

by the Commission in the course of the instant adjudicative proceeding through use by counsel supporting the complaint of documents secured in the course of investigations of the PDS Code or submitted to the Commission by respondents in connection with the operations of that Code.

For the reasons stated above we deny the respondents' appeal from the hearing examiner's denial of their motion to dismiss the complaint.

ORDER DENYING MOTION TO FILE INTERLOCUTORY APPEAL FROM
DENIAL OF MOTION TO DISMISS COMPLAINT

Respondent Cowles Communications, Inc., having requested permission to file an interlocutory appeal from the hearing examiner's November 8, 1971, Order Denying Motion to Dismiss Complaint; and

The Commission having considered said request and having determined, in accordance with the views expressed in the accompanying opinion, that respondents' request should be denied:

It is ordered, That respondent's motion for permission to file an interlocutory appeal from the hearing examiner's November 8, 1971, order denying its motion to dismiss the complaint in this matter be, and the same hereby is, denied.

Chairman Kirkpatrick and Commissioner MacIntyre not participating.

EATON YALE & TOWNE, INC.

Docket 8826. Order, March 2, 1972

Order denying respondent's motion for a stay of hearings and appeal from hearing examiner's denial of application for subpoena *duces tecum* directed to Federal Trade Commission.

ORDER DENYING RESPONDENT'S MOTION FOR STAY OF HEARINGS
AND DENYING APPEAL

This matter is before the Commission upon respondent's motion for a stay of hearings and its appeal from the hearing examiner's denial of application for subpoena *duces tecum* to the Federal Trade Commission, filed February 16, 1972; and the answer of complaint counsel in opposition thereto filed February 24, 1972.

The hearing examiner on February 14, 1972, in a pretrial hearing, considered respondent's application for a subpoena to the Federal Trade Commission (a copy of which is attached to the appeal and identified as Exhibit A), and the question of a stay in the beginning

of the trial, scheduled for March 6, 1972. The examiner denied the application and he also refused to consider a stay (Tr. 246-47; 264-65). The record shows that he carefully weighed the issues presented. Upon hearing argument he expressed the view that it was not necessary for respondent to possess the additional data sought in order to cross-examine witnesses during the case-in-chief (Tr. 245-46; 251). He held, however, that if it was later demonstrated the respondent would be prejudiced by his ruling he would grant a recess to permit the production of such data and the recalling and re-examination of witnesses if necessary.¹ As to at least some of the information sought the examiner expressed his belief that it didn't appear to be material or relevant (Tr. 249). The hearing examiner additionally offered to sign subpoenas to enable respondent to obtain directly from witnesses certain, if not all, of the information in question (Tr. 255-56; 259).

Under Section 3.36 of the Commission's Rules of Practice, a respondent seeking access to information in the confidential records of the Commission must demonstrate not only general relevancy and the reasonableness of the scope of the request but also "a showing that such * * * information * * * is not available from other sources by voluntary methods or through other provisions of the rules in this chapter." Respondent has not demonstrated that it has satisfied this provision of the Commission's rules.

In any event, the issues here presented, both as to the stay and the issuance of the subpoena, are matters which the Commission ordinarily leaves to the sound discretion of the hearing examiner. On the matter of discovery the Commission has stated on a number of occasions that it will not overrule the hearing examiner's decision except where there has been a showing of an abuse of discretion or other unusual circumstances. See, for example, *Maremont Corporation*, Docket No. 8763 (July 28, 1969) [76 F.T.C. 1061]. No such showing has been made here. In the circumstances, both the request for the stay and the appeal from the examiner's denial of respondent's application for subpoena *duces tecum* will be denied. Accordingly,

It is ordered, That respondent's motion for a stay of hearings in this matter, scheduled to commence March 6, 1972, be, and it hereby is, denied.

¹ He summarized his view at page 271 of the record in part as follows:

"I may reiterate that in denying respondent's motion I resummairize what I said before and that is that if any prejudice is shown during the course, any prejudice to respondents, the case will be recessed until that can be adjusted and respondents have an opportunity for further discovery, if necessary and if prejudice is shown. If certain witnesses can be recalled, he will be recalled."

He stated at pages 250-51 in part:

"* * * if the respondent can show me that at that point he would be prejudiced with regard to cross-examination, of which I don't believe is so here presently, but I may think it is so later on, I will require that any witnesses be recalled to relieve that situation. You may assume the same thing. * * *"

It is further ordered, That respondent's appeal from the hearing examiner's denial on February 14, 1972 of its application for a subpoena *duces tecum* to the Federal Trade Commission be, and it hereby is, denied.

