



Volume 7 | Issue 3

Article 3

1962

FTC Procedure Revisions: A Critique

Martin F. Connor III

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>

 Part of the [Administrative Law Commons](#)

Recommended Citation

Martin F. Connor III, *FTC Procedure Revisions: A Critique*, 7 Vill. L. Rev. 359 (1962).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol7/iss3/3>

This Article is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

SPRING 1962]

FTC PROCEDURE REVISIONS: A CRITIQUE

MARTIN F. CONNOR, III†

ON JUNE 29, 1961, the Federal Trade Commission issued amended and revised rules to govern its "adjudicatory" proceedings.¹ It would be idle to pretend that this event evoked any great interest, much less excitement, except among those few attorneys who earn their daily bread by enforcing or resisting the enforcement of the antitrust laws. The occasion went unnoticed in the popular press and unremarked even in professional journals. Yet it was of more than passing importance.

If our law reviews and journals of opinion are any gauge of public temper, it must be surmised that no phase of the law (questions of taxation aside) interests the legal profession and the lay public more than antitrust law and trade regulation. This is true despite the fact that relatively few attorneys will ever be asked for an opinion on an antitrust matter, and even fewer members of the public will ever be clients seeking such advice. Be this as it may, the astonishing body of comment and criticism which these laws have evoked is ample witness to the overwhelming importance that attaches to them. To use a phrase that is weary from overwork, they are the *magna charta* of our competitive system. And competition, in the American experience, is less an economic theory than an article of faith, less a description of reality than a rallying cry. Free enterprise is an essential ingredient of that mix which we describe as our way of life, and antitrust is our solution to the real or fancied problems of keeping enterprise free from the restraints of excessive private power on the one hand and of positive public control on the other. Antitrust is a peculiarity and typically American *via media* in the contest between private and public economic power which characterizes much of recent history. As such, the antitrust laws are neither statist nor socialistic in conception; they are essentially conservative measures designed in response to a felt necessity to preserve and guarantee a social and economic order which

† LL.B., Georgetown University. Associate, Kyte, Conlan, Wulsin & Vogeler, Cincinnati. Formerly, Trial Attorney, Federal Trade Commission.

1. 26 Fed. Reg. 6015-22 (1961), amending 16 C.F.R. ch. 1, subch. A, pt. 3. See also 3 CCH 1961 TRADE REG. REP. §§ 9815-22. The superseded rules, herein-after referred to as the 1955 rules, were effective May 21, 1955, 20 Fed. Reg. 3062 (1955), amended at 22 Fed. Reg. 2077 (1957), 24 Fed. Reg. 7607 (1959) and 25 Fed. Reg. 9530 (1960). See also 3 CCH 1961 TRADE REG. REP. §§ 9825.01-30.

less self-conscious generations of Americans presumed to be part of the order of things. Thus the antitrust laws are at the core of our system, both as dogmatic assertions and police regulations; whether they are wise or foolish, effective or futile, is therefore a legitimate and important matter for public concern.

While the substantive content of the antitrust laws and the varying policies which govern their enforcement are widely understood and discussed, the efficiency of their enforcement is a problem generally reserved for meetings of the antitrust bar. However unfortunate this circumstance may be, it is nonetheless understandable; the enormous practical problems of antitrust enforcement are best known to those who must cope with them. Yet it is obvious that the worth of our antitrust laws is a function of the efficiency with which they are enforced. If they are not given or cannot be given swift and facile enforcement, their importance as an ideal and as a standard of conduct dwindles proportionately.

Thus the Federal Trade Commission's recent attempt to improve its procedures deserves attention. The Commission is one of the two principal federal agencies commissioned to enforce the antitrust laws. Although differing enforcement policies will at any particular moment give the FTC and the Antitrust Division of the Justice Department somewhat different areas of emphasis, their jurisdictions generally overlap.² (Of course, the FTC has sole sway over a large field of trade regulation, as opposed to antitrust in the strict sense. It is, for example, empowered to enjoin false and misleading advertising in interstate commerce and violations of various labeling acts.³) Even after allowance is made for the fact that the FTC may do no more than enjoin unlawful conduct, it would seem on its face to be particularly well-constituted for securing compliance with the laws it enforces. The Commission functions through its own corps of investigators who are widely dispersed and equipped with a broad power of subpoena; it brings offenders to trial before hearing examiners who are schooled in the intricacies of antitrust law and who have in the

2. Formal liaison agreements govern the FTC's relations with the Justice Department, as well as with the Food and Drug Administration and the Federal Communications Commission. 22 Fed. Reg. 2318 (1957). Regarding the FTC and the Department of Agriculture, see Packers and Stockyards Act § 406, 42 Stat. 169 (1921) as amended 7 U.S.C. §§ 226-227 (1959).

3. The organic act of the FTC is the Federal Trade Commission Act, 38 Stat. 717 (1938) as amended, 15 U.S.C. 41-58 (1959). The FTC also enforces provisions of the Clayton Act, 38 Stat. 730 (1914) as amended, 15 U.S.C. 12-27; the Wool Products Labeling Act, 54 Stat. 1128 (1940), 15 U.S.C. 68 (1959); the Fur Products Labeling Act, 65 Stat. 175 (1951), 15 U.S.C. 69 (1959); the Flammable Fabrics Act, 67 Stat. 111 (1953), 15 U.S.C. 1191-1200; and the Textile Fiber Products Labeling Act, 72 Stat. 1717-24 (1958), 15 U.S.C. 70 (1959).

administrative process a flexible medium within which to face formidable issues of fact; it is itself a body of reputed experts fully capable of formulating a judicious and coherent policy and implementing the same through discreet issuance of complainants and apt review of its hearing examiners' decisions. The FTC's viability as an enforcement agency would seem to be assured in light of its broad mandate, subject only to review by the Courts of Appeals and the Supreme Court of the United States, to establish standards of competitive conduct and to seek compliance with these standards in the relaxed atmosphere of the administrative process. Realities, unfortunately, fall far short of this high promise. "The old woman of Pennsylvania Avenue," as the Commission is sometimes called, has, like the woman in George Gershwin's song, been a "sometime thing": sometimes alert, sometimes swift, sometimes wise, but far more often slack, slow and uncertain.

There has, of course, been no single cause of the FTC's inefficacy. Individual Commissioners have rarely had the experience or expertise presumed by their office. It is not unfair to say that a seat on the Commission has often been a reward for the politically weary or a stepping stone for the politically or professionally ambitious. (Let it also be said in justice that it would be most unfair to describe the present members of the Commission in these terms.) The Commission's staff has been inadequate both in numbers and in talent; the funds at its disposal have been meager. Too much energy has gone into what has been aptly called the FTC's own "numbers racket":⁴ the prosecution of countless petty offenses, which produces enviable win-loss records at year's end but no other result that is worthy of comment. The list could be extended, but at length it would have to be crowned by one paramount problem, that of procrastination and delay. The administrative process which boded so well in theory has in the FTC's experience been an occasion of unconscionable dilatoriness, protracted procedural skirmishes, and trials which might appropriately be described in the language of show-business as "extravaganzas."⁵

4. MASON, *THE LANGUAGE OF DISSENT* 305 (1959).

5. Delay is not a problem peculiar to the FTC; ironically, it characterizes the processes of federal administrative agencies. See statistics at DAVIS, *ADMINISTRATIVE LAW* 295 (1951). The majority of FTC cases are disposed of in a matter of months; unfortunately, however, those cases to which the greatest public interest attaches are generally the very ones whose disposition requires years. This situation is consistent with the findings set forth in the 1958 Annual Report of the Office of Administrative Procedure, according to which 50% of cases in federal administrative agencies are disposed of in six months or less, while 10% are still undisposed of after three years. It may be unfair to single out examples among recent FTC cases, but the following might be considered *inter alia*: Pillsbury Mills, No. 6000, complaint issued June 16, 1952, final order of divestiture entered December 16, 1960;

Delay in federal courts and agencies is a generally pressing problem, but it has been nowhere more acute than in proceedings before the FTC. Delay in civil cases has the unfortunate consequence of postponing a claimant's award or a defendant's vindication; but, more often than not, delay in FTC cases will render the proceeding moot or make it exceedingly difficult to fit a remedy to the wrong. On one hand, the annals of the FTC abound with orders to cease and desist from using advertising copy that had already outlived its usefulness, from granting preferential prices whose occasion was already all but forgotten, from employing promotional devices that were long since passe. On the other hand, the Commission has been from time to time, and will be again, confronted with the herculean task of realigning two concerns which had merged with one another as much as ten years earlier. Widespread personnel changes had occurred; plants had been dismantled, offices moved, and operations generally intermingled. Yet the Commission must somehow re-establish two competing entities. But more important than these extreme cases, time is usually a precious prize in an antitrust or trade-regulation case. If an allegedly unlawful practice has indeed been giving a company a competitive edge, surely that company may well tend to weigh the cost of litigation against the advantages of continuing the practice for another year, or two or five. To obtain such a reprieve has not required the exercise of any particular chicanery; a party has had only to take full advantage of the procedures which the Commission has made available to it.⁶ These, abetted by a measure of inertia on the part of Commission personnel, have sufficed. The results of this situation have at times been deplorable. Presumably, an FTC proceeding is premised upon a substantial public interest in termination of a challenged practice; this interest is little served by relief that comes too late.

