

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
ET AL

Docket 8866. Interlocutory Order, Jan. 19, 1973.

Order ruling on certification order of administrative law judge and on respondent's motion for leave to brief and argue issues raised by certification order and for related relief.

ORDER RULING ON CERTIFICATION ORDER OF ADMINISTRATIVE
LAW JUDGE AND ON RESPONDENT'S MOTION FOR LEAVE TO
BRIEF AND ARGUE ISSUES RAISED BY CERTIFICATION
ORDER AND FOR RELATED RELIEF

This matter is before the Commission on the administrative law judge's certification order, dated October 24, 1972. The order certifies to the Commission A & P's motion filed September 1, 1972, for dismissal of Count I of the complaint for failure to state a claim under Section 5 of the Federal Trade Commission Act insofar as the motion claimed that the charges in Count I

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should have been the subject of a rulemaking proceeding.¹ It also certifies a motion by A & P dated October 12, 1972, requesting dismissal of all three Counts of the complaint on the grounds that delay in issuance of the complaint has deprived A & P of the opportunity to obtain evidence needed in its defense and that the complaint is no longer in the public interest because the acts and practices alleged in the complaint have been discontinued and are not likely to recur.

Before addressing ourselves to the certified motions, we turn first to a motion filed with the Commission by A & P on October 25, 1972, subsequent to the administrative law judge's certification order. In its motion A & P requests permission to file an additional brief on the issues raised on certification and to argue the matter orally before the Commission. It also seeks a continuance of the hearings which had been scheduled to commence on November 30, 1972, pending the Commission's disposition of the certified questions.

We think that the issues before us already have been briefed extensively. Even A & P appears to agree on this point. It notes in its motion that the issues have been briefed "in several separate submissions"² and that its purpose in submitting a further brief would be to have "a single statement of position."³ We see little value to adding still more to the now sizeable volume of paper work, or to allowing oral argument, in the matter. Accordingly, A & P's request is denied.

The request for continuance of the hearings is, as a practical matter, mooted by the withdrawal from participation in this proceeding by Administrative Law Judge Theodor P. von Brand on November 21, 1972, pursuant to Section 3.42(g) of the Commission's Rules of Practice. And the administrative law judge

¹ Other arguments contained in A & P's motion of September 1 were ruled upon by the Administrative law judge and were disposed of by an order of the judge, dated September 19, 1972, dismissing the motion. By Motion for Leave to Brief and Argue Issues Raised by Certification Order and For Related Relief, dated October 25, 1972, A & P invites us to review all the arguments dismissed by the judge's ruling of September 19th notwithstanding the refusal by the judge, as indicated in his certification order of October 24, 1972, to make the written determination with respect to his ruling which is required by Section 3.23(b) of the Commission's Rules of Practice. We decline the invitation. The purpose of Section 3.23(b) is to grant the administrative law judge the authority to limit the opportunity for requesting interlocutory review to matters (other than those matters specified by Section 3.23(a) of the Commission's Rules) which, in his opinion, fall within the guidelines established by Section 3.23(b). To accept A & P's invitation would be to undermine this purpose.

² Motion for Leave to Brief and Argue Issues Raised by Certification Order and For Related Relief, dated October 25, 1972, page 2.

³ *Id.*

now appointed to this proceeding is instructed to proceed with the hearings at the earliest reasonable date.

I

The sole question before us with respect to A & P's motion to dismiss Count I of the complaint is whether we abused our discretion by issuing complaint as to this Count, rather than proceeding through rulemaking. A & P's contention rests on the assumption that the charge of Count I involves a wholly-novel challenge to activity never before found to be a violation of Section 5 of the Federal Trade Commission Act. Proceeding from that assumption, A & P argues that it would be unfair for the Commission to issue an order prohibiting the challenged conduct without having first, via a trade regulation rule, forewarned A & P that such conduct is unlawful.

The challenged activity is not as novel as A & P claims. We think that the alleged practice is similar enough to the facts of the Kroger case⁴ to warrant a full hearing on the record and we would be remiss in our obligation to the public interest were we to dismiss the count so prematurely, as A & P requests. Moreover, in issuing this complaint, we made the determination that the practices alleged therein, including those of Count I of the complaint, if found to exist on the basis of substantial evidence of record, could best be dealt with by means of an adjudicative order to cease and desist. This determination was clearly our responsibility to make. *Federal Trade Commission v. Universal-Rundle Corporation*, 387 U.S. 244 (1967); *Moog Industries v. Federal Trade Commission*, 355 U.S. 411 (1958). And we are not persuaded that we should reverse our decision without the benefit of a full record. A & P's motion to dismiss Count I of the complaint is, therefore, denied.

II

A & P also moves to dismiss the complaint in its entirety on two grounds: (1) the delay between the inception of the investigation and issuance of complaint constitutes an abuse of discretion on the part of the Commission; and (2) the proceeding is no longer in the public interest since the alleged illegal practices have been discontinued and are unlikely to recur and the evidence which would be introduced at hearings is stale.

⁴ *The Kroger Company v. Federal Trade Commission*, 438 F.2d 1372 (6th Cir. 1971).

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We find that the time taken to conduct the investigation leading to the issuance of the complaint herein is neither atypical nor inordinate, particularly in view of the complexity of the investigation and the limited manpower available to the Commission for conducting investigations in connection with its varied and broad statutory responsibilities. Moreover, it seems clear from the pleadings and affidavits before us that respondents were timely alerted to the fact that the Commission was interested in the private label arrangement between them in the Chicago trading area from the standpoint of possible violations of the amended Clayton Act and Section 5 of the Federal Trade Commission Act. And there is no indication that either A & P or Borden was ever advised that the Commission had abandoned its investigation. On the contrary, the papers before us clearly indicate that attempts to pursue and complete the investigation were made by Commission staff on a continuing and regular basis during the period March 1967–December 1969.⁵ Accordingly, we find no abuse of discretion in our issuance of complaint herein.

We agree with the administrative law judge, however, that the question of alleged unfair prejudice to A & P by possible denial of adequate opportunity to defend is one which cannot be answered now, but only at the conclusion of hearings. Therefore, the motion in this respect will be denied without prejudice to A & P to renew its argument in conjunction with the submission of proposed findings of fact and conclusions of law at the close of the reception of evidence.

We also agree that questions of staleness of evidence and good faith discontinuance can only be decided after all the evidence is in, particularly in a situation of this sort where the contractual arrangement with which the complaint is concerned was discontinued by the respondents subsequent to formal issuance of the complaint.⁶ Accordingly,

It is ordered, That respondent's motion for leave to brief and argue issues raised by certification order and for related relief be, and it hereby is, denied.

⁵ Affidavit of FTC Attorney Examiner Richard A. Palewicz, dated October 18, 1972, which appears as Attachment I to complaint counsel's Answer dated October 20, 1972. Mr. Palewicz's statements as to the dates on which contacts were made with respondents in the course of the investigation are not challenged by A & P's Reply, dated October 21, 1972. On the contrary, A & P's Reply, at page 4, notes that Mr. Palewicz's affidavit omitted one interview with an A & P official.

⁶ A & P's Motion to Dismiss the Complaint and For Related Relief, p. 22.

It is further ordered, That respondent's motion to dismiss Count I of the complaint, certified to the Commission on October 24, 1972, be, and it hereby is, denied.

It is further ordered, That respondent's motion to dismiss the complaint, certified to the Commission on October 24, 1972, be, and it hereby is, denied.

Commissioner MacIntyre abstained.