

Complaint

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ness of the product to those persons whose symptoms are due to an established or existing deficiency of Vitamin B<sub>1</sub>, Vitamin B<sub>2</sub>, or Niacinamide, and further unless such advertisement clearly and conspicuously reveals the facts that in the great majority of persons, or of any age, sex or other class or group thereof, who experience such symptoms, these symptoms are caused by conditions other than those which may respond to treatment by the use of the product, and that in such persons the product will not be of benefit.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of respondents' preparations, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in or which fails to comply with any of the affirmative requirements of Paragraph 1 hereof.

*It is further ordered,* That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

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IN THE MATTER OF

WESTERN RADIO CORPORATION ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket 7468. Complaint, Apr. 2, 1959—Decision, Sept. 25, 1963*

Order requiring manufacturers of a "Walkie Talkie" portable radio transmitter in Kearney, Nebr., to cease representing falsely in newspaper and magazine advertising and otherwise that their said "Walkie Talkie" transmitter had a satisfactory operational range of up to one-half mile for a home receiver and up to 10 miles when transmitting from auto to auto; that the device carried a 1-year service guarantee; and that operation thereof required no license.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Western Radio Corporation, a corporation, and Paul S. Beshore and W. P. Beshore, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it

appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Western Radio Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Nebraska. Its office is located at Kearney, Nebraska. Individual respondents Paul S. Beshore and W. P. Beshore are officers of said corporation. They formulate, direct and control the policies of the corporate respondent. The address of the individual respondents is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the manufacture, sale and distribution of various kinds of electronic devices, including portable radio transmitters sold under the names of "New Magic Walkie Talkie", "Radio Vox" and "Radio Talkie".

PAR. 3. In the course and conduct of their business respondents ship their products from their place of business in Nebraska to purchasers thereof located in various other States, and maintain, and have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents in the conduct of their business were, and are, engaged in substantial competition in commerce, with corporations, firms and individuals engaged in the sale and distribution of portable radio transmitters and related electronic products.

PAR. 5. Respondents in the course and conduct of their said business, and for the purpose of inducing the purchase of their portable radio transmitters, advertise the same by means of advertisements inserted in newspapers and magazines of general circulation and by circulars and other advertising material distributed through the mail and otherwise. Among and typical, but not all inclusive, of the statements and representations appearing in said advertisements are the following:

New Magic Walkie Talkie! Your own pocket size radio station! Broadcasts to any home or car radio without wires or hookups! \* \* \* With this radio talkie you can talk to your friends up to a block or more away! Talk up to 1 mile or more between two automobiles. Instant operation. Just push button to talk. No license needed \* \* \* Guaranteed to work. 1 year service guarantee.

\* \* \* \* \*

A real transistor Powered Pocket Size Radio Talkie. Sends your voice to any house or car radio! No connections, wires or electric "plug in". Works every-

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where—up to ½ mile or more! No license or permit required anywhere! \* \* \*  
One year service. Money Back Guarantee!

\* \* \* \* \*

Use Radio-Talkie Radi-Vox in a thousand ways.

\* \* \* \* \*

Talk to any one radio or to all or any group of radios in nearby locations.

\* \* \* \* \*

Talk from car to car up to 1-10 miles apart. Any number of cars can be used!

\* \* \* \* \*

Between Hotel Rooms—upstairs or down. From car to trailer. To House.  
Between buildings up to ½ mile or more. Break in regular Radio Broadcasts.

\* \* \* \* \*

PAR. 6. By the use of the statements appearing in the aforesaid advertisements, and others of the same import not herein set forth, respondents represented, directly or by implication:

1. That respondents' portable radio transmitter, without the use of additional equipment, has a satisfactory operational range of up to one-half mile for every type of home radio receiver located in the home or other buildings.

2. That respondents' said device, without the use of additional equipment, has a satisfactory operational range of up to 10 miles when transmitting from an automobile to any automobile radio receiver in another automobile.

3. That said device carries a 1-year service guarantee.

4. That no license is required to operate said device.

PAR. 7. The aforesaid statements, representations and implications arising therefrom, were and are, false, misleading and deceptive. In truth and in fact:

1. Respondents' portable radio transmitter, without the use of additional equipment, has a satisfactory operational range of substantially less than up to one-half mile for home radio receivers located in the home or other buildings.

2. Respondents' said device, without the use of additional equipment, has a satisfactory operational range of substantially less than up to 10 miles when transmitting from one automobile to an automobile radio receiver located in another automobile.

3. The guarantee furnished by respondents in connection with said device is limited in certain respects and requires the payment of \$1.50 for postage and handling charges, which facts are not disclosed in the advertising of the guarantee.

4. Respondents' said device when used to broadcast in a certain manner set out in the operating instructions, requires a license under the regulations of the Federal Communications Commission.

PAR. 8. The use by the respondents of the foregoing false and misleading statements, representations and implications has had, and now has, the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the mistaken and erroneous belief that said statements, representations and implications were, and are, true, and to induce a substantial portion of the purchasing public, because of such mistaken and erroneous belief, to purchase their said product. As a result thereof, trade in commerce has been unfairly diverted to the respondents from their competitors and injury has thereby been done to competition in commerce.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

*Mr. Garland S. Ferguson* and *Mr. John J. McNally* for the Commission.

