in the subpoena would appear to require a lengthy and burdensome production task "not necessary to any appropriate discovery purpose" in the case.

Although Section 3.37 requires certification of a request for a subpoena directed to another government official, it is nevertheless the initial responsibility of the examiner to rule on the discovery and evidence questions presented. The Commission gives substantial weight to the recommendation of the hearing examiner in such instances, and his opinion will be adopted unless it is shown to be clearly in error.

Respondent in its brief filed November 13, 1970, asserts that the hearing examiner has abused his discretion and that unless the Commission overturns his recommendations respondent will be denied due process. Respondent's point seems to be that the hearing examiner cannot receive into evidence a U.S. Government document and then neither require complaint counsel to place a witness on the stand to testify as