

order dated January 6, 1972, in which the examiner ordered the production of and granted protective treatment to material sought under specification 6 of respondent's subpoenas *duces tecum* directed to seven third-party competitors of respondent and upon answers in opposition filed by complaint counsel and by certain third parties on January 24, 1972; and

It appearing that respondent has not made the requisite showing under Section 3.35(b) of the Commission's Rules of Practice 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; and

The Commission having therefore determined that the appeal should be denied:

It is ordered, That respondent's appeal from the hearing examiner's order dated January 6, 1972, be, and it hereby is, denied.

Commissioner MacIntyre abstaining from the action herein.

COWLES COMMUNICATIONS, INC., ET AL.

Docket 8831. Order and Opinion, March 1, 1972

Order denying respondent's motion to file an interlocutory appeal from the hearing examiner's denial of respondent's motion to dismiss complaint on the grounds that Commission violated its own Procedures and Rules of Practice and that complaint counsel will be relying on illegally obtained evidence.

OPINION OF THE COMMISSION

Respondents filed a motion with the hearing examiner seeking a dismissal of this complaint. The hearing examiner denied the motion and respondents requested permission to file an interlocutory appeal. For the reasons hereinafter stated, the request is denied.

The grounds urged by respondents in support of their motion are essentially two: (1) that the Commission in issuing its complaint violated its own Procedures and Rules of Practice and (2) that counsel supporting the complaint will be relying on illegally obtained evidence in the proof of the instant adjudicative proceeding and hence will be violating respondents' Fourth Amendment rights. (Motion, p. 2.)

The basis for both of these contentions by respondents rests on the circumstances surrounding the Commission's issuance of Advisory Opinion No. 128.¹ This Advisory Opinion was issued on May 22,

¹The Advisory Opinion was conveyed to respondents' counsel in a letter from the Secretary of the Commission. Under then existing rules, the text of this letter was held confidential. A "digest" or paraphrase of the substance of the opinion was issued in a press release May 23, 1967.

1967, at the request of these respondents and other members of the magazine subscription sales industry. It advised that the Commission found no illegality under the antitrust laws of the industry's proposed self-regulatory program designed to eliminate abuses in the sales practices of this industry.

Respondents argue that this opinion: (1) approved practices alleged as illegal in the instant complaint served on respondents on January 21, 1971; (2) committed the Commission not to institute adjudicative proceedings against these respondents while the Advisory opinion was in effect; and (3) bound the Commission not to use any information received during the course of investigations in connection with the Advisory Opinion in any subsequent adjudicative proceedings brought against them. We will deal with these various contentions in the course of our consideration of respondents' two principal grounds for their appeal.

Respondents' Contentions that Issuance of the Complaint Violates Commission Procedures and Rules of Practice

Respondents contend that the Commission's issuance of this complaint violated its own Section 1.3(b) of the Commission's Procedures and Rules of Practice and that, therefore, it must be dismissed in its entirety.

Section 1.3(b) of the Commission's Procedures and Rules of Practice provides that following issuance of an advisory opinion the Commission will not:

* * * proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notification of rescission or revocation of the Commission's approval.

Respondents argue that all of the sales practices challenged in the instant complaint were either approved or permitted by the Commission's Advisory Opinion or were prohibited by their own industry self-regulatory Code which was approved by the Advisory Opinion. They argue further that in issuing its Advisory Opinion, the Commission expressly committed itself not to sue the respondents or other industry members subject to the Code for any of the practices which they claim were prohibited or permitted while the Code was in effect, and that, therefore, all of their activities were undertaken in reliance on this commitment and could not be challenged, until the Advisory Opinion was rescinded.

The answer to all of respondents' assertions, understandings and beliefs concerning the Advisory Opinion must be found squarely

within the four corners of the industry request for a Commission Advisory Opinion and the text of the Commission's response. It is necessary, therefore, to examine this opinion in order to deal fully with respondents' contentions.

The Commission's opinion and the industry's original request show clearly that the magazine subscription sales industry came to the Commission for the express purpose of receiving an *antitrust* clearance for a self-regulatory program which the industry desired to institute in order to clean up its own sales practices in the solicitation and sale of magazine subscriptions.²

The Commission's Advisory Opinion stated unequivocally that with the modifications contained therein, the Commission believed the antitrust obstacles to the Code could be overcome and the Code approved so as to enable the industry to carry out its self-regulatory program. The Commission's opinion makes clear its almost total preoccupation with the antitrust problems which were raised by the industry's proposals to levy sanctions against Code violators.³ Thus, the Commission's Advisory Opinion pointed out:

