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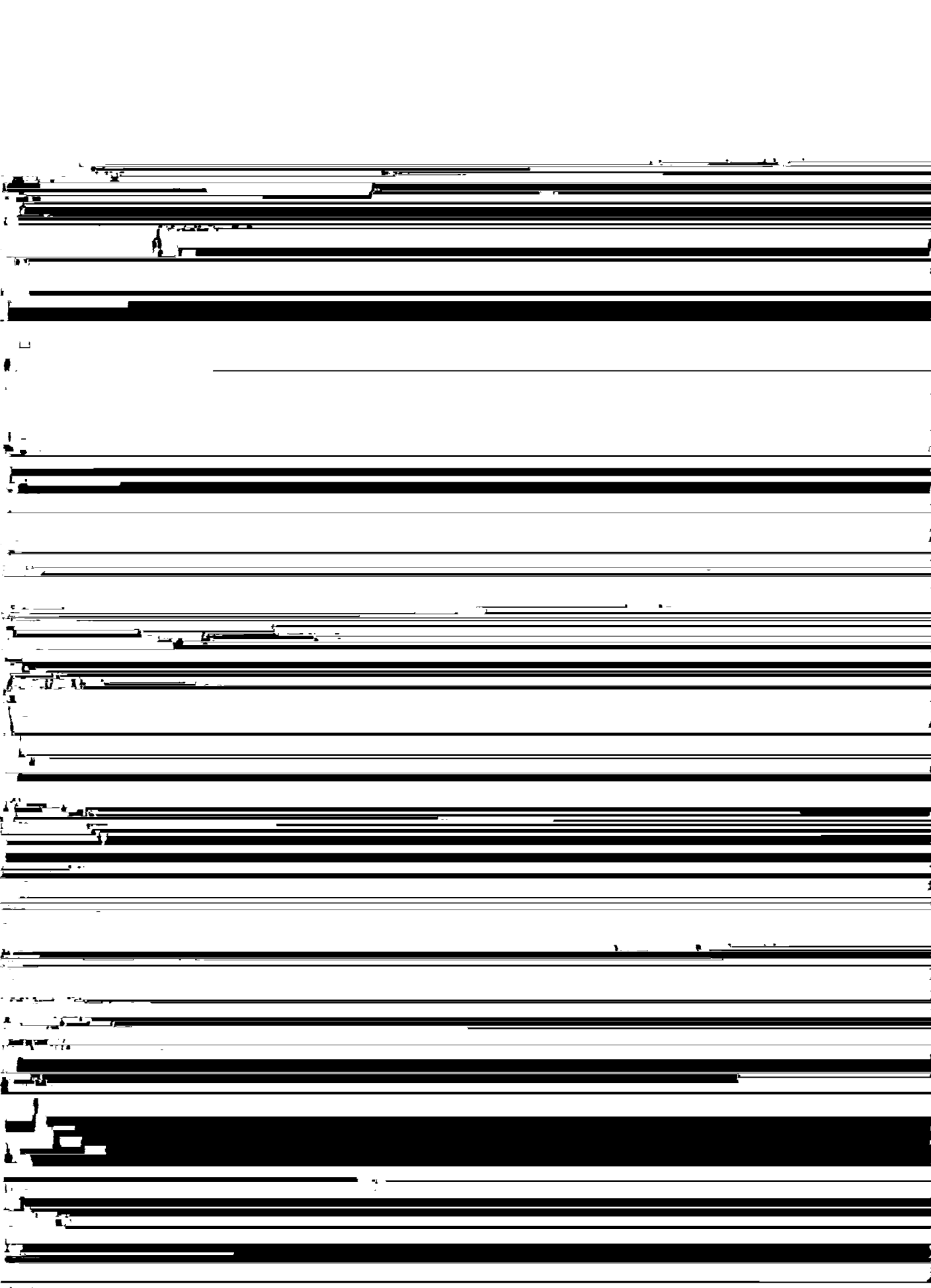
Wednesday, September 11, 1968

James M. Nicholson, Commissioner
Federal Trade Commission

Before the



contrary in its official pronouncements and decisions "In

of motions or cross-motions which are idled through in quite ordinary lawsuits seems many from the start to delay and

[redacted]

expense which impair or destroy the value of the right to prosecute or defend." 6/

