

of the order to cease and desist. To the contrary, such a rule would remove the asserted disparity of treatment complained of by respondents.

For the foregoing reasons, it is concluded that respondents have failed to allege changed conditions of fact or law that would even suggest, let alone require, that the order to cease and desist should be modified by suspending the effective date of Paragraph 3. Nor is there any indication that the public interest so requires.

ORDER DENYING PETITION TO REOPEN

This matter having come before the Commission upon petition of respondents, filed November 24, 1970, pursuant to Section 3.72(b)(2) of the Commission's Rules of Practice, requesting that this proceeding be reopened for the purpose of suspending the effective date of Paragraph 3 of the Commission's order to cease and desist, and the Director, Bureau of Consumer Protection, having filed an answer in opposition to said petition; and

The Commission for the reasons set forth in the accompanying opinion having determined that the petition should be denied:

It is ordered, That the petition to reopen filed by respondents be, and it hereby is, denied.

AVNET, INC.

Docket 8775. Order and Opinion, Jan. 29, 1971

Order denying respondent's motion for a subpoena *duces tecum* and granting complaint counsel's motion for a subpoena *ad testificandum* directed to an official of the Bureau of Census.

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 of January 11, 1971, of complaint counsel's motion for issuance of a subpoena *ad testificandum* addressed to Paul F. Berard, Chief, Metals and Machinery Branch, Bureau of the Census, United States Department of Commerce, which motion and certification is made pursuant to Section 3.37 of the Commission's Rules of Practice. Complaint counsel seek to have Mr. Berard appear and testify concerning proposed Commission Exhibit 270, *1967 Census of Manufacturers Series*, engine electrical equipment, SIC Code 3694, MC67 (2)-36E, which is a Bureau of the Census publication. More specifically, complaint counsel intend to elicit from the witness testimony which will establish that the Bureau of the Census publication was

prepared in the regular course of business as well as "explanatory information concerning the various product classifications contained therein." Complaint counsel state that Mr. Berard has indicated his willingness to appear and testify for these purposes. The examiner, in his certification, recommends that complaint counsel's request be granted.

The examiner further recommends that any subpoena which may issue directed to Mr. Berard be a subpoena *duces tecum* so as to include the specifications attached to respondent's motion of November 5, 1970. These specifications embrace the mailing list used by Bureau of the Census in collecting information regarding certain product codes in the 1967 Census of Manufacturers, with an indication of those who in fact furnished the information compiled under those product codes.

We adopt the examiner's recommendation as regards issuance of a subpoena *ad testificandum* requested by complaint counsel for the reasons stated in his certification, but we are of the opinion that respondent's motion of November 5, 1970, for the issuance of a subpoena *duces tecum* should be denied.

We disagree with the examiner's conclusion that respondent has satisfied the requirements of Section 3.37(b) of the Commission's rules as to necessity and relevancy of the specified material. Respondent's stated purposes for a subpoena *duces tecum* appear to be: (1) cross-examination and rebuttal of the report complaint counsel are expected to offer in evidence and (2) discovery of evidence necessary for preparation of its defense.

As to cross-examination, respondent will be afforded opportunity to question Mr. Berard regarding the terms used in the report and the manner in which the firms furnishing the information as well as the products were classified in the report. This, in our opinion, will adequately protect respondent's right to cross-examination.¹

¹ We believe the examiner's reliance on *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1964), is misplaced. That case involved a minimum wage determination, under Section 1(b) of the Walsh-Healey Act (41 U.S.C. § 35(b)), by the Secretary of Labor based on a survey which had been conducted by the Secretary for use in the particular proceeding. The requirement that the underlying survey material be made available to respondent's counsel when a summary based thereon is offered in evidence is well established, and the Commission has followed this rule in cases involving tabulations based on Section 6(b) special report surveys conducted for use in litigation. *E.g.*, *Grand Union Co.*, 62 F.T.C. 1491 (1963) [1963-1965 Transfer Binder] Trade Reg. Rep. ¶ 16,341, at p. 21,172. We are of the opinion that this rule does not obtain with respect to regular reports compiled and published by Bureau of the Census pursuant to Title 13 of the United States Code. Generally speaking, the latter is admissible without production of the underlying material in an administrative proceeding under Section 7 for the reason that necessity and circumstantial guaranty of trustworthiness is present and the Commission may take official notice thereof. *Of. United States v. Aluminum Co. of America*, 35 F. Supp. 820, 823-825 (S.D.N.Y. 1940); *United States v. Aluminum Co. of America*, 148 F. 2d 416, 445, 446 (2d Cir. 1945); Dession, "The Trial of Economic and Technological Issues of Fact," 58 Yale L. J. 1019, 1242 (1949). This also appears to be the established practice before the courts and, as far as we are aware, has not been successfully challenged.