COWLES COMMUNICATIONS, INC., ET AL.

Docket 8831. Order and Opinion, March 2, 1972

Order denying respondent's appeal from the hearing examiner's order requiring respondents to comply with subpoenas *duces tecum* obtained by complaint counsel.

OPINION OF THE COMMISSION

This matter is before the Commission on the interlocutory appeal of respondents from the hearing examiner's order of November 5, 1971, requiring respondents to comply, in substantial part, with subpoenas *duces tecum* obtained by complaint counsel.

Claiming abuse of discretion, respondents base their appeal on two main arguments: (1) that the subpoenas should not have been issued upon the *ex parte* application of complaint counsel; and (2) that the subpoenas are a belated attempt to engage in post-complaint investigation. We will consider these arguments *seriatim*.

I Complaint counsel's *ex parte* application for the subpoenas

Respondents object to the alleged procedural injustice resulting from the ability of complaint counsel to obtain subpoenas directed at them by *ex parte* application under Sections 3.35 and 3.34 of the Commission's Rules of Practice, whereas respondents are required to make a formal motion—which is subject to answer by complaint counsel—in order to obtain a subpoena for discovery of Commission files under Rule 3.36. The effect of this, according to respondents, is that complaint counsel is favored by not being required to make a showing on the record of the specificity of designation, relevancy and reasonableness in scope of the information sought by the subpoenas. Respondents claim that this circumstance violates the Administrative Procedure Act, 5 U.S.C. §599 (“* * * requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons”), and the due process clause of the Fifth Amendment.

Rule 3.36 requires that an application for issuance of a subpoena requiring the production of confidential files of the Commission shall be in the form of a motion filed in accordance with the provisions of Rule 3.22(a). A motion filed under Rule 3.22(a) is subject to answer by the opposing party under Rule 3.22(c). Thus, if a respondent attempts to obtain a subpoena for discovery of confidential Commis-

sion files, the request for the subpoena will be subject to an answer by counsel supporting the complaint.

The need for this rule is clear. Commission files often contain documents and information of a highly confidential nature, including trade secrets, names of complainants, and data supplied by competitors of a respondent. Congress has recognized the confidentiality of this information. Section 10 of the Federal Trade Commission Act makes it a criminal offense for Commission employees to make public any information obtained by the Commission without first obtaining its permission. The Commission restricts access to confidential information in its files by allowing its release only upon good cause shown pursuant to Rule 4.11. Another method of insuring the safety of the Commission's confidential files is the procedure required by Rule 3.36.

The reasonableness of Rule 3.36 may be seen by examining what would happen without it. If a respondent could obtain a subpoena under Rule 3.34 for discovery of the Commission's confidential files, there is nothing in the rules which would provide complaint counsel with the opportunity of submitting an answer. What rule would complaint counsel rely on to file a motion to quash a subpoena issued on application of a respondent and directed to the Secretary of the Commission? There is none. Without an adversarial response from complaint counsel, the Commission would be at a disadvantage in attempting to weigh the specificity, relevancy and reasonableness of the subpoena. For this reason, Rule 3.36 provides an opportunity for complaint counsel to respond to an attempt by respondent to obtain a subpoena to discover the confidential files of the Commission.

Respondents argue that this procedure would require them to state on the record the specificity, relevancy and reasonableness of the subpoena, whereas, under Rule 3.34 complaint counsel may obtain a subpoena directed at respondents' files by an *ex parte* application. This ignores the fact that the Commission cannot itself enforce the subpoenas. If respondents doubt the specificity, relevancy and reasonableness of the subpoenas, they can refuse to comply, which will require the Commission to allege and prove these factors in a United States district court on an enforcement action filed under Section 9 of the Federal Trade Commission Act (15 U.S.C. §49). *Adams v. Federal Trade Commission*, 296 F.2d 861, 866 (8th Cir. 1961), *cert. denied*, 369 U.S. 864 (1962).

Respondents' argument is that the granting of an *ex parte* subpoena is discriminatory and that both parties should have equivalent discovery rights. This same argument has been rejected by the courts.