Therefore, the modest announcement of June 29, 1961, that the Federal Trade Commission was adopting new rules of procedure in order to "expedite the disposition of adjudicatory proceedings and to generally improve the Commission's procedures governing such pro-

Luria Bros., No. 6156, complaint issued January 1, 1954, pending; The Borden Co., No. 6173, complaint issued Feb. 15, 1954, pending; Giant Food Shopping Center, Inc., No. 6459, complaint issued Nov. 21, 1955, pending; A. G. Spalding & Bros., No. 6478, complaint issued January 1, 1956, order entered March 30, 1960; The B. F. Goodrich Co., No. 6485, complaint issued Jan. 1, 1956, pending; Foremost Dairies, Inc., No. 6495, complaint issued Jan. 17, 1956, pending; Pure Oil Co., No. 6640, complaint issued Sept. 26, 1956, pending.

6. The writer does not intend to imply that deliberate dilatoriness of a respondent or its counsel is a necessary ingredient of delay in an FTC proceeding. Delay is almost endemic to FTC proceedings, whatever the intention of the parties, particularly when the legality or illegality of conduct must be determined in light of its effect on competition. The above remarks are meant only to accent the problem.

ceedings," rates more than cursory attention. If it be conceded that the antitrust laws occupy, and deserve to occupy, a place of honor and central importance among our institutions, then a sincere attempt to refurbish and revitalize a faltering champion of those laws deserves study and, if necessary, constructive criticism.

The pages which follow will set forth and assess the changes which the FTC's new rules have introduced. They may serve another purpose as well. There has been little commentary upon the Commission's procedures, either in its published opinions or elsewhere. A practitioner appearing before the Commission for the first time has little guidance, unless it be the counsel of a more experienced colleague or — and this is very often the situation — the advice and suggestions of the Commission's own trial attorney.⁷ To some degree, therefore, this account may also be useful as a primer in the Commission's procedures.

I.

PLEADINGS AND MOTIONS.

An FTC case may start in any one of several ways.⁸ For example, petty violations of the various fur and textile labeling acts generally come to the Commission's attention through routine checks made by its own investigators; mergers, at the other extreme of the trade-regulation scale, usually attract the Commission's eye through newspaper accounts or SEC filings. In the vast majority of cases, however, an FTC inquiry results from the complaints of a competitor, customer or supplier of the alleged culprit, or of a Better Business Bureau, or of some other interested individual or organization. (The complainant is referred to in the jargon of the FTC as an "applicant." His identity is usually a closely guarded secret.)

7. "When [a typical practitioner] tries to handle a case in the field of an administrative agency, he is uncomfortable and unhappy, for the usual guides, the digests, the judicial rules, and the familiar methods of practice seem to afford little help His resentment at the widespread rejection of the tried and tested methods of conducting judicial proceedings grows deep and abiding. Everywhere [he] turns, the methods are not only unfamiliar but seem to sacrifice the most precious values." DAVIS, ADMINISTRATIVE LAW 18 (1951). This observation is, however, less applicable to the FTC than to most other federal administrative agencies; the general drift of FTC practice and procedure has been away from the administrative process and toward that of the federal courts. This trend is particularly ironic in view of the Commission's unflagging hostility to the recurring proposals of those who would convert it into a court.

8. This essay deals only with the FTC's formal adjudicatory procedures. Numerous matters are also disposed of informally by education and persuasion; this is the province of the Commission's Bureau of Industry Guidance.

Under the 1955 rules, the Commission accepted "stipulations to cease and desist" from careless or unintentional violations of Section 5 of the Federal Trade Commission Act. 1955 Rules §§ 1.51-57. This procedure has now been discarded but it is not to be anticipated that this change in policy will result in abandonment of all informal proceedings. The Commission's former policy with regard to stipulations is set out in its 1958 Annual Report, pages 113-117.

Complaints of this sort are received in great numbers and are evaluated by the Commission's staff in Washington. Those that are found to have some substance and are serious enough to warrant formal action are referred to an appropriate field office for investigation. There are eleven of these field offices located in principal cities across the country. If investigation leads to a conclusion that the law has probably been violated, the matter is referred to a member of the Commission's trial staff in Washington. If the trial attorney concurs in the investigator's conclusions, he drafts a complaint and forwards it to the Commission for its approval and issuance. Except in most extraordinary circumstances, the complaint is approved and issued as a matter of routine, and the case is assigned to a hearing examiner for trial.

There is, of course, another sequence of events which commonly leads to a complaint. FTC cases tend to be self-perpetuating. One case leads to another. Evidence received against one firm will implicate a competitor, supplier or customer. It is no secret that FTC cases produce a chain reaction.

1. *The Complaint.*

Thus, the first formal public step in an FTC proceeding is issuance of a complaint. (Under the 1961 rules, the Commission submits this complaint to the prospective "respondent" before its issuance in order that the respondent might have an opportunity to settle the matter voluntarily.⁹ This procedure, an innovation under the new rules, will be considered in the following section of this article.) The 1961 rules make no express changes in the required form or contents of a complaint. Basically, an FTC complaint is to consist of "a recital of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated" and "a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law."¹⁰

The ambiguity of these requirements is apparent on their face. The rules required that the complaint contain a factual statement, but all this statement has to do is notify the respondent of the "type" of practices whose legality is challenged. There is no necessity that the complaint inform the respondent of those specific acts and omissions which will be marshalled at trial as instances of its wrongdoing.

9. § 3, 26 Fed. Reg. 6015-16 (1961).

10. § 4.4(a), 26 Fed. Reg. 6016 (1961).

In practice, the content of this factual statement varies considerably from case to case. Aside from a few areas, such as cases involving deceptive advertising, where standard forms of complaint are used, there is no consistency in the drafting of FTC complaints. Some allege a cause of action in the unadorned language of a statute; others set out more or less specific facts but hasten to add that these are only an example of the type of conduct that is complained of; still others are extravagantly verbose narratives. The unfortunate result, in the majority of cases, is that the allegations of an FTC complaint do not in any real sense define the limits of the litigation which is to follow. It is, in the baldest sense of the term, a mere notice that litigation has been instituted.

This form of pleading has been a constant source of dismay to respondents in FTC proceedings, but it has been consistently defended on the ground that due process requires no more.¹¹ This has unquestionably been true. The courts have invariably held that an administrative complaint meets the requirements of due process so long as it gives notice of the general nature of the violation charged and the respondent is subsequently given such information of the specific transactions in question as will enable it adequately to prepare a defense.¹² Such information may result from a pretrial conference, from informal communications of counsel, or even from the evidence introduced at trial in support of the complaint.¹³ This latter alternative is ordinarily the manner in which FTC respondents have learned of the specific acts or practices whose legality they must defend. The propriety of this procedure rests on the fact that a substantial interval has always been allowed between the introduction of evidence in support of the complaint and the introduction of a defense by the respondent. This interval has eliminated the hazards of surprise and has presumably removed any inequity that might result from the complaint's insufficiencies.

However, the demands of due process are one thing and a complaint's practical suitability to a proceeding is another. If constructive measures are to be taken to expedite and facilitate the disposition of adjudicatory proceedings before the FTC, it would be worthwhile to re-examine the purpose and scope of pleadings.

