

SKYLARK ORIGINALS, INC., ET AL.*

Docket 8771. Order, Sept. 25, 1970

Order vacating initial decision, and case remanded to hearing examiner for further proceedings.

ORDER VACATING INITIAL DECISION AND REMANDING PROCEEDING TO HEARING EXAMINER

The complaint in this proceeding, issued November 27, 1968, charged that respondents violated the Federal Trade Commission Act by engaging in false and misleading advertising of their ladies' clothing and wigs by advertising fictitious prices at which their products were claimed to have been sold; falsely advertising that they unconditionally guarantee the return of the purchaser's money on request; falsely advertising that their wigs were available in five styles and ten colors at reduced prices from a limited supply for a limited time; and falsely advertising that their merchandise would be delivered promptly.

On November 26, 1969, the hearing examiner certified to the Commission a motion by respondents requesting that an agreement containing a consent order be accepted. Complaint counsel had joined in respondents' motion and the hearing examiner recommended that it be approved. This motion was denied by the Commission on December 18, 1969 [76 F.T.C. 1091], and a subsequent motion for reconsideration also was denied.

Thereafter, counsel for respondents and counsel supporting the complaint submitted to the hearing examiner a stipulation of facts and an agreed order with the understanding that the facts were stipulated subject to the acceptance by the Commission of the agreed order. On the basis of this stipulation the examiner cancelled hearings which were scheduled to commence March 23, 1970, and entered his initial decision adopting the stipulated facts and the order agreed upon by counsel.

The Commission by order of June 1, 1970, placed this proceeding on its own docket for review to permit a determination of whether the changes in Paragraphs 3, 5, 6 and 9 of the order which accompanied the complaint, particularly the addition of the language "in good faith," was warranted by the facts and whether the revised paragraphs would effectively prevent a resumption of the practices they purported to cover. Pursuant to authorization in said order, counsel supporting the complaint and counsel for respondents have filed briefs on the above issue.

*Order to cease and desist issued by Commission, March 9, 1972, 80 F.T.C. 337.

Paragraphs 3, 5, 6 and 9 in the notice order would prohibit respondents from failing to make refunds within the time and in the amount represented, failing to perform all of the actual and represented obligations under the terms of their guarantee, advertising merchandise of stated features or characteristics unless such merchandise is on hand and available to fill orders, and failing to make timely delivery of merchandise. According to the briefs submitted by counsel, the words "in good faith" were added to each of these paragraphs for the purpose of affording respondents a defense in the event of a violation which might occur without their knowledge or beyond their control. Counsel contend that such an order would effectively prevent recurrence of the practices found to be unlawful. Counsel further contend (as did the hearing examiner) that the inclusion of the "good faith" provision in the above paragraphs is consistent with the use of the same provision in Paragraphs 1, 7 and 8 of the original order.

With respect to the latter contention, the words "in good faith" as used in Paragraphs 1, 7 and 8 of the notice order do not provide respondents with a defense for practices which would otherwise be proscribed. In fact, the exact opposite is true. The words "in good faith" as used in these three paragraphs have nothing to do with a "defense" or with violations "which might occur without respondents' knowledge or beyond their control." Rather than provide a defense, these words would impose additional restrictions on respondents.¹

Counsel are also in error in contending that an order which would permit respondents to make claims which may be false because of events or circumstances beyond respondents' control would be effective in preventing recurrence of the violations found by the hearing examiner. Respondents, having chosen to make representations about refunds, guarantees, availability and deliveries, must either perform as advertised or discontinue making these representations. The public is entitled to get what is advertised irrespective of respondents' good intentions or innocent motives. It should be emphasized that it is completely immaterial whether respondents' representations are made in good faith or bad faith. The purpose of the order is to protect the public from false and misleading claims and an order which would permit respondents to make such claims if they are "motivated by honest intentions" as complaint counsel suggests, would not accomplish that end.