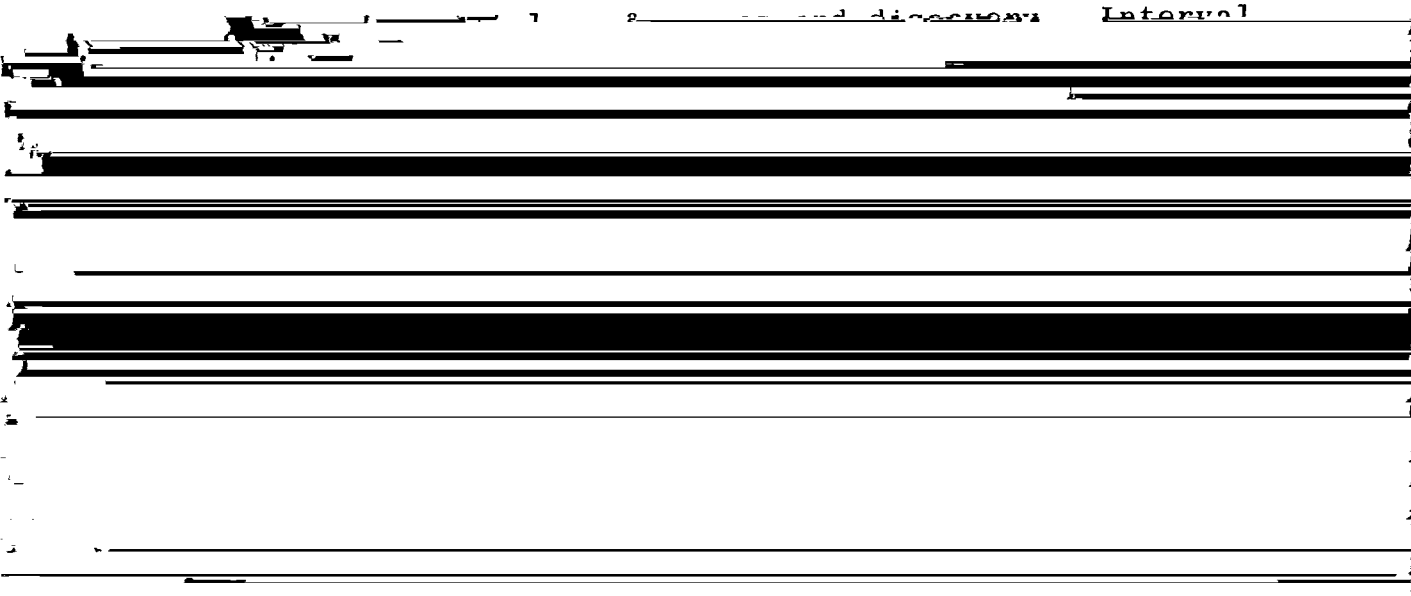
Although most members of the antitrust bar are as concerned as are we with resolving issues as rapidly as is consistent with procedural fairness, there is enough truth in these allegations to justify the Commission's actions designed to eliminate any purely mechanical barriers to the effective discharge of its statutory responsibilities in the public interest. Discovery is simply not a game, or at least is not designed to be, and if there are any members of the bar who listen to or read these remarks with the hope of receiving instruction in the artful use of discovery motions to thwart Commission proceedings, they will receive no lessons from me.

The evolution of our present Rules began in 1961. Perhaps the most significant change made at that time, and certainly the one with the most drastic effect on the rules of discovery, was the adoption of the continuous hearing