*Mr. Charles H. Rowan*, Milwaukee, Wis., and *Mr. C. W. Collins*, Los Angeles, Calif., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

JULY 25, 1962

This is a proceeding under the Federal Trade Commission Act, charging violation of § 5 thereof in that respondents have falsely advertised, in interstate commerce, a pocket-size radio transmitter designated by them, and referred to usually in the record herein, as Radi-Vox. There are four distinct charges alleged in Paragraphs 5, 6, and 7 of the complaint, which in substance are that respondents have falsely claimed in advertisements inserted in newspapers and magazines of general circulation, as well as by circulars and other material distributed through the mail and otherwise, that their radio transmitting device in question:

1. Has a satisfactory operational range of up to one-half mile for every type of home radio receiver located in buildings;
2. Has a satisfactory operational range of up to 10 miles when transmitting from an automobile to any automobile radio receiver in another auto;
3. Carries a 1-year service guarantee; and
4. Requires no license to operate.

Respondents, in substance, deny these charges in their answer. It is found herein that the material allegations of the complaint either have been admitted by respondents or have been sustained by preponderance of the evidence, and an appropriate order is hereinafter issued.

The complaint herein was issued April 2, 1959, and the respondents filed their answer on June 10, 1959. While the record is short, the subsequent history of the litigation is somewhat complicated, and must be stated in order to determine herein the real contentions of respondents. Prior to any hearings, counsel supporting the complaint, and respondents' counsel negotiated a consent agreement, which was submitted to the hearing examiner on October 27, 1959. It disposed of the first three charges, but reserved the right to litigate the fourth charge. Reference would not be made herein to any proceedings relating to this consent agreement, since they are not a part of the official record, except that respondents, in their proposed findings, insistently contend that the initial decision of the hearing examiner accepting said consent agreement and issuing an order in accordance therewith is final and binding upon the parties as to the first three charges, and limits the issues for trial and decision to the fourth charge. Respondents also, as a part of their proposals, tender the same order that was stipulated in said consent agreement.

The hearing examiner issued his initial decision accepting said consent agreement on October 28, 1959, and thereafter, upon review, the Commission, on December 2, 1959, issued its order vacating such initial decision as "not appropriate in all respects to dispose of this proceeding", and remanded the case to the hearing examiner for further proceedings. It is the respondents' contention (Proposed Findings, pp. 1-3, paragraphs 1 and 3) that, the agreement having been duly approved by respondents and by counsel supporting the complaint and the Bureau of Litigation of the Commission, and the initial decision accepting said agreement being in strict accord with the then Rules of Practice of the Commission, the said agreement became final and binding, and that the first three charges of the complaint are not litigable herein because:

1. Said initial decision was not served upon the parties until November 14, 1959, and the Commission's order vacating it was improper since it was issued on December 2, 1959, more than fifteen days thereafter;
2. No party had appealed from the initial decision; and
3. There was no sound factual basis for its disapproval by the Commission.

No such contention had previously been made by respondents throughout the course of this proceeding since the vacation of said initial decision.

Respondent's counsel have erroneously attempted in such contention to apply the present rules of the Commission, which are greatly misconstrued by counsel, to a proceeding which was conducted entirely under the Commission's then applicable May 1957 Rules of Practice for Adjudicative Proceedings. Under § 3.25 of those Rules, and in strict pursuance thereof, the initial decision accepting the consent agreement was issued and served within 30 days following the submission to the hearing examiner of said agreement, and while a joint appeal by the parties was provided for by such Rules in the event the hearing examiner did not approve the consent agreement, the Commission retained its authority and discretion, under § 3.25(e) thereof, without limitation as to time, either to approve or reject any consent agreement accepted by the hearing examiner and his initial decision thereon, and to remand the case to the hearing examiner for adjudication in regular course. Furthermore, the said initial decision under consideration here, in accord with such Rules, was in no sense final, expressly providing, "The agreement shall not become a part of the record unless and until it becomes a part of the decision of the Commission." Also, a consent-order adjudication, under the Commission's Rules, always has been and still is a matter of discretion to end litigation upon agreement, and is not a determination of any contested factual issues.

Under the Commission's present Rules, hearing examiners are no longer concerned with consent settlements, which are now delegated to the Office of Consent Orders under Part 3 of the Commission's Rules of Practice, Procedures and Organization effective June 1, 1962, which Part 3 became originally effective July 21, 1961. Counsel for respondents is evidently also confused by the current Rules of Practice for Adjudicative Proceedings, which is Part 4 of the Commission's present Rules of Practice, Procedures and Organization. Section 4.19 of the Rules of Practice for Adjudicative Proceedings provides that a petition for review of an initial decision must be filed within 15 days after service of the initial decision, but also provides that the Commission has an additional 15 days within which to place a case on its own docket for review. This rule has no application whatsoever either current consent-order procedures or to any consent-order proceeding coming under the former rules, such as the one under consideration here. Neither of these consent-order procedure rules limits the Commission's time for consideration and