For the foregoing reasons, the Commission has determined that the modification of Paragraphs 3, 5, 6 and 9 of the notice order is not

¹ In Paragraphs 1 and 7 these words would require respondents to use only a *bona fide* offer to sell as a basis for claiming that an offering price is a regular or former price. In Paragraph 8 respondents would be prohibited from representing that an offer is limited unless such limitation is actually imposed and "in good faith" adhered to.

warranted by the facts and that these paragraphs, as modified by the agreed order, will not effectively prevent a resumption of the practices they purport to cover. The agreed order therefore is deemed unacceptable.

The stipulation of facts upon which the initial decision is based was entered into subject to the acceptance by the Commission of the order agreed upon by counsel.

Accordingly, *It is ordered*, That the initial decision of the hearing examiner be, and it hereby is, vacated and set aside.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings.

Commissioner Elman not participating.

CCM: ARTS & CRAFTS, INC., ET AL.

Docket 8817. Order and Opinion, Oct. 15, 1970

Order denying respondents' request for permission to file interlocutory appeal from orders of the hearing examiner striking a portion of respondents' answer to the complaint and denying their motion for discovery of certain Commission documents; and returning the case to hearing examiner for further action.

OPINION AND ORDER DENYING RESPONDENTS' REQUESTS FOR PERMISSION TO APPEAL AND REMANDING TO THE EXAMINER

This matter is before the Commission upon two requests by the respondents both filed September 23, 1970, for permission to file interlocutory appeal. The first seeks to pursue an appeal from the hearing examiner's order dated September 14, 1970, striking a portion of respondents' answer to the complaint. The second is a request for permission to appeal from the examiner's order of September 14, 1970, denying in part their motion for the discovery of certain Commission documents. Complaint counsel on September 30, 1970, filed in separate documents their statements opposing the requests of the respondents.

The examiner's order striking a part of respondents' answer resulted from a motion by complaint counsel requesting the examiner to strike three different portions of such pleading on the grounds that "the cited portion of respondents' answer are immaterial and impertinent, and, even if true, do not establish a legal defense to the charges contained in the complaint." The hearing examiner after receiving respondents' answer to such motion, and without stating his reasons therefor, granted in part complaint counsels' motion and ordered that a portion of Paragraph 4 of the answer be stricken, which portion reads as follows:

* * * which Order has obviously not been the subject of any effective enforcement proceedings, and but for such dereliction the instant proceeding would not have been instituted.¹

The second request to appeal relates to the order of the hearing examiner denying respondents' motion for the discovery of documents to the extent that they had requested "all Commission memoranda, correspondence and other documents relating to complaints, investigations or enforcement proceedings against Ramonts pursuant to the 1961 Federal Trade Commission Order in Docket 8217." In denying such part of the request the examiner apparently was concurring in the argument of complaint counsel which states in part: "To explore the happenings in the Ramonts matter would obfuscate the question before the examiner and would be of no probative value." and "The steps the Commission took to enforce the order against Ramonts do not bear upon the essential allegations contained in the complaint or provide a defense thereto." (Answer filed September 8, 1970 to respondents' motion for discovery) The hearing examiner in his order denying the stated portion of respondents' request for discovery gave no reasons for his action.

Respondents in their request for permission to appeal consider these two actions by the examiner to be related. They also construe his actions as meaning that he will not permit them to make one of their claimed defenses which is

that their supplier of wood fibre materials was under a Cease and Desist Order prohibiting the sale of untreated materials of this nature and that the failure effectively to enforce such Order was a contributing cause to the allegedly flammable materials being in respondents' hands. (Request to appeal from denial of discovery, pg. 2)

The examiner has the power to strike portions of pleadings and he may strike a claimed defense for the reason, among others, that it is clear under any of the facts to be proved such would not constitute a valid defense to the complaint. Sections 3.42(c), 3.15 and 3.21(a)(2)² We are of the view, however, that amending or striking a portion of a pleading so as to deny a party a defense requires in fairness that this action be explicit and unequivocal. In this instance, the examiner has not said that he is denying to respondents one of their defenses, and it is uncertain whether or not he did so even though the parties speculate that this is the effect of his actions. He has said nothing on what the

¹ Of the three portions of the answer requested stricken by complaint counsel the examiner struck only a part of one. His selective action creates doubt whether such order, by itself, amounts to a rejection of respondents' claimed defense, since other assertions possibly involving this defense including a reference to the Ramonts order were not stricken.

