Docket 8835. Order and Opinion, Nov. 18, 1971

Order denying respondent's motion to postpone hearings and dismiss the complaint; case returned to hearing examiner.

Order and Opinion of the Commission Denying Respondent's Motion to Postpone Hearings and Dismiss Complaint

This matter is before the Commission upon the hearing examiner's order filed October 13, 1971, certifying to the Commission respondent's motion to postpone the hearings and to later dismiss the complaint, alleging that a proposal to regulate the marketing of lettuce made by the U.S. Department of Agriculture moots the charges in the complaint. The hearing examiner held that the relief sought in the motion presents a question addressed to the administrative discretion of the Commission and that under the Commission's rules and pertinent decisions certification is the proper procedure. He accordingly certified the motion but without recommendation.[1]

We agree that the motion here was properly certified and we will proceed to consider the merits of respondent's request. See *First Buck-*

[1] The papers before the Commission on the question, other than the certification, include the following: Respondent's motion to postpone hearings and to dismiss the complaint, filed September 28, 1971; complaint counsel's answer in opposition thereto, filed October 8, 1971; respondent's reply memorandum in support of its motion, filed October 20, 1971; and, finally, complaint counsel's comments on the reply memorandum, filed October 22, 1971.

ingham Community, Inc., Docket 8750, Order Vacating Initial Decision and Dismissing Complaint, May 20, 1968 [73 F.T.C. 938].

Respondent asserts that the hearings should be postponed and the complaint ultimately dismissed on the ground mainly that the substantive issues relating to alleged anticompetitive effects are made moot by a proposed marketing order, covering lettuce, of the Department of Agriculture; secondarily, it contends that a continuation of the proceeding pending a decision by the Department of Agriculture would be contrary to asserted policy of the Commission not to proceed where the subject matter is, by specific legislation, the direct responsibility of another federal agency.

On the first point, the marketing order relied upon has not yet been put into effect, and it may never become effective.[2] Even if adopted, it may possibly remain in effect only for a short time. Thus there is no certainty here that the market will be changed or that it will be changed on a permanent basis, as respondent seems to imply.

In addition, respondent has not otherwise supported its contentions. There have been no sufficient facts presented on which to base a valid conclusion. It would be highly premature to conclude that none of the alleged anticompetitive effects can be shown as a result of the proposed marketing order. The facts on this will be developed during the course of the hearings.

Finally, there has been no showing that the existence of the marketing order would dispense with the need for enforcement of laws involved in the complaint if violations are proved, and we therefore reject the contention that there is a conflict of some kind between agencies here in administering their respective statutes.

We conclude that the motion of respondent should be denied. Accordingly,

It is ordered, That respondent's motion to postpone hearings and subsequently to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for further proceedings pursuant to the Commission's Rules of Practice.

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[2] The referendum on the proposal apparently is scheduled for some time in November or December 1971.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order and Opinion, Dec. 6, 1971

Order and opinion denying interlocutory appeal by two of the respondents from examiner's order granting motion to quash subpoena of newspaper reporter's records.

Opinion of The Commission

By Jones, *Commissioner:*

This matter is before the Commission on the interlocutory appeal of respondents, Hearst Corporation and Periodical Publishers' Service Bureau, Inc., from the hearing examiner's order of September 22, 1971, granting a motion to quash a subpoena *duces tecum* to Arthur E. Rowse, a syndicated columnist specializing in articles of interest to consumers. Respondents are appealing this ruling on the ground that it involves substantial rights and will materially affect the final decision in this case. Since matters of discovery and claims of First Amendment violations are involved, we have concluded that a decision now on the merits of the appeal will substantially further the expeditious handling of this proceeding.[1]

The subpoena which is the subject of this appeal was requested by respondents on July 13, 1971, and seeks production by Mr. Rowse of all of the documents upon which he based a newspaper article written by him about Congressman Fred B. Rooney's efforts to eliminate abuses in the magazine sales industry.[2] In addition, respondents' subpoena also asked for the production of all documents communicated between Mr. Rooney or his staff and the Federal Trade Commission, all documents dealing in any way with the efforts of Mr. Rooney or his staff to cause any government agency to take action against respondents and all documents reflecting positions by Mr. Rooney or his staff in regard to the Paid During Service (PDS) Code, a self-regulatory industry program to eliminate selling abuses in the magazine subscription industry.

Respondents contend that this material may be relevant to three of their defenses to the pending Commission complaint against them

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[1] Section 3.35(b) of the Commission's Rules of Practice provides that appeals to the Commission from rulings on motions to limit or quash process will be entertained by the Commission on a showing that:

[T]he 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.

[2] The article entitled, "New Magazine Guidelines Set," appeared in the Washington Star on July 11, 1971.