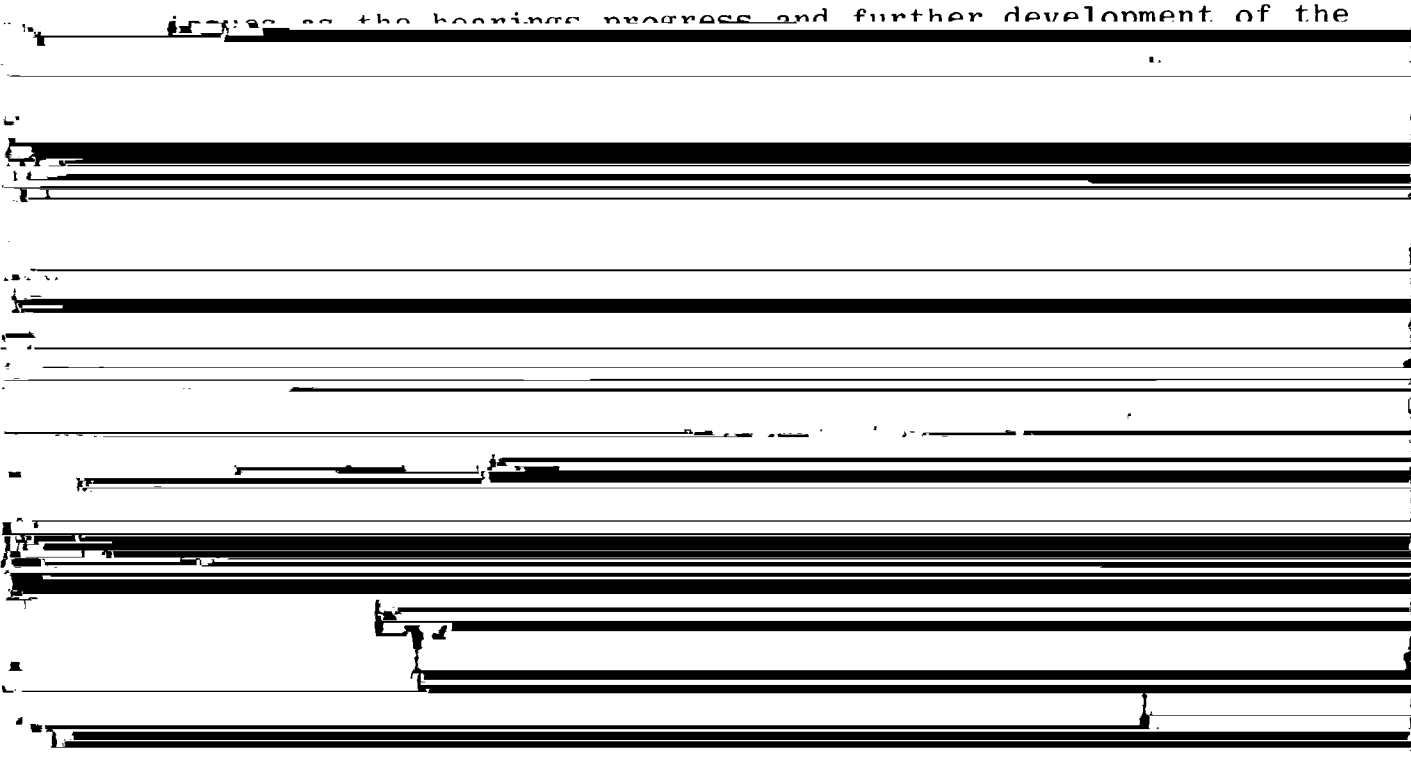
Prior to this amendment, hearings in adjudicative proceedings

issues consistent with procedural fairness. It can even be argued that the present rule incorporates the best features of each system in that, as now drafted, the rule provides sufficient flexibility to permit intervals between hearings where the circumstances indicate good cause therefor.

This change has required far greater attention to the



hearings permit a process of continuous refinement of the



to dwell upon the subject of prehearing conferences except to set the stage for discovery and to point out that the Commission itself has recognized the impropriety of attempting discovery until "a clear delineation of issues to be tried" has been accomplished to permit intelligent assessment of the scope and need for discovery. 12/

[redacted]

avoiding the injection of the Commission into the conduct of hearings. Rulings on interlocutory appeals are no longer subject to appeal as a matter of right, but will now be entertained by the Commission only upon a showing that the ruling involves substantial rights which will materially affect the final decision and that a determination by the Commission before conclusion of the hearing is essential to serve the interests of justice. Further, the examiner's rulings on such matters will not be reviewed or disturbed in the absence of unusual circumstances. 16/

In my view, these steps are of extreme importance in light of the constantly increasing volume of work which is being pressed upon the Commission both by new legislation and the normal increment of an expanding economy. Much has [redacted] to devising ways in which we can make even more efficient use of our examiners' time and talents both in our consideration of matters which the parties seek to have us review and in further appropriate revisions in our rules where the need [redacted]