The Commission has given this matter very careful consideration in view of the magnitude of the problems which confront the industry and the obvious sincerity of the [PDS Agency] Committee in attempting to devise ways to cope with those problems. Even taking all these factors into consideration, however, the Commission is unable to give its approval to those sections of the Code which apply to the salesman as those sections are now written. While the Code now provides that the action to be taken with respect to the salesmen found to be in violation would be on the basis of a recommendation by the Administrator rather than by agreement among the signatory agencies, the Commission believes the probable result of that recommendation would be to substantially interfere with those individuals' right of employment and their right to have their fate decided by their individual employers uninfluenced by virtually mandatory recommendations from the Administrator. However, the Commission does not believe that this would call for outright rejection of the Code, since it is *believed the Code can be amended so as to achieve the legitimate objectives of the Committee without running afoul of the antitrust laws.*

* * * * *

The Commission is further of the opinion, now that greater participation of the independent agencies has been insured, *that it is possible to apply the Code as now written to the publishers and agencies in such a manner as not to*

² The industry's preoccupation with the antitrust implications of its self-regulatory program is borne out by the fact that originally it had gone to the Antitrust Division of the Department of Justice for a railroad release and had been referred by the division to the Federal Trade Commission. (See letter, Zimmerman to Kintner, August 24, 1966.)

³ Indeed it was this precise issue of private police power which gave rise to Commissioner Elman's dissent. However, there is no doubt that even Commissioner Elman had no concept that in approving the self-regulatory program, the Commission was abdicating its own law enforcement responsibilities to the industry. See, for example, Chairman Weinberger's opening statement at the Commission's 1970 hearing concerning the operations of the PDS Code and Commissioner Elman's interchange with industry counsel on this precise point. See note 7 *infra* for citations.

do violence to the antitrust laws, particularly if the element of coercion can be truly eliminated insofar as the independent agencies are concerned when they are arriving at their decision as to whether to join or whether to remain under the Code after having joined. It should be made clear, however, that this conclusion is a tentative one since there is little recorded experience upon which to predicate such a judgment. Therefore, this opinion is based on the understanding that there will be no coercion of any agency to subscribe to the plan, no coercion of any agency to remain in it after it has subscribed and no retaliation of any kind against any agency which does not choose to join or which subsequently elects to leave after having joined. (Emphasis added.)

Indeed the Commission was so concerned with the antitrust implications of the industry's assertion of sanction power over its members that it was reluctant to make its approval unconditional. Therefore, it advised the industry that its approval was limited to a trial period of three years and that during this period the industry was to provide it with detailed reports on the operations of the Code so that the Commission could observe for itself the way in which the Code enforcement provisions were actually implemented.

There is not the slightest indication either in the opinion or in the record before us on this motion that the Commission in approving the organization and enforcement machinery of the Code from an antitrust viewpoint also granted clearance for any proposed types of selling practices or in any way surrendered any right or power to proceed against unfair or deceptive acts and practices engaged in by members of this industry. The industry's request clearly shows that no immunity from prosecution for selling practices was sought. Although the Commission's opinion noted that the proposed Code contained substantive provisions setting out the practices prohibited by the Code, the Commission observed that in its view these provisions merely attempted to restate the substantive law respecting practices in the selling of magazine subscriptions and as such it had no objection to them.⁴ This clearly affords no basis for the contention that the Commission thereby "approved" any or all selling practices not specifically prohibited by the Code.⁵

Nor is there anything in the Commission opinion or the papers before us which indicates an intention on the part of the Commission to delegate exclusive policing authority to the industry. Not only

⁴The sentences containing this observation in the Advisory Opinion read as follows:

It is noted that the Code incorporates a number of provisions which attempt to restate the substantive law applicable to this method of field selling of magazine subscriptions. The Commission herewith advises you that it sees no objection to these provisions as presently worded.

⁵ Respondents argue that Paragraphs 5(a), 6(a), 7(a), 7(c), and 8 of the complaint challenge practices which were permitted under the Code and that the Commission therefore approved of those practices. Aside from the fact that the Commission did not "approve" any selling practices, we have examined the Code and fail to find any indication that such practices are permitted. Indeed, the Code appears to prohibit the practices alleged in Paragraphs 5(a), 6(a), and 7(a).

1 did the Commission not surrender any such rights, it could not have
done so legally. The Commission has no power to delegate even
temporarily to private parties its statutory duties to enforce the
law. It did not do so in this case.