11. "While the complaint charges the cause of action in the words of the statute, we think this is sufficient to advise [the respondents] of the nature in general of the complaint." *A. E. Staley Mfg. Co. v. FTC*, 135 F.2d 453, 454 (7th Cir. 1943).

12. See, *e.g.*, *Kuhn v. CAB*, 183 F.2d 839, 841 (D.C. Cir. 1950).

13. See cases cited at DAVIS, *ADMINISTRATIVE LAW* 278-83 (1951).

The greatest procedural problem of the FTC is definition of the issues to be tried. It is the absence of such definition which produces unduly prolonged trials, voluminous records, and fuzzy decision. Thus, for example, in cases which turn on the competitive effects of a respondent's conduct, the record tends to become overloaded with economic and financial data regarding all phases of the respondent concern and its industry. Neither side is ready to omit anything remotely significant or suggestive, since neither side is quite sure what the issue will turn out to be. In truth, the Commission's trial counsel will generally insist that there is no issue by which the relevance or materiality of evidence may be judged; whatever indicates or relates to a violation of the law is grist for his mill. In his eyes there is no point at which inquiry stops and proof begins; an FTC trial is, to use a hallowed phrase, "a continuing investigation."

A change in pleading requirements would be no panacea, but it might nonetheless be a salutary measure. If an FTC complaint were to set out the ultimate issuable facts which would, if true, constitute a prima facie case, there would at least be a clear and unequivocal definition of the conduct whose legality is challenged and of the competitive context within which this legality is to be judged. A respondent deserves this much at the outset. Pretrial and discovery are also valuable devices for delineating issues, but in the peculiar context of FTC proceedings they do not suffice alone.¹⁴ One should not exaggerate the resemblance of FTC proceedings to civil cases; they differ from actions for equitable relief in substantial respects. The respondent stands before the bar in much the same posture as one who must answer to criminal charges. He is accused, in effect, by the public, not by a plaintiff; there is not even a complainant who may be identified. The claim against him has been formulated by the attorney supporting the complaint; the most extensive discovery is to no avail unless that attorney condescends to disclose the breadth and length of that claim. No individual has been injured; only the attorney supporting the complaint can reveal the standard by which he proposes to measure injury to the competitive process. The respondent is unlike a criminal in that he is seldom conscious of wrongdoing. It does little good to tell him, generically, that his pricing practices are unlawful; until he is told which practices and why, he may have little notion of the action's basis. But more important, once he is told which practices

14. The viewpoint that pretrial and discovery, rather than more stringent pleading requirements, are the apt solution is well expressed in Kaufman, *Have Administrative Agencies Kept Pace with Modern Court-Developed Techniques Against Delay?* 12 *AD. L. BULL.* 103 (1960).

and why, that should be that. If he is told that he has granted discriminatory prices to jobbers, he should not find at trial that evidence is being taken concerning his prices to original-equipment manufacturers. If he is told that the "relevant market" is such-and-such, he should not suddenly discover evidence developing with regard to a quite different market. In short, it is true that after a pretrial conference a respondent may feel that the cards have finally been dealt and he may safely show his hand; but he should also have some assurance that the cards will not be dealt again in the middle of the game. He is, therefore, as entitled to "a plain, concise and definite statement of the essential facts constituting the offense charged"¹⁵ as is the defendant in a criminal proceeding.

In this context, it is rather surprising to find provision in the 1961 rules for a "motion for more definite statement."¹⁶ The 1955 rules made no mention of such a motion. On various occasions in the past, the Commission has affirmed the hearing examiner's right to grant such motions, but it has just as consistently held that no more definite statement is required if the complaint has informed the respondent of the general nature of the charges against it.¹⁷ This position resulted in a state of affairs which was nothing short of farcical. Almost as a matter of course, respondents have exercised their "right" to demand a more definite statement, and hearing examiners, as a matter of equal course, have issued the pre-ordained ruling that no more definite statement was needed. (Several years ago, Commissioner Caretta said in a dissenting opinion that the Commission had approved the granting of a motion for more definite statement only once in 38 years.¹⁸)

In view of the Commission's past policy of refusing more definite statements, some explanation must be sought for the fact that explicit provision for the motion is now made for the first time in the 1961 rules. A reason may readily be surmised. More definite statements have been refused in the past on the theory that the substantial interval which would occur between presentation of the Commission's case and presentation of the respondent's defense made it unnecessary that the pleadings inform the respondent in any detail of the acts or practices it would be required to defend. However, one of the most substantial changes under the 1961 rules is the elimination of this

15. FED. R. CRIM. P. 7(e).

16. § 4.4(b), 26 Fed. Reg. 6016 (1961).

17. The classic statement is the opinion of Commissioner Spingarn on interlocutory appeals in *Fruitvale Canning Co.*, 50 F.T.C. 177 (1953); *Safeway Stores, Inc.*, 50 F.T.C. 125 (1953); and *The Kroger Co.*, 50 F.T.C. 213 (1953).

18. *The Kroger Co.*, No. 5991, dissenting opinion 50 FTC 213 (1953). The lone instance referred to is *Calumet Baking Powder Co.*, 10 F.T.C. 35 (1925).

interval.¹⁹ The respondent will now be required to introduce its defense immediately upon conclusion of the case in chief. Accordingly, fairness to the respondent now requires that he be informed in advance of the specific acts or practices whose legality is challenged. This education cannot be left to chance, and pleadings are its proper medium.

An important conclusion would seem to follow from this addition to the rules. If a respondent may now move to have general and indeterminate charges particularized, then it follows that complaints should be drafted in the first instance in terms which make such motions unnecessary. In other words, it would appear that an FTC complaint should hereafter specify in some detail the time, place and circumstances of the precise conduct by which the respondent purportedly breached the law, and upon trial no evidence should be received unless it tends to prove the facts thus put in issue. The same result would seem to follow in cases whose decision must rest on broad economic inquiry. The complaint initiating such a case should set forth the ultimate economic facts which would, if found true, support a conclusion that the alleged acts or course of conduct are in restraint of trade or have substantially lessened competition. If the conclusions drawn here are correct, and are articulated and insisted upon by the Commission, the uncertainties and vagaries of FTC litigation would be considerably lessened.

Commissioner Spingarn once said that "the instant a serious attempt is made to invoke rigid, formal rules of pleading, all the technicalities incident to practice before trial courts will grow up around the agency, hampering and delaying it."²⁰ This is a view which is generally shared by the Commission and its staff, and it might doubtless be raised in protest against the present proposal. Yet, if experience has taught anything, it is that the informal procedures of the FTC have far more efficiently delayed and hampered the administration of justice than have the procedures of trial courts.

2. *The Answer.*

The next innovation in pleading under the 1961 rules is the requirement that a complaint be answered.²¹ Hitherto, the rule regarding answers was construed as being merely permissive. Default occurred only upon the respondent's failure to enter an appearance at

19. § 4.14 (d), 26 Fed. Reg. 6018 (1961).

20. 50 FTC 213 (1953).

21. § 4.5 (c), 26 Fed. Reg. 6016 (1961).

trial.²² The change introduced by the new rules was obviously necessary. It has always been absurd to require that a hearing be convened when there has been no responsive pleading from the respondent.

3. *Pretrial Motions.*

The 1961 revisions make no substantial change in the rules governing pretrial motions.²³ Unlike the common judicial procedure, motions must be answered in writing by the opposing party and failure to answer a motion within 10 days constitutes a consent to its granting.

The 1961 rules retain the rather indefinite language of the 1955 rules regarding motions to dismiss.²⁴ Such motions commonly occur at two stages in a proceeding: First, as a demurrer before trial, and then as a motion for directed verdict at the close of the case in chief. Such motions are generally made by the respondent, although there have been instances in which the Commission's own counsel has moved for dismissal on one ground or another.

Motions to dismiss before trial rest in general on the same grounds as would a demurrer in code pleading: lack of jurisdiction, failure to state a cause of action, and mootness.

