Valley under Section 3.36 of the Commission's Rules of Practice to warrant issuance of subpoenas to Messrs. Tobin and Ferguson; and

3. Whether the scope of the subpoena directed to Mr. Simon should be limited to exclude testimony concerning Advisory Opinion 128 in light of the Commission's decision in this matter of October 29, 1971.

Chairman Kirkpatrick not participating.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order, April 20, 1972

Order denying respondents' interlocutory appeal from hearing examiner's denial of their motion to compel testimony or in the alternative, for an order striking certain allegations from the complaint.

Order Denying Interlocutory Appeal

Respondents the Hearst Corporation (Hearst) and Periodical Publishers' Service Bureau, Inc., (Periodical) have filed an interlocutory appeal from the hearing examiner's November 1, 1971, order denying Hearst's and Periodical's Motion to Compel Testimony, or Alternatively, for an Order Striking Certain Allegations from the Complaint. This appeal arises from an attempt by these two respondents to take the depositions of the president and vice president of a third respondent, International Magazine Service of the Mid-Atlantic (IMS) which is a franchisee of Periodical. Several allegations in the complaint seek to hold appellants responsible for certain deceptive practices engaged in by IMS, and appellants claim it is necessary to take the depositions of these IMS officials in order to effectively prepare to cross-examine certain of complaint counsel's consumer witnesses who dealt with employees of IMS. The two officials have refused to testify on Fifth Amendment grounds.[1] On September 23, 1971, Hearst and Periodical filed a motion with the hearing examiner to compel their testimony or alternatively for an order

[1] Upon Hearst's and Periodical's application, subpoenas directed to the IMS officials were first issued by the hearing examiner in May 1971, but the officials refused to testify at the scheduled depositions. Thereafter, Hearst and Periodical requested that the examiner certify to the Commission their request that the Commission issue an immunity order under the Crime Control Act, 18 U.S.C. § 6002. The Commission sought the approval of the Attorney General for the issuance of such an order which was denied, and the Commission remanded the matter to the hearing examiner who once more ordered the discovery depositions of the two officials. They again asserted their privilege against self-incrimination, whereupon Hearts and Periodical filed the motion which is the subject of this appeal.

striking the allegations of the complaint charging Hearst and Periodical with responsibility for the acts of IMS. This motion also requested that the examiner certify the motion to the Commission recommending that it commence enforcement proceedings. The examiner's denial of this motion is the subject of this appeal.

At the outset, we must consider whether respondents have made the necessary showing that the examiner's ruling 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] We are of the opinion that respondents have not made the necessary showing to warrant an interlocutory appeal in this instance.

In our view, respondents' request is premature. The hearings involving the IMS phase of the proceedings have been postponed indefinitely due to a criminal indictment against IMS and three of its officers which involves some of the same acts and practices alleged in the Commission's complaint. In addition, we do not believe respondents' claim that they will be denied effective cross-examination of certain consumer witnesses can be determined until these witnesses have testified. Also, the examiner has given respondents an opportunity to raise the issue again after hearings involving IMS are subsequently rescheduled. Furthermore, if respondents are found to have been prejudiced in their cross-examination of consumer witnesses, there will be ample opportunity to correct such prejudice at the conclusion of the hearing.[3]

Consequently, at this stage in the proceeding, it cannot be said that the hearing examiner's ruling denies Hearst and Periodical substantial rights or that his ruling will materially affect the final outcome of the case. A determination of the correctness of the ruling at this time is in no way essential to the interests of justice, and in fact, the correctness of the ruling cannot even be accurately or adequately determined at this time.

Accordingly, the Commission having concluded that the respondents Hearst and Periodical have failed to make the necessary showing to warrant an interlocutory appeal under the Commission's Rules of Practice,

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[2] This showing is required to justify an interlocutory appeal under both Sections 3.23 and 3.35(b) of the Commission's Rules of Practice. While we believe that respondents were in error in appealing here under Section 3.35(b) because the examiner has not in fact quashed the subpoenas at issue to give rise to an appeal under this rule, their error does not affect the outcome of this appeal since both rules require the same showing.

[3] For example, the testimony of the consumer witnesses might be stricken, or the allegations in the complaint seeking to hold Hearst and Periodical responsible for IMS' acts might be stricken at that time.