In *The Sperry and Hutchinson Company v. Federal Trade Commission*, 256 F. Supp. 136 (S.D.N.Y. 1966), a respondent in a Com-

mission administrative action filed a complaint for declaratory judgment and relief in the nature of mandamus against the Commission, alleging that its discovery rights under Commission rules were not equivalent to the discovery rights of the Commission. Sperry sought discovery and inspection of a mass of statements and documents accumulated by the Commission during the investigation. The court denied Sperry's motion for a preliminary injunction. Sperry had relied on Section 12 of the Administrative Procedure Act (now codified as 5 U.S.C. §559), on which respondents also rely. The court held, regarding the rights of a respondent in a Commission adjudicative proceeding:

Section 12 adds little to Sperry's argument. This provision states that "*except as otherwise required by law*, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons." By no means can it be said that the Commission has flouted this open-ended legislative direction.

Such "equal" rights of access to evidence as Sperry may have under this provision are by no means unqualified. As the statute indicates these rights are plainly subject to the protections against disclosure of confidential information required by the Commission's rules. It was primarily for this reason that the Commission denied Sperry's motion. 256 F. Supp. at 143.

The court recognized that the Commission had facilities for inspection not available to a private litigant, but held that this did not violate the Administrative Procedure Act or the due process clause.

Similarly, the courts have denied injunctions to respondents claiming a violation of the Administrative Procedure Act and the due process clause because only complaint counsel can obtain special reports under Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. §46(b), whereas respondents cannot use that means for obtaining information and evidence. *Papercraft Corp. v. Federal Trade Commission*, 307 F. Supp. 1401 (W.D. Pa. 1970); *Union Bag-Camp Paper Corp. v. Federal Trade Commission*, 233 F. Supp. 660 (S.D. N.Y. 1964).

These cases show that neither the due process clause nor the Administrative Procedure Act requires the Commission to make available to respondents exactly the same procedures for obtaining information and evidence as those afforded complaint counsel. We find, therefore, that the examiner did not err in issuing the subpoenas on the basis of complaint counsel's *ex parte* application.

II Complaint counsel's post-complaint discovery

Respondents argue that complaint counsel are belatedly attempting to engage in post-complaint investigation in violation of the Commission's Rules of Practice.

The Commission has stated its policy with respect to post-complaint discovery by complaint counsel, holding that "complaint counsel may properly find, particularly after the issues are refined in a prehearing conference, that some additional documentation may be required to *round out, extend, or supply further details* for the particular transactions to be pursued. * * * The rules are not intended to provide for comprehensive post-complaint investigation, but only post-complaint discovery." *All-State Industries of North Carolina, Inc., et al.*, Docket 8738, Order Granting Interlocutory Appeal, November 13, 1967, p. 6 [72 F.T.C. 1020]. The Commission has clarified that statement by making it clear that the policy of requiring complaint counsel to have evidence sufficient to support a *prima facie* case before issuance of the complaint is merely an internal "housekeeping" matter. *Lehigh Portland Cement Company*, Docket 8680, Order Denying Interlocutory Appeal, August 9, 1968 [74 F.T.C. 1589]. The Commission has also made clear that these internal administrative guidelines do not confer upon a respondent a legal right to object to a post-complaint subpoena on the grounds that the material sought should have been in hand at the time of the issuance of the complaint, and that the Rules of Practice establish the standards for dealing with discovery matters in the light of the issues raised by the complaint. *All-State Industries of North Carolina, Inc., et al.*, Docket 8738, Supplemental Clarifying Opinion by the Commission, August 9, 1968 [74 F.T.C. 1591]. The United States Court of Appeals for the District of Columbia upheld this policy statement in the *Lehigh* case, *supra, sub nom., Federal Trade Commission v. Browning*, 435 F.2d 96, 102-03 (D.C. Cir. 1970).

Respondents' argument that the subpoenas are improper post-complaint discovery is, therefore, without merit.*

III Other issues raised by respondents

Respondents also raise—but do not argue—two other issues on appeal (Memorandum in Support of Interlocutory Appeal, p. 9):

The subpoenas are so unreasonable in scope and so burdensome that they should be quashed; in the alternative, respondents should be awarded its cost of production under applicable rules.

The subpoenas were the subject of two prehearing conferences as well as other informal conferences between complaint counsel and counsel for respondents (Complaint Counsel's Answer in Opposition

* *Federal Trade Commission v. Crowther*, 430 F.2d 510 (D.C. Cir. 1970), cited by respondents, merely holds that the Commission must identify and articulate the reasons for declining to follow a stated policy. Since the Commission has not declined to follow its stated policy, *Crowther* is inapplicable.