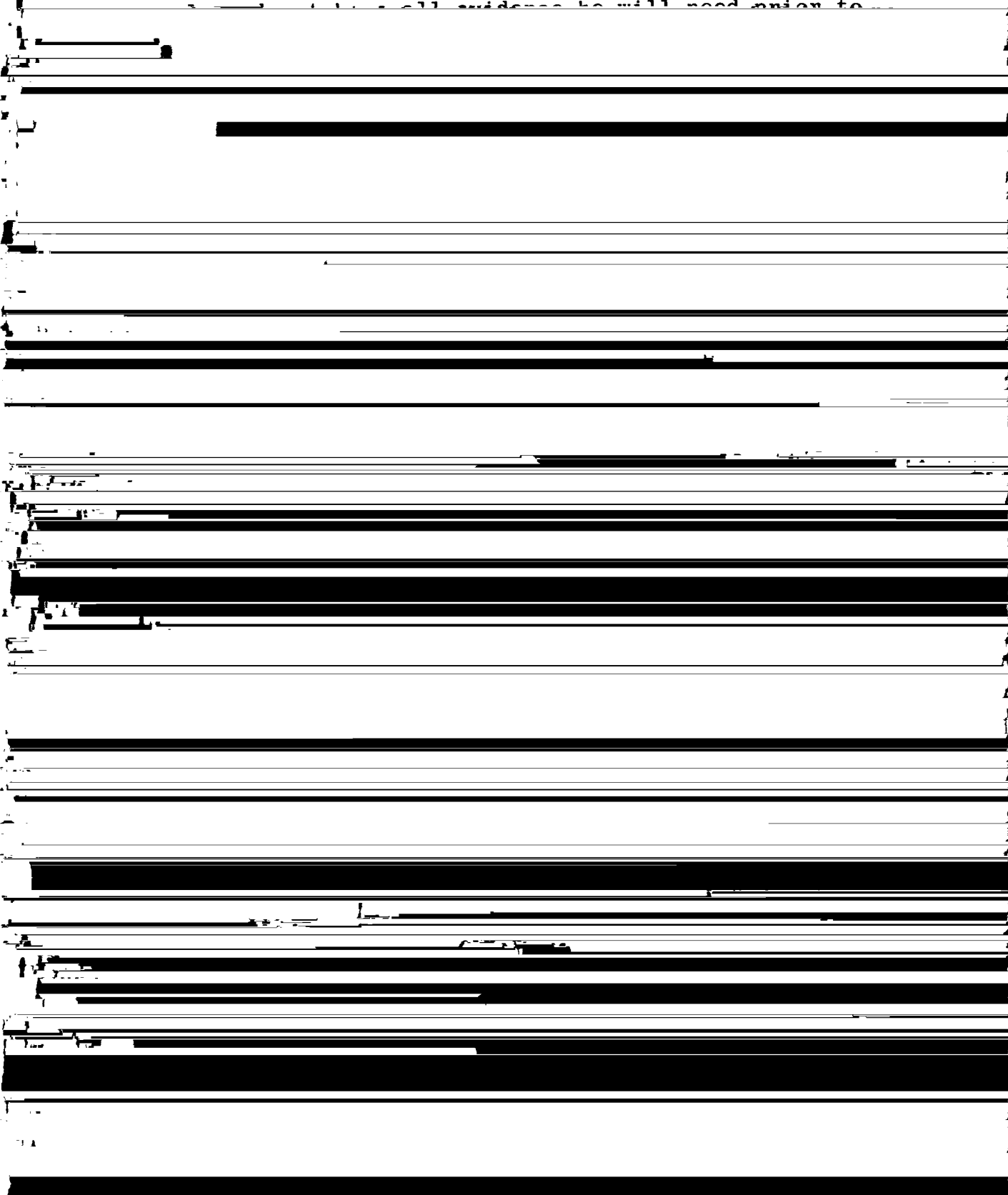
[redacted] are authorized to make use of admissions as to facts

Fundamental to the successful operation of the continuous hearing procedure is the assumption that complaint counsel will, at the time the complaint issues, have all the evidence he will need to establish a prima facie case. To that end they have been furnished with a broad range

[redacted]

general proposition, use of the discovery processes are not allowable when the purpose is to investigate and obtain materials and information required as part of complaint counsel's prima facie case in chief. Fairness to the respon-

post complaint investigation, but only post complaint discovery. But the Commission also made clear that complaint