Respondents suggest in their papers that their alleged understand-
ing of the immunity purportedly granted to them by the Advisory
Opinion was supported by statements made by members of the Com-
mission and by its staff. We have no indication of what these state-
ments might be, but in any event respondents' assertions on this
point are legally and factually irrelevant.⁶ The Commission is a
collegial body and can act officially only in its collegial form. No
individual expressions on the part of Commissioners or staff can
change one iota of the Commission's official actions as they are re-
flected by its response to this industry's request for an Advisory
Opinion.⁷

⁶ Commissioner Elman in his dissent from the Commission's decision to issue the
Advisory Opinion deplored the fact that the Commission's Opinion permitted the
industry to exercise what he termed the regulatory powers of government. But nothing
in his statement can possibly be interpreted or implied to be a representation that in his
view the Commission's opinion was allowing the industry to exercise any powers to the
exclusion of the Commission's right and duty to do so. Again, there is simply nothing
in this statement which could form any reasonable basis for respondents' present claims
in this regard. See also Commissioner Elman's interchange with counsel for the industry
during the public hearing on the operations of the PDS Code. *Infra* note 8.

The only other "statement" under consideration, by a Commissioner or Commission
staff members, is an oblique reference in a letter by The Hearst Corporation's counsel
(Docket No. 8832) to the Special PDS Agency Committee which requested the Advisory
Opinion about a meeting he had had with then Commission Chairman Dixon in which
counsel reported that Chairman Dixon intimated that complaints would issue against
industry leaders unless the Code "developed" into operation. (Letter, Kintner to Camp-
bell, February 21, 1967.) Whatever encouragement the Chairman reportedly gave to
the industry to go forward with their own efforts to clean up abuses in their industry
can hardly be translated by hindsight into a commitment or understanding given to
respondents that approval of their self-regulatory program constituted a formal Com-
mission commitment not to proceed adjudicatively against industry members prior to
revocation or expiration of the Advisory Opinion.

⁷ While we do not believe that statements made outside the text of the Advisory
Opinion can in any way change the plain meaning of the opinion itself, it is of some
relevance to respondents' assertions about statements of individual Commissioners, to
note the statement of Chairman Weinberger made on behalf of the full Commission in
the course of his opening statement in the public hearing which the Commission held
at the request of these respondents and other industry members to consider the opera-
tions of the PDS Code.

[I]t is the Commission's view that industry efforts to[wards] self-regulation should
in no way affect or limit the Commission's responsibility under Section V of the Federal
Trade Commission Act to eliminate any deceptive or unfair practices that may exist
in the industry, nor is it the purpose of this hearing to hear arguments on how the
Commission can or should act to exercise its responsibility to protect the public interests.
(Special Public Hearing In The Activities Of Door-To-Door Magazine Subscription Sales
Industry, March 10, 1971, p. 3.)

During the hearings, Commissioner Elman asked counsel for the industry association
whether the PDS Code "repealed" any aspect of the Federal Trade Commission Act. (*Id.*,
p. 51.) Counsel for the association, who initiated the request for Advisory Opinion No.
128, responded in the negative. He characterized the relationship between the Commis-
sion and the industry as "a joint cooperative effort." (*Id.*, p. 52.)

It would be anomalous for a Commission, empowered and directed by Congress to initiate enforcement actions against unfair and deceptive acts and practices, to be stopped from such actions by the private expressions of staff members or even of individual Commissioners. This is not the law. Courts will not apply the principles of estoppel against government actions taken to protect the public interest. *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 384 (1947); *Utah Power and Light Co. v. United States*, 243 U.S. 389, 408-409 (1917); *Nichols and Co. v. Secretary of Agriculture*, 131 F.2d 651, 658-659 (1st Cir. 1942); *SEC v. Torr*, 22 F. Supp. 602, 611-612 (S.D. N.Y. 1938); *L. B. Samford, Inc. v. United States*, 410 F.2d 782, 788 (Ct. Cl. 1969); *Bornstein v. United States*, 345 F.2d 558, 562, (Ct. Cl. 1965).

Our examination of the record presented on this motion has failed to indicate any factual or legal basis for respondents' contentions. Quite apart from the legality of any such grant of power as is claimed by respondents, if any such sweeping commitment to confer on an industry a blanket immunity from prosecution was to have been granted, it would surely have been stated quite expressly and not be embodied in a respondent's "understanding" of what on its face was a very carefully worded Advisory Opinion discussing in painstaking detail the Commission's reactions to the industry proposal. It is inconceivable that, if the Commission was in fact granting the industry the type of power which these respondents now claim, that not a single word about it was included in the Commission's lengthy discussion of the legality of the industry proposal. We, therefore, conclude that respondents have failed to sustain their argument that the Commission's Advisory Opinion expressly or implicitly contained a commitment that industry members would be immune from prosecution under Section 5 of the Federal Trade Commission Act while the Advisory Opinion was in effect.⁸

Respondents' Contention that their Fourth Amendment Rights have been Violated

Respondents' second argument in support of their motion to dismiss the instant complaint is also without factual or legal support.