The Commission's jurisdiction may be attacked on any one of several grounds. It may, for example, be argued that the transactions complained of were not in interstate commerce, or that the subject-matter is within the exclusive jurisdiction of another federal agency, or that the controversy is essentially between private parties and thus unaffected by a public interest. "Mootness" has a special meaning in the language of the Federal Trade Commission; a case is referred to as moot when the practices complained of have been voluntarily abandoned under circumstances making their resumption unlikely. The author has discussed this notion at some length elsewhere.²⁵ "Failure to state a cause of action" is self-explanatory.

The right of a hearing examiner to dismiss a complaint before trial, on such grounds as these, is unsettled. Some years ago the Commission announced very emphatically that an examiner has no such right, since decisions of the Commission incidental to issuance of a complaint are administrative rather than adjudicatory and hence not subject to the examiner's review.²⁶ There has, however, been a retreat

22. 1955 Rules § 3.6 (b).

23. § 4.6, 26 Fed. Reg. 6017 (1961).

24. § 4.6 (e), 26 Fed. Reg. 6017 (1961).

25. Connor *The Defense of Abandonment in Proceedings before the Federal Trade Commission*, 49 Geo. L.J. 722 (1961).

26. Florida Citrus Mutual, D. 6074, 50 FTC 959 (1954). Accord, Premier Pillow Corp., D. 6136, 52 FTC 1417 (1956).

from this position in practice, and hearing examiners customarily entertain and rule on pre-trial motions to dismiss.^{26a}

Pre-trial motions to dismiss raise a practical problem of considerable proportion. The Commission has presumably issued its complaint only after deciding that it has jurisdiction and that the alleged facts would, if proved true, constitute a violation of the law. A contrary conclusion by the hearing examiner, before the reception of any evidence, may, of course, be appealed to the Commission. Thus the respondent whose motion had been sustained would probably find himself being led around in a complete circle.

Despite the Commission's ambiguous role as petitioner and reviewing body, it seems appropriate to allow a respondent to test the legal sufficiency of the complaint before embarking upon a trial of factual issues. This would be particularly true if FTC complaints were drafted along the lines suggested above; that is, if they were to allege all ultimate issuable facts.

4. *Conclusions.*

To summarize this discussion, the inordinate delay which characterizes FTC proceedings generally occurs at trial. A primary source of this delay has been a lack of prior direction. Serious consideration should be given to the role which pleadings might play in limiting and directing the course of these proceedings. Although the 1961 rules make little explicit change in pleading requirements, formal provision for a motion for more definite statement and the elimination of trial by interval imply and perhaps require the necessity of reform in this regard.

II.

SETTLEMENT PROCEDURES.

A formal proceeding before the Federal Trade Commission commences with a complaint and terminates with an order to cease and desist or an order of dismissal. (Despite the negative implications of its name, the order to cease and desist will often be mandatory in character.) The overwhelming majority of orders to cease and desist are entered as the result of a consent-settlement agreement.²⁷ In view of the importance which attaches, therefore, to the Commission's

²⁶(a). Cf. *Nu Arc Co., Inc.*, D. 7848, interlocutory order (October 28, 1960).

²⁷. Over the years, approximately 87% of the Commission's cases have terminated with consent settlement.

settlement procedures, their drastic revision by the 1961 rules deserves close and critical scrutiny.

The procedure for voluntary settlement of FTC cases has been the product of a curious evolution.²⁸ As early as 1927, the Commission expressly permitted a respondent to answer its complaint by consenting to entry of a negotiated order to cease and desist. Reductively, however, this rule required an admission of wrongdoing. In 1936, the rules were amended to eliminate this form of answer and require a general admission of respondents who chose not to contest the charges made against them. Despite, or perhaps because of, the harshness of this rule, an extraordinary procedure developed in practice, whereby a respondent would file a general admission on the stated condition that it might be withdrawn if the Commission did not enter an order to cease and desist in anticipated terms. In 1951, upon passage of the Administrative Procedure Act, the Commission adopted a forthright settlement procedure for the first time. A respondent had only to concede the jurisdictional allegations of the complaint. An order to cease and desist might then be entered in a form agreed to by respondent and approved by the Commission. In 1955, the rule was changed once more. Negotiation of a consent order was now permitted at any time prior to other disposition of a case; settlement did not have to dispose of all issues raised by the complaint. Most interesting of all, and this provision suggests a reason for the Commission's long hesitancy in adopting a true settlement procedure, the consent agreement had to include a waiver by the respondent of any and all right to challenge the validity of the order to cease and desist.

The 1961 rules introduce these principal changes:

(1) A consent settlement must now be negotiated prior to issuance of a complaint. The Commission will notify a prospective respondent of its decision to issue a complaint; a draft of the complaint and a proposed order to cease and desist will accompany this notice. The respondent will be given ten days within which to express its willingness to dispose of the matter "by entry of an order in substantially the form proposed." If such willingness is indicated, the matter will be referred to a newly established Office of Consent Orders and the respondent will be allowed thirty days to negotiate a settlement with that office.²⁹ If agreement is reached, and the consent order is approved by the Commission, the complaint will issue simultaneously with entry of the

28. Address by Commissioner Anderson, "An Examination into the Settlement and Compliance Procedures of the FTC," Pacific Northwest Regional Meeting of the ABA, May 24, 1960.

29. § 3.2, 26 Fed. Reg. 6015 (1961).

order to cease and desist; otherwise, the complaint will issue alone and the case will proceed to trial.³⁰

(2) This procedure bypasses the Commission's hearing examiners entirely. Previously, consent settlements were negotiated with the Commission's trial staff and submitted to a hearing examiner. If the agreement received his approval, he submitted it to the Commission.³¹ Institution of the Office of Consent Orders will relieve the Commission's harried hearing examiners of a substantial burden, and thus this amendment of the settlement procedure — of which no more will be said here — is an unmixed blessing.

(3) The 1961 rules make no mention of partial disposition of a proceeding by consent settlement.³² It must be assumed, therefore, until the contrary is indicated in practice, that settlement procedures will be available only to a respondent who is prepared to dispose thereby of all issues raised by the complaint. If this is in fact the Commission's intention, it must be adjudged unreasonable. It is surely in the interest of economy and expedition to allow a respondent to settle certain of the issues raised by a complaint even though it chooses to contest others. Quite frequently, Federal Trade Commission complaints contain several counts whose charges are diverse and even unrelated. Denial of partial settlement in such instances serves no apparent advantage except perhaps as an added incentive to full settlement.

The major innovation, however, is that restricting the period in which settlement is available; its merits and drawbacks require more extensive appraisal.

Presumably, this change is intended to eliminate delay in Commission proceedings, and there is no denying that the settlement procedure of the 1955 rules was used from time to time as a delaying device. Once a complaint had issued, respondent was allowed thirty days to file its answer.³³ This could usually be extended by an additional thirty to ninety days with the hearing examiner's leave. After answer, however, indefinite deferral of the trial date was available in order to permit negotiation of a consent settlement. Needless to say, few defense attorneys were inclined to rush these negotiations. Once commenced, such negotiations could, in major cases, involve numerous meetings at substantial intervals from one another. Even after the case had gone to trial, consent negotiations could be opened or re-opened

30. § 3.4(b), 26 Fed. Reg. 6016 (1961).

31. 1955 Rules, § 3.25(c) and (d).

32. The 1955 Rules made express provision for partial settlement at § 3.25(a).

33. 1955 Rules § 3.7. The 1961 Rules, § 4.5(a), make the same provision. 26 Fed. Reg. 6016 (1961).

at any time.³⁴ Although a trial could be interrupted for such negotiations only with consent of the Commission's trial counsel, such consent was invariably given.

The 1961 rules eliminate these occasions for dilatoriness. A respondent will be given one month within which to agree to the terms of a consent order. If no agreement is reached, complaint will issue and there will be no settlement thereafter without an admission of wrongdoing. Whether the new rule will accelerate proceedings must depend in some measure on the rigor with which the thirty-day rule is adhered to. The rules provide that complaint will issue thirty days after the matter is referred to the Office of Consent Orders "unless for good cause the time is extended by the Commission."³⁵ If such extensions become automatic, all is for naught. It is to be expected that voices will be raised in vigorous protest against strict adherence to this time bar. FTC cases, it will be said, are complex and cannot be disposed of in peremptory fashion. Time, and time in abundance, is required to draft, study, and evaluate an order to cease and desist. This outcry, when it comes, as it will surely come, will occasionally have some merit, particularly in novel cases, but these are few and far between. There has been a great deal of sham in the laborious struggles which take place in the Commission's halls during the negotiation of a consent settlement. The simple fact of the matter is that the Commission will not accept a consent order unless it is framed in the very same language used in orders which it has issued in contested cases involving the same or similar material allegations.³⁶ Thus, unless there is no clear precedent among contested cases, the weeks or months of discussion and alleged study which so often go into the preparation of a consent order rarely beget anything except the boiler-plate order which is all the Commission will accept in any event.