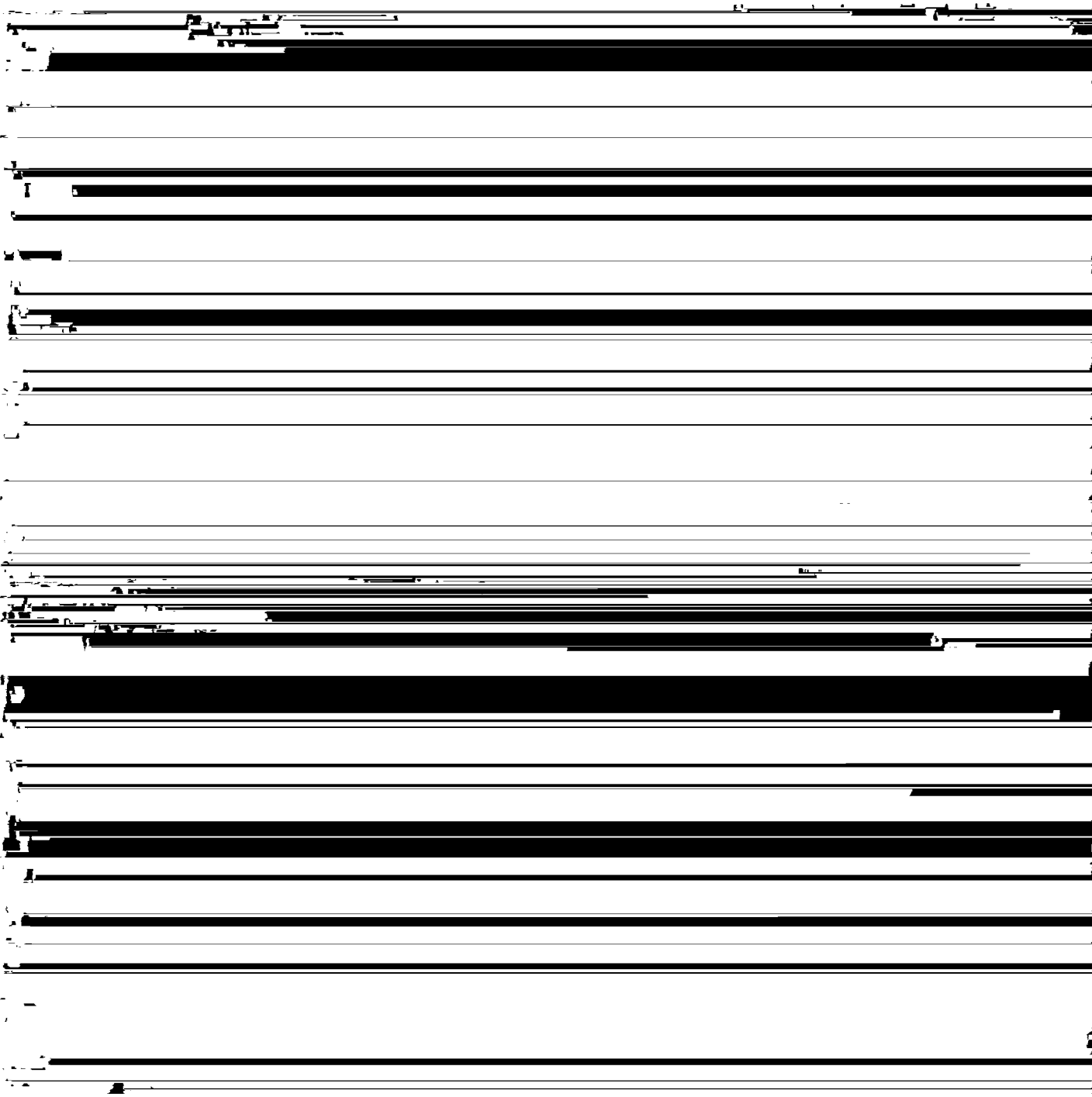


and on reviewing courts the burden - to police the implemen-

[redacted] bookkeeping rules in this regard.

questions which arise. Too much depends upon the facts of

thereof. The exercise of Commission's broad and extensive power to investigate encompasses not only evident violations,



it is not" 26/. This entails the acquisition of detailed information concerning the business assets and other confidential data concerning persons or corporations being investigated or

The requirement that respondent show "good cause" has not been precisely defined in the decisions, except in a

[redacted] information as is necessary for [redacted]

[redacted] Union Camp, 21/ the Commission ordered that certain special [redacted]

reports filed by respondent's competitors not be disclosed to [redacted] that disclosure could be made to respondent's [redacted]

has been forced to rule that neither technique was mandatory, and was not intended to be a substitute for the exercise of the sound and responsible discretion of the examiner. 33/ The examiner is in a far better position than the Commission, because of his proximity to the case, to assess the multitude