⁸ In view of our conclusion on this point, it is unnecessary for us to deal with the question of the date when the Advisory Opinion expired or with the argument of complaint counsel, accepted by the examiner, that whatever respondents' understanding as to commitments which might or might not have been given, the complaint filed against these respondents was served after the expiration of the Advisory Opinion by its own terms and hence respondents' argument must fall on this ground alone. We have no quarrel with the examiner's conclusion on this point but we have elected to treat the more fundamental issue raised by respondents because of its significance both to this part of respondents' motion to dismiss as well as to the second part of its motion to which we now turn.

It, too, rests essentially on respondents' basic contentions with respect to the meaning of Advisory Opinion No. 128 and the commitments which they argue were given in connection with it.

Respondents state that part of the information complaint counsel will rely on to prove the allegations of the instant complaint was in fact provided voluntarily by respondents in response to Commission investigations of the administration of the PDS Code. Respondents contend that these documents were furnished to the Commission only pursuant to their agreement to do so under Advisory Opinion No. 128 and assert that they would not have cooperated in these investigations and would not have submitted this information had they been aware that the information would be used against them in an adjudicative proceeding (Respondents' Motion for Order Dismissing Complaint, p. 20) (hereinafter cited as RM). From this they argue that the use of any documents obtained by the Commission in connection with the PDS Code "constitutes the practical equivalent of using information obtained through a warrantless search and thereby a violation of the Fourth Amendment."

The hearing examiner found "no indication" in the record before him that an illegal search had taken place. He noted that the Advisory Opinion notified the industry that it would be subject to careful Commission scrutiny. He noted that the Commission had not relinquished any of its powers to investigate the practices of the PDS Industry stating: "The Commission had the right and authority under the Advisory Opinion and the mandate of the Congress under the Federal Trade Commission Act to investigate these [PDS] complaints. The Commission so informed the respondents." (Hearing Examiner's Order Denying Motion to Dismiss Complaint, *In the Matter of Hearst Corporation et al.*, Docket No. 8832, p.6, referred to in Order Denying Motion to Dismiss Complaint in the present matter.) We agree with the examiner's conclusion.

Respondents do not deny that under Advisory Opinion No. 128 they were required and agreed to provide the Commission with documentation as to the administration of their self-regulatory Code.⁹ Essentially respondents are arguing first that the Commission misled

⁹ The Advisory Opinion made the following provision with respect to the furnishing of information to the Commission:

[T]he Administrator or the Committee must submit reports to the Commission of each complaint which was received, considered or investigated and of each action taken by the Administrator. Further, the opinion is being rendered with instructions to the staff of the Commission to initiate periodic inquiries after the plan has been put into effect to determine and report to the Commission as to how it is actually working.

After this opinion was issued, the PDS Code Administrator made periodic submissions of documents to the Commission. The Commission staff initiated several investigations of PDS Code signatories and received from them various documents pertinent to their business operations.

them into agreeing to provide this documentation concerning the administration of their self-regulatory Code and, second, that they were also misled into believing that the documentation which they supplied would not be used in any adjudicative proceeding.

Respondents acknowledge that the Commission investigators stated to them that they were requesting access to respondents' files in connection with investigations of the PDS Code. (Respondents' Reply to Complaint Counsel's "Answer to Respondents' Motion for Order Dismissing Complaint," p. 3, Ex. A; respondents' Reply To Answer To Request For Permission To File An Interlocutory Appeal From Order Denying Motion To Dismiss Complaint, pp. 3-5, and Exs. A and B attached thereto.) No misrepresentation, therefore, was made by these investigators as to the information they were seeking or the purpose of their requests. Since, as noted above, we have concluded that the Commission made no commitment to refrain from prosecuting industry members cooperating in the PDS self-regulatory program, we do not find that respondents were misled into agreeing to provide the Commission with documentation concerning the implementation of this program. Therefore, we do not find any wrongful or improper action on the part of the Commission in seeking respondents' disclosure of documents to the Commission.

We find equally unpersuasive the second prong of respondents' search and seizure argument that the Commission in some way committed itself not to use the documents received in the course of its monitoring of the PDS self-regulatory Code in any adjudicative proceeding.

Respondents were on notice of the fact that documents and information obtained by the Commission under any of its powers could be used against them in any adjudicative proceedings. Section 3.43(c) of our Procedure and Rules of Practice states:

Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceeding.

Thus, respondents were fully aware at all times that materials secured in investigations of the PDS Code could be used in adjudicative proceedings. If they had desired or received some contrary commitment with respect to these so-called PDS generated documents, it is quite evident that such a commitment would have had to be express and explicit. No such commitment is pointed to by respondents.

Respondents, therefore, have not made out even a colorable claim that their Fourth Amendment rights will in any way be infringed