Be this as it may, it is not self-evident by any means that the former settlement procedure was a significant source of delay. Truly reprehensible delay has generally occurred in the trial of FTC cases, not before. Even if the new rules remove some slight occasion of delay, they appear to do so at an enormous cost in terms of economy, efficiency and even fairness. In short, the new procedure will handicap both the Commission and respondents in several substantial respects.

In the past, the odds were great that a complaint would be disposed of by consent settlement. As a result, there was no need for the Commission's staff to undertake an exhaustive investigation of

34. 1955 Rules, § 3.25 (a).

35. § 3.4 (a), 26 Fed. Reg. 6016 (1961).

36. The FTC staff has been expressly instructed to this effect.

an alleged offense until it became apparent that a trial would be necessary. It was enough in most instances simply to ascertain that the law had probably been violated; the marshalling of evidence could wait on the outcome of settlement negotiations. There were, of course, obvious exceptions to this rule, such as merger cases. Now, however, the staff apparently must face the prospect of prompt trial if the brief time allotted for settlement does not produce a result satisfying to the Commission. Thus it would seem that every case will have to be prepared to a degree, and at an expense, that few required in the past. In other words, there were some blessings in delay even for the Commission.

Secondly, the new rules make it impossible for the Commission's own trial staff to initiate or take advantage of consent disposition of a case in litigation. Strange as the suggestion may sound, the consent-settlement procedure was not a one-way street. The Commission's trial attorneys have occasionally been thankful that they had this tactful device for disposing of a case which had been brought improvidently or which they did not feel confident of winning. It would be impertinent to suggest specific instances of this sort, but examples may surely be found among those cases brought under Section 7 of the Clayton Act and disposed of by a consent order which did not require divestiture of the acquired stock or assets.³⁷ Henceforth, the Commission's trial attorneys will have, presumably, to "do or die."

So much for the hardship the new rule will work on the Commission's staff. From the standpoint of the respondent, there are far more serious drawbacks.

Under the 1955 rules, a respondent, on issuance of complaint, could, as now, counter with a motion to dismiss which was tantamount to a demurrer.³⁸ The most common grounds of such a motion are lack of jurisdiction, failure to state a cause of action, and mootness. If such pleas in bar were overruled, it could then proceed, if it chose, to a consent settlement. Under the 1961 rules, the respondent must make an election. If it sincerely believes that the Commission has no jurisdiction, or that a violation of law has not been alleged, or that the issues raised are moot, it can proffer these objections only at the expense of its right to voluntary settlement. This is a fearsome dilemma which will probably be resolved, in most instances, in favor of consent settlement.

37. The writer would prefer not to incur the wrath of his former colleagues on the FTC staff by suggesting specific examples.

38. See *supra*, Part I.

Such an outcome may be defended on the ground that consent settlement is a privilege, not a right, and that a respondent has, therefore, no reason to cavil at the terms on which the Commission allows it to settle its account without admission of guilt. On the other hand, the Commission must look objectively at the enormous coercive power which the settlement procedure gives it. Innocent or guilty, few respondent companies can as a practical matter do anything but settle cases brought against them. The high cost of antitrust litigation alone is often sufficiently compelling. In antitrust and trade regulation, all but the mighty and the most self-righteous are obliged to ask "at what price victory?" It is incumbent upon the Commission to acknowledge these realities in all fairness and to frame its rules accordingly. Its settlement procedures should not conduce to the settlement of improperly brought cases. It must, moreover, be noted also that consent settlement is less a privilege conceded respondents than a practical necessity in effective trade regulation. If Federal Trade Commissioners have nightmares, one might be this: that all the members of our business community have suddenly decided to contest all cases brought against them by the FTC. For if the FTC were compelled to try every case it brings, it would soon be reduced to virtual impotency.

These reflections lead to a second criticism of the new settlement procedure. Once a proposed respondent has elected to contest a Commission complaint, it is most unlikely to reverse its stand. Since its only remaining alternative will be to admit a violation of the law, a most unpalatable course, it will go on to exhaust its remedies. (The most obvious reason that FTC respondents have for refusing to admit guilt is the omnipresent threat of private litigation.³⁹) The result is a most uneconomical situation. What public interest is there in the prolonged trial and appeal of a case against a respondent who was long ago ready to settle voluntarily? Why should not the Commission dispose of a case at any time if it is able thereby to accomplish all that it set out to do? The questions answer themselves: the provisions of the 1955 rules, allowing settlement at any time prior to other disposition, were fair, sensible and economical, whereas the contrary provisions of the 1961 rules are not.

Finally, in a less polemic vein, it might be pointed out that the 1961 rules make no provision for re-negotiation of a settlement after the Commission has rejected a proposed consent order to cease and

39. But see Hardy, *The Evisceration of Section 5 of the Clayton Act*, 49 *Geo. L.J.* 44 (1960).

desist. This is a striking omission. Under the 1955 rules, many an agreed-upon consent order was turned down by the Commission, only to be re-negotiated in a form that found acceptance. It may be that the door is still open for such re-negotiation, however, since the new rules provide that the Commission may either accept a settlement, reject it, or "take such other action as may be appropriate." It is surely to be hoped that opportunity for re-negotiation will remain a standard part of the Commission's settlement procedure.

If such re-negotiation is to remain available, the 1961 rules might well have provided for notice to the parties of the reasons for the Commission's rejection of a proposed order. Absence of such provision from the 1955 rules was a notorious defect in the Commission's procedures. Upon rejection of a proposed settlement, a confidential memorandum would pass from the Commission to the Director of what was then called the Bureau of Litigation. In an atmosphere of ludicrous intrigue, the Director of the Bureau of Litigation, or one of his assistants, would communicate the contents of this memorandum to the staff attorney who had negotiated the rejected settlement. He was then expected to re-negotiate a settlement along the precise lines set out in the memorandum without revealing to the defense attorney that he was fully aware of the reasons for rejection of the first settlement and of the changes which the Commission would require before accepting a second proffer of settlement. In other words, the Commission's trial attorney was to sit down with defense counsel and work out a new settlement in the exact terms dictated by the Commission but without disclosure to the defense attorney that he had been given the final word on these terms. This *modus operandi* was foolish and unfair. The rules could well be amended to provide for notice to both parties of the grounds for rejection of a consent settlement when re-negotiation is to be permitted, and for notice to no one when such re-negotiation is not to be permitted.

III.

PRETRIAL, TRIAL AND REVIEW.

Since the 1961 rules introduce a variety of changes into the FTC's pretrial and trial procedures, this section will necessarily deal with a number of generally related topics. By way of introduction, it might be worth observing that it is here rather than at any other stage of the Commission's formal proceedings that the most inexcusable delay has usually occurred. To the Commission's credit, it has recognized the

most formidable occasions of delay and made a commendable effort to eliminate them.

1. *Pretrial Practice.*

The 1955 rules provided that a hearing examiner might, at his discretion, convene a pre-hearing conference to consider simplification of the issues, stipulations and admissions, limitation of the number of expert witnesses, and similar matters.⁴⁰ The rule was a paraphrase of Rule 16 of the Federal Rules of Civil Procedure. There has, however, been no systematic use of pretrial practice, and even when used, its value has varied considerably from one case to another. The most common function of pretrial has been to facilitate consent settlements by allowing the hearing examiner to mediate differences arising between the parties.

The 1961 rules make pretrial mandatory in every case which appears likely to require a hearing of more than three days.⁴¹ In addition to the matters which were to be considered under the 1955 rules, the hearing examiner may now require that the parties disclose to one another the names of all prospective witnesses and give one another an opportunity to inspect and copy all proposed physical exhibits. In his discretion, the hearing examiner may also enter an order excluding the testimony of any other witnesses on the introduction of any other exhibits.⁴² If this were done, the pretrial hearing would become a true preview of the trial which is to follow.