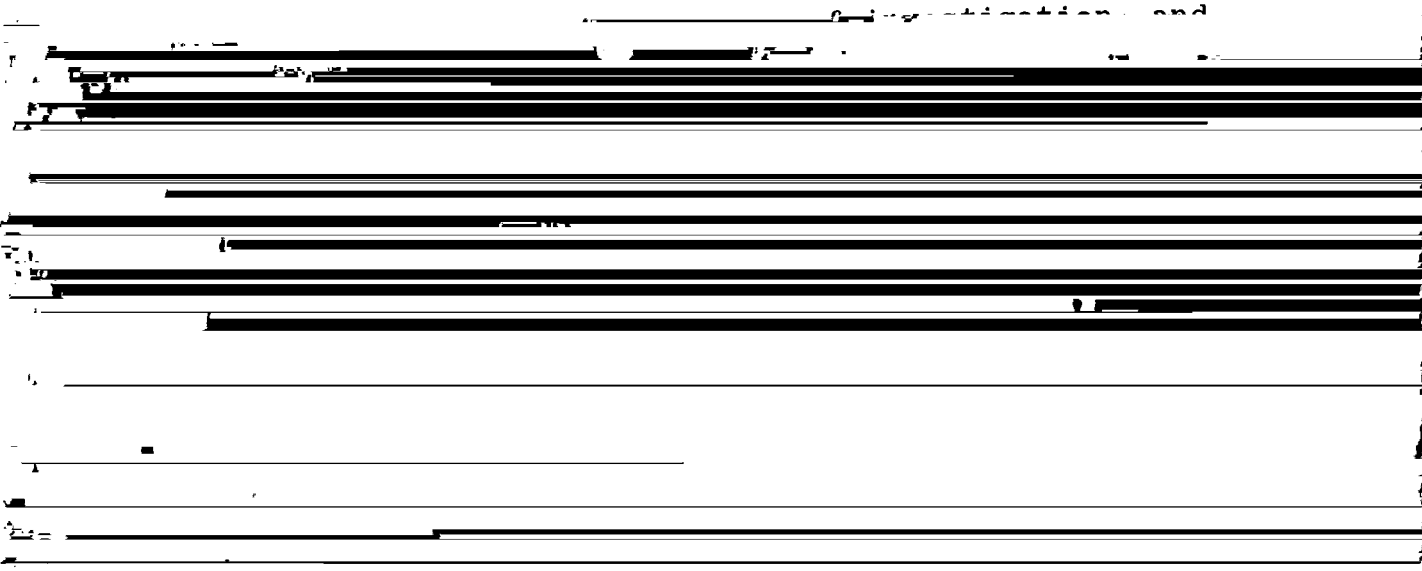
the possession of third parties or depositions to secure

tute for the continuous hearings required by the rules or to delay the proceeding and there must be a showing of good cause for the use of the procedure and of the need for eliciting the information by deposition rather than by testimony at the hearings. 35/

In the area of respondents' discovery, much as been said and written of late concerning the right of access to interview reports of potential witnesses prepared by members of the Commission's staff. Starting with the Supreme Court's landmark Jencks decision 36/ and the subsequent enactment of the so-called Jencks Act 37/, the Commission has taken the position

interview and also his own thoughts and subjective impressions of what he is being told . . .".

It is important, I think, to distinguish between interview reports prepared by attorneys of the Commission



interview reports prepared by the trial attorney during the process of getting ready for trial. The investigatory interview reports are prepared at a time when it is uncertain whether a complaint will be issued, or even recommended, and thus the more general report, interspersed with opinions and evaluations of the witness could be issued. The reasons for protecting these reports would seem obvious, for they represent a perfect illustration of an attorney's work product, defined in its narrow sense as the distillation of his subjective impressions, evaluations and interpretations, which is traditionally protected from disclosure. 40/ However, when a trial attorney is preparing an interview report of a witness whom he knows he intends to call, the type of report should be different -- so also the propriety of disclosure.

With respect to trial attorney interview reports, a middle ground seems worthy of consideration. If, as

well take another look to see if there are ways in which they can be more adequately advised as to the nature of the testimony they might expect from Commission witnesses.

staff, then I for one would be favorably disposed. 41/ From personal trial experience this type of statement would seem to best suit the needs of the trial counsel in preparing his witness for testifying.

To conclude these remarks I would return to the beginning and remind one and all that discovery is not a game to be played by opposing counsel at the expense of their clients and the public interest. The rules discussed above are not designed to enable counsel to demonstrate their technical skills in delaying proceedings [redacted] order to gain

common good. While this is regrettable, it cannot be regarded as justification for restrictions on the legitimate right of discovery which the law confers upon parties to litigation and without which the whole truth might never come to light. Consequently, if this Commission is, as I think it should, to be ever vigilant