It is readily apparent that the trial of a complex case would be substantially abbreviated and simplified if the hearing examiner were to make full use of the powers conferred by this rule. In addition, the hearing examiners might well adopt the technique, frequently used by federal trial judges, of requiring the parties to submit detailed trial briefs at the time of the pre-hearing conference.

Whether full use will be made of these procedures must await the test of time. Bear in mind that hearing examiners are employees of the FTC, and have in many cases been trial attorneys for the Commission before moving to the bench. They tend, therefore, to sympathize with the views and apprehensions of government trial counsel. (This is, of course, a generalization, subject to the qualifications of any general statement. Some hearing examiners have displayed a quite contrary attitude.) There is among the members of the FTC trial

40. 1955 Rules, § 3.10.

41. § 4.8 (a), 26 Fed. Reg. 6017 (1961).

42. § 4.8 (a) (5), 26 Fed. Reg. 6017 (1961).

staff a widespread misgiving as to the practical wisdom of making full pretrial disclosure.

From the nature of FTC cases, witnesses are often persons upon whom the respondent is able to exert a degree of moral pressure. They may, for example, be its dealers, customers, suppliers, competitors or even employees. It is a frequent occurrence for the testimony of such a witness to differ materially from his pretrial statements to the Commission's investigator or trial attorney. (Commission personnel do not as a rule take signed or sworn statements from prospective witnesses; a contrary policy would perhaps minimize the problem under discussion here.) Whether these incidents ever reflect direct or indirect pressure upon the witness cannot be surmised. Such a witness has, as he must realize, a considerable vulnerability, and he well may come of his own accord to doubt the prudence of jeopardizing his position, or that of his company, by testifying against the respondent. It may at least be said safely that FTC trial attorneys are generally apprehensive that such pressures will result from pretrial disclosure. If hearing examiners respond sympathetically to these fears, the provision for full disclosure may well have only limited usefulness.⁴³ This outcome would be unfortunate for, as will be noted below, full disclosure is almost a requisite for a fair hearing now that "trial by interval" has been abolished.

Thus the use of pretrial in defining the issues and obtaining full disclosure would contribute enormously to the expediting of FTC proceedings. However, pretrial in the true sense is alien to the experience of FTC hearing examiners and trial attorneys.⁴⁴ It would be well worth the Commission's while to undertake a study of pretrial procedures and prepare concrete guides or directives for the use of its hearing examiners in preparing substantial cases for trial. It has been the Commission's tendency in the past to resign itself to the individual viewpoints (and even eccentricities) of its examiners in matters of procedure and evidence. Pretrial is one area in which this course might well be changed.

2. *Trial by Interval and Discovery.*

The trial of an FTC case proceeds with the same formalities and under the same procedures as would a similar trial in a state or

43. There have, for example, been instances in the past when a hearing examiner's order requiring disclosure of prospective witnesses for the Commission also restrained the respondent or its counsel from communicating, directly or indirectly, with the witnesses so identified.

44. It should be borne in mind that the typical FTC trial attorney has had little or no experience in the courts. The same is true in many cases of his superiors and of the hearing examiners.

federal court. The hearing examiner sits for all purposes as a trial judge. He administers oaths, issues subpoenas, receives evidence, rules on motions, generally regulates the proceedings and ultimately makes a decision.⁴⁵ The one peculiarity of FTC hearings in the past has been the degree to which they have been splintered into many sessions held in various places and at substantial intervals. The trial could extend over a term of years with hearings held in numerous cities across the breadth of the land. In an extreme case, a single trial might involve ninety or more separate sessions.⁴⁶ The 1961 rules provide that "unless the Commission otherwise orders upon a certificate of necessity therefor by the hearing examiner, all hearings will be held at one place and will continue without suspension until concluded."⁴⁷ Unless "certificates of necessity" become a matter of course, this may well prove the most valuable innovation of the revised rules. (It might even be asked whether there should be provision for "certificates of necessity"; attorneys have succeeded for centuries in trying complex cases without benefit of safaris from city to city.)

There will doubtless be a difficult period of adjustment to this rule. A by-product of trial by interval has been the total absence of discovery from FTC proceedings. The rules have provided, as they now do, for depositions upon oral or written interrogatories and for requests for admissions, but these devices have been availed of only in most extraordinary circumstances.⁴⁸ The FTC trial attorney has had at his disposal the copious materials gathered by field investigators. These consist principally of interview reports and physical exhibits. All prospective witnesses have been available, for the simple reason that the hearing could be transported to any place in which the witness could be found. Now, however, witnesses must be brought to the situs of the hearing. Conversely, a respondent has hitherto had a substantial period in which to analyze and appraise the testimony of the Commission's witnesses and to prepare a rebuttal. Now that the interval between case-in-chief and defense has been eliminated, defense counsel will, no doubt, be compelled to take depositions of prospective government witnesses whose identity has been disclosed. It can only be concluded that depositions will, perforce, become an important element in FTC proceedings.

A criticism which Commission personnel have privately leveled at the new rules is that any acceleration of proceedings which might

45. § 4.13(c), 26 Fed. Reg. 6018 (1961).

46. *E.g.*, Gulf Oil Corp., 55 F.T.C. 2030 (1958).

47. § 4.14(d), 26 Fed. Reg. 6018 (1961).

48. 1955 Rules, §§ 3.12-13. 1961 Rules §§ 4.10-.11, 26 Fed. Reg. 6017-18 (1961).

result from abolition of trial by interval will be offset by the addition of a period of discovery. This is not altogether true. The greatest disadvantage of trial by interval arose from the enormous burden it placed upon the hearing examiner. Examiners wasted considerable time in traveling and were sorely taxed by the fact that they might have a dozen cases in trial at one and the same time. The great pitfall of trial by interval was the outrageous scheduling problem it normally created. A period of a year might elapse between sessions simply because the hearing examiner had other commitments. Thus, the extreme fragmentation of hearings could produce inordinate delay in a case's disposition. Since depositions will presumably be taken before notaries public, this problem is resolved and the hearing examiner may well insist that counsel proceed to discovery with all reasonable expedition.

3. *Subpoenas.*

The 1961 rules make one important change with respect to subpoenas. In the past there was an automatic right of appeal to the Commission from a hearing examiner's ruling granting or denying a motion to limit or quash a subpoena. Under the 1961 rules, such an appeal will be allowed only upon a showing that the ruling involved substantial rights and will materially affect the outcome of the proceeding.⁴⁹

To appreciate the impact of this change, it must be recalled that a witness may ignore an FTC subpoena with impunity; the Commission must then seek a court order requiring compliance; it is only upon failure to comply with this latter order that a witness may be held in contempt.⁵⁰ Thus, in the past, respondents have had a marvelous panoply of weapons with which to resist a subpoena. They could begin by moving to quash, proceed to appeal the overruling of this motion to the Commission, and after hearing and affirmance still decline to comply with the subpoena. Only then, after substantial delay, would the Commission go to the courts. The time that could be consumed by such maneuvers may readily be imagined. The present revision will mitigate this problem to some extent. There can be no complete cure, of course, so long as the Commission's subpoenas are not self-enforcing.

49. § 4.15 (d), 26 Fed. Reg. 6019 (1961).

50. Federal Trade Commission Act. § 9, 38 Stat. 722 (1914), 15 U.S.C. 49 (1959).

4. *Rules of Evidence.*

There has been no change in the rule regarding admission of evidence. "Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable and unduly repetitious evidence shall be excluded."⁵¹ The Commission's failure to come to grips with the glaring shortcomings of this rule is nothing short of tragic. One of the most vexing questions in FTC litigation is the treatment to be accorded incompetent evidence which is nonetheless probative and reliable.⁵² Specifically, is hearsay evidence always to be excluded? By its failure even to refer to competency and incompetency, the FTC rule dodges this vital question quite artfully.

The persistent tendency of FTC hearing examiners has been to give very stringent effect to the rules of evidence which govern non-jury cases in the federal courts.⁵³ This has resulted in many instances in a rigid definition of hearsay evidence and a stalwart resistance to its inclusion. When great quantities of economic data must be mustered in order to support a contention that conduct will or will not tend to lessen competition, the effect of this attitude has been to paralyze the entire proceeding. Both the attitude and its effects are wholly inconsistent with the spirit of the Administrative Procedure Act.

This is not the place to undertake a study of problems of evidence in FTC proceedings. Nor will any attempt be made to formulate a better rule than the present one. Suffice it to say that such study and such formulation are sorely needed, and the Commission has so far failed in its responsibilities in leaving this important question entirely to the discretion of its hearing examiners.

5. *Interlocutory Appeals.*

The 1955 rules gave the parties an unlimited right of interlocutory appeal to the Commission from rulings of the hearing examiner.⁵⁴ This procedure was once described as "the worst and least justified cause of unnecessary delay and expense in agency proceedings".⁵⁵ Henceforth, interlocutory appeals may be taken only after

51. § 4.12 (b), 26 Fed. Reg. 6018 (1961).

52. The classic illustration of this problem is doubtless *Gulf Oil Corp.*, 55 F.T.C. 2030 (1958).

53. See Cox, *Adherence to the Rules of Evidence and Federal Rules of Civil Procedure as a Means of Expediting Proceedings*, 12 AD. L. BULL. 51 (1959). Hearing Examiner Cox presided over *Gulf Oil Corp.*, 55 F.T.C. 2030 (1958).

54. 1955 Rules, § 3.20.

55. Beelar, *The Dark Phase of Agency Litigation*, 12 AD. L. BULL. 34, 38 (1959).

leave has first been obtained from the Commission. A written request must show (a) that the ruling which would be appealed involves a novel and substantial question not previously reviewed by the Commission or the courts, (b) that the question presented may be answered without reference to the record, and (c) that granting of leave to appeal will expedite the proceeding.⁵⁶ It may be predicted that these requirements, particularly the first, will rarely be met, and that interlocutory appeals will fall into disuse. The previous procedure had little or no merit, and the change is for the better.

6. *The Initial Decision.*

At the trial's conclusion, the hearing examiner files an "initial decision." He is ordinarily assisted in its preparation by proposed findings of fact and conclusions of law, submitted at trial's end by the parties.⁵⁷ The 1961 rules require that the initial decision be filed within ninety days after completion of the reception of evidence.⁵⁸ Under the 1955 rules, it was to be filed within thirty days of the hearing examiner's order closing the proceeding.⁵⁹ The distinction is more than conceptual. In practice, under the previous rules, hearing examiners simply withheld their order formally closing a proceeding until they were prepared to file a decision. This could be a year or more after completion of the reception of evidence.

7. *Commission Review of the Initial Decision.*

A hearing examiner's initial decision will include findings of fact, conclusions of law and an order dismissing the case or requiring the respondent to cease and desist from certain acts or practices. Initial decisions are generally written in opinion form. Previously any party to the proceeding could, as a matter of right, appeal an initial decision to the Commission, and it has been most unusual for a party to waive this right.⁶⁰ Commission review had all the dimensions of a trial *de novo*, save only that additional evidence was not received. Under the 1961 rules, the initial decision becomes final within thirty days of its filing unless a petition for review is filed within fifteen days or the Commission docketed the case for review *sua sponte* within the thirty-day period.⁶¹ From the rule's wording it is to be inferred that

56. § 4.18, 26 Fed. Reg. 6019 (1961).

57. § 4.17, 26 Fed. Reg. 6019 (1961).

58. § 4.19, 26 Fed. Reg. 6019 (1961).

59. 1955 Rules, § 3.21.

60. 1955 Rules, § 3.22.

61. § 4.19 (a), 26 Fed. Reg. 6019 (1961).

only fifteen days are allowed for filing a petition for review in order that the Commission may, if necessary, have the same length of time within which to decide whether it will review the case on its own motion.

The petition for review is to be in writing and should state the questions presented for review, a summary of the facts, and the reasons why review is in the public interest.⁶² The petition will be granted if two or more of the five Commissioners are of the opinion that it should be.⁶³ If review is allowed, briefs are filed and oral argument is heard as previously.⁶⁴

If a policy statement may legitimately be extrapolated from this revision of the Commission's rules, it must be concluded that henceforth the Commission will sit for the most part as an appellate body and not as a trier of facts *de novo*. Argument on appeal is to be restricted to the questions of substance or procedure set out in the petition for review; only so much of the record will be considered as is necessary for consideration of these questions.

The result of this revision should be an enhanced status and increased responsibility for the hearing examiners, a drastic reduction in the backlog of cases at the Commission review stage, greater opportunity for the Commission to give concentrated attention to novel and substantial questions, and from all this a considerable improvement in the adjudicatory process. For these consequences to follow as a matter of fact as well as theory, one obvious condition precedent must be met: a very high level of competency must be achieved and maintained among the Commission's hearing examiners. If this be had, the institution of discretionary review should prove a laudable innovation.

8. Summary.

In summary, the principal changes introduced by the 1961 rules in the areas of pretrial, trial and agency review are: (1) The enhanced importance of pretrial practice, (2) the elimination of trial by interval, (3) the new emphasis which will thus be given to discovery procedures, (4) the substantial restriction of a party's right to an interlocutory appeal and (5) the elimination of a right to agency review of the examiner's decision. All of these measures are well calculated to lessen delay and increase efficiency in the Commission's enforcement activities. The one great criticism which may be leveled at the 1961 rules, so far as they relate to trial procedure, is their continued failure to announce a policy with respect to the admissibility of incompetent evidence.

62. § 4.20 (b), 26 Fed. Reg. 6020 (1961).

63. § 4.20 (d), 26 Fed. Reg. 6020 (1961).

64. § 4.21, 26 Fed. Reg. 6020 (1961).

CONCLUSION

There is, when all is said and done, no simple solution to the problem of delay in FTC proceedings. The 1961 rules are, nonetheless, a heartening sign. First, they show an awareness of the problem's extent and importance and a resolve to work conscientiously toward a solution. Secondly, they single out for correction certain particularly notorious aspects of the Commission's procedures. Elimination of trial by interval and qualification of the right to agency review of interlocutory orders and initial decisions will be beneficial. These revisions are no panacea, but a solution is, after all, most likely to be found in the cumulative effect of many such innovations and improvements in the Commission's day-to-day processes.

Promulgation of rules will not, however, refashion a system. Delay has occurred in the past only because it has been acquiesced in by the Commission, the hearing examiners, and the staff. Even within the procedural context of the 1955 rules, it is difficult to believe that years could have elapsed between issuance of a complaint and its disposition without considerable inertia on the part of all concerned. Contrariwise, no degree of procedural innovation will be of any avail unless it is accompanied by an equivalent modification of attitudes and working habits.

The burden of effecting such changed attitudes and habits lies squarely on the shoulders of the Commission. Every plaintiff's attorney knows that the surest cure of procrastination is an impatient client. Unfortunately, the FTC trial attorney has no client to whom he must answer; only if the Commission sets high standards and demands their observance will procrastination and delay be eliminated.

Progress in this direction should be premised, it would seem, on a determination of what constitutes excessive delay in an FTC proceeding. This is not a simple matter. Clearly, it should not have taken the Commission nine years to reach a decision in *Pillsbury Mills*.⁶⁵ Nor should *Luria Bros.*⁶⁶ be pending on the Commission's docket today, eight years after issuance of the complaint. On the other hand, it might be just as outrageous for a charge of deceptive advertising to be pending twelve months after the action was brought. In other words, delay is relative to the case. There is no way to decide whether a particular matter is being handled with reasonable dispatch unless criteria have been formulated for that purpose.

65. No. 6000 (1960), 3 CCH Trade Reg. Rep. ¶ 25349.
66. No. 6156 (1954), 3 CCH Trade Reg. Rep. ¶ 25358.

The length of time it has generally taken the Commission to dispose of merger cases has been notoriously excessive. These are dramatic instances and may actually tend to distract attention from the broader problem. For example, the Commission issued thirty-four complaints in May, 1960.⁶⁷ Nine of these are still pending;⁶⁸ all of the others were disposed of by consent settlement. Four of the nine pending cases charge violation of Section 5 of the FTC Act; one charges violation of Section 2(a) of the Clayton Act; three charge violations of both Section 5 of the FTC Act and Section 2(a) of the Clayton Act; one charges violation of the Fur Labeling Law. The important point is that, of these routine cases, everyone which could not be settled voluntarily is still pending on the Commission's docket twenty months later. (Most of those which were settled were so disposed of within sixty or ninety days.) This should be every bit as disturbing as the "big case" which is still pending after many years.

Criteria of delay cannot be evolved in the abstract; this undertaking would require some study and the exercise of prudent judgment. With that word of caution, however, it might be suggested that most FTC cases could be disposed of within six or eight months of the complaint's issuance. While certain so-called "big cases" might require twice that time, it is not easy to see that the public interest is adequately served by proceedings which take longer.

It is proposed, then, that the Commission set down standards by which it might judge the relative dispatch with which its proceedings are handled, that it promulgate these standards as norms to be observed by its staff, and that it take prompt remedial action the moment deviation from the norm is detected. Only by such unrelenting supervision will the Commission eradicate the delay which is so deeply rooted in its *modus operandi*. Failing this, the best-tailored procedures will have little worth.

(The often-heard suggestion that delay in FTC proceedings is caused in great part by the fact that the members of its staff are overburdened is not even deserving of comment. It is a rare FTC trial attorney indeed whose work-product is even remotely comparable, in terms of quantity, to that of a private practitioner. If this suggestion has any merit, it is perhaps only in the degree to which it reflects either

67. No. 7875 through No. 7908.

68. Continental Baking Co., No. 7880; Southern Bakeries Co., No. 7881; Grand Caillou Packing Co., No. 7887; Gimbel Bros., No. 7888; S. Klein Dept. Stores, Inc., No. 7891; Gadget-of-the-Month Club, Inc., No. 7905; The Logan-Long Co., No. 7906; The Celotex Corp., No. 7907; Lloyd A. Fry Roofing Co., No. 7908. The month of May, 1960 was chosen at random and is typical. *E.g.*, in April, 1960, twenty complaints were issued of which eleven have been disposed of by consent settlement, eight are pending and one has been adjudicated.

on the caliber of the Commission's attorneys or on the measure of incentive which is offered them.)

In short, the 1961 revisions of the Commission's procedures and the innovations which may follow in their wake, will have value only to the extent that their spirit is infused into the working habits and attitudes of the Commission's staff.

Finally, it must be admitted in justice that the Commission labors under certain difficulties which are not of its doing. One of these is its lack of authority to issue temporary orders *pendente lite*; another is the unsettled state of the antitrust laws themselves. Each of these matters has a significant bearing on the problem of delay. While neither can be discussed at any length here, they will be noted briefly within the limited context of that problem.

The importance of a temporary injunction is familiar to any attorney who has ever sought permanent injunctive relief. An injunction is sought, presumably, because of some pressing and urgent need; time, however, is likely to be on the defendant's side, and dilatoriness may well make ultimate relief meaningless. A temporary injunction puts the shoe on the other foot. Now it is the defendant who is spurred to press the issue.

The FTC has no authority to restrain a respondent pending trial. It has sought such authority almost annually, but Congress has not, to date, heard its pleas. This is not the place to discuss the rather substantial arguments which have been raised pro and con in this matter. The limited point which would be made here is that, at least for the purpose of eliminating delay, temporary orders to cease and desist would have a patent usefulness. Entry of a temporary order, whether to cease and desist from a practice or to preserve a *status quo*, would surely spur the respondent to press for swift disposition of the case. More is meant than that the respondent would avoid dilatory tactics; he would, in addition to this, be far less tolerant than now of procrastination and indecision on the part of the Commission's staff.

The unsettled state of the antitrust laws is another extrinsic factor leading to delay. This is apparent, above all, in the several varieties of Clayton Act cases. Each merger case, for instance, tends to become a broad inquiry into the meaning and scope of the law itself. The whole policy of the antitrust laws is brought implicitly before the hearing examiner and the Commission for their consideration and review. In a real sense, the law itself is put on trial. The question raised is not so much whether this merger is contrary to the policy enunciated by the Clayton Act, but in what circumstances would any merger be

contrary to that policy. To use the language of traditional logic, most lawsuits resemble a syllogism whose major premise — the law — is more or less certain. At trial, it is the minor premises — the facts — which must be verified. Thus it is settled, in an action in deceit, that if a party has comported himself in such-and-such a way, he is guilty of fraud. It is the minor premise, that *this* party has comported himself, which must be proved. This is not to deny that there may be disagreement as to what the law is, or what the pertinent law is, but the context of debate is generally well defined. Not so in the trial of an antitrust case. It is the major premise — the law — which is really in issue. The facts are ascertainable; it is the policy by which these facts are to be judged which is uncertain. Thus, a plethora of data is produced while the parties hedge on this principle or that and adduce one theory or another. Neither party is quite sure what the law will turn out to be; neither will put too much faith in any particular theory of the case; each must straddle all the diverse views which the hearing examiner or the Commission may in a particular instance espouse. The parties will also recall that “no deciding authority can with precision fix static guidelines governing exact quantum of proof necessary to meet such a statutory requirement.”⁶⁹ They have been told that it is their chore to present all “relevant facts concerning the competitive pattern of the industry as a whole and its markets,”⁷⁰ and they will not fall short of that goal. So grows a voluminous record, a mass of miscellaneous market information with which no hearing or reviewing officer can possibly cope.

To some extent this problem may diminish with time, as the statutory requirement is refined and clarified by the process of judicial review. To some extent too, the problem may arise from the very nature of antitrust laws and to that degree have no solution. But for the FTC, the problem has a practical aspect of some immediacy: what-

69. Commissioner Kern, dissenting *Union Carbide Corp.*, No. 6026, Sept. 25, 1961. This is an interesting opinion. Commissioner Kern would have vacated the initial decision and remanded the case to the hearing examiner. In this connection, he said, “I recognize that it is presently fashionable in certain legal circles to discuss the administrative process almost entirely in terms of ‘regulatory lag’ and ‘length of legal records’ and that this suggested disposition may be considered out of harmony with such an administrative approach. It should be remembered, however, that we are considering here a merger entailing potentially large economic consequences both to the public and to the private interests involved. In order to perform that task fairly and conscientiously, deciding authority cannot become hostage to legal fashions of the day.” These words were written of a merger which had been consummated five years earlier, and of a proceeding which had been before a hearing examiner for three and a half years! Whatever the merit of Commissioner Kern’s view of the case, and regardless of whether the case should or should not have been remanded, it is most disheartening to hear concern for such delay branded a “legal fashion.”

70. *Pillsbury Mills*, 50 F.T.C. 555, 571-2 (1953) (interlocutory order).

ever the obstacles may be, the Commission must somehow get on with its business. Without sacrifice of values, it must somehow place limits on the litigation of antitrust issues.

So complex a problem has no facile solution, but one observation might be in order. The Commission stands in a very different relation to a proceeding than does a court. It has, after all, the first and last word in every proceeding. It initiates the case by issuing its complaint and terminates the same case by reviewing or declining to review the initial decision. While issues are *presented* to a court, the Commission *frames* issues for its own eventual deciding. Although this ambiguous aspect has engendered much criticism, there is no doubt that it is the FTC's distinguishing note. The fact that the Commission has, in a sense, prejudged each case is what distinguishes its processes essentially from those of a court. Just or unjust, wise or foolish, this is a given fact.

If one reflects, in light of this fact, on the tortuous course which the "big cases" take through the Commission's processes, the incongruity is striking. The Commission, after all, must be presumed to issue a complaint in full contemplation of the legal theory on which its action will be predicated and of the proof which will have to be adduced to support charges based on that theory. The terms of the complaint might, therefore, be expected to leave little room for doubt on either of these scores. Yet such is not the case. Without further elaboration, it is submitted that FTC proceedings might be much simplified and abridged if they were given greater direction *a priori* by the Commission. These considerations prompted, in part, the proposals made above with respect to pleadings.

Suffice it to say, by way of conclusion, that the 1961 rules, and the spirit which prompted their promulgation, bode well for the future of the Federal Trade Commission. For this promise to be fulfilled, however, they must become a starting point and not a resting place.