² Cf. 12(f) of the Federal Rules of Civil Procedure which provides that the court may, upon the motion of a party, order stricken any pleading containing "any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."

orders in question mean. We do not wish to be understood, however, as suggesting that the examiner would be either correct or incorrect here if he acts so as to deny to respondents their claimed defense. We do not pass on that question.

We believe respondents are entitled to a clear statement on the issue raised and if the hearing examiner has, in fact, rejected a defense asserted by them, we believe they are also entitled to the reasons or the basis for such action.

In the circumstances, the matter is not ripe for review. We believe that the issue should be further considered and acted upon by the examiner in the light of our views expressed herein. Accordingly,

It is ordered, That the requests of the respondents filed September 23, 1970, for permission to file interlocutory appeal be, and they hereby are, denied.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for further appropriate consideration and action in the light of the opinion herein.

Commissioner Elman no participating.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Order, Oct. 22, 1970

Order granting an individual respondent time to perfect an appeal from the initial decision; granting said respondent time to make satisfactory proof of financial inability to retain counsel; and referring the cause to the examiner to make findings of fact respecting said respondent's financial condition.

ORDER

Whereas, the hearing examiner entered an initial decision herein on February 10, 1970, concluding that the respondents had violated Section 5 of the Federal Trade Commission Act, and respondents through their counsel filed due notice of intent to appeal, which was thereafter withdrawn by letter from said counsel dated April 14, 1970;

Whereas, respondent Jordan L. Lichtenstein notified the Commission by letter dated April 24, 1970, that he did not have the funds to pay counsel for the prosecution of an appeal, and requested that the Commission appoint one of its own attorneys to represent him in the conduct of such appeal and judicial review proceedings;

Whereas, the Commission issued an Order dated May 13, 1970, adopting the initial decision of the hearing examiner as the final decision of the Commission except as to respondent Jordan L. Lichtenstein as an individual, and extending the time within which respondent Lichtenstein could perfect an appeal from the initial decision to

fourteen (14) days after said respondent was served with the order dated May 13, 1970;

Whereas, respondent Jordan L. Lichtenstein, within fourteen (14) days after being served with the order of the Commission dated May 13, 1970, notified the Commission by letter dated June 9, 1970, that he still desired to perfect an appeal to the Commission but lacked sufficient resources to retain counsel, and set forth allegations of fact in support of said claim of inability to retain counsel;

Now therefore it is ordered, That the letter of June 9, 1970, from respondent Jordan L. Lichtenstein being treated as a request for further time within which to perfect an appeal to the Commission, such request be, and hereby is, granted as to respondent Jordan L. Lichtenstein as an individual, and that said respondent shall have an additional period of time within which to make satisfactory proof of financial inability to retain counsel, as set forth hereinafter.

It is further ordered, That the cause is hereby referred to the hearing examiner for the purpose of making findings of fact on the issue of whether the respondent Jordan L. Lichtenstein presently possesses sufficient financial resources to retain counsel for prosecuting an appeal to the Commission.

It is further ordered, That the respondent Jordan L. Lichtenstein shall execute under oath the form of affidavit served herewith, and shall return the aforesaid executed affidavit to the Federal Trade Commission at the following address, either in person or by registered mail with return receipt requested, within seven (7) days after being served with this order:

Robert L. Camenisch, Federal Trade Commission
Room 486, U.S. Courthouse & Federal Office Building,
219 South Dearborn Street,
Chicago, Illinois 60604

It is further ordered, That the respondent Jordan L. Lichtenstein shall, on the fourteenth (14) days after being served with this order, be present for a hearing before the hearing examiner at the time and place set forth below, unless advised by the hearing examiner that such appearance is unnecessary, and shall within five (5) days thereafter submit to the hearing examiner such further information or documents relating to the said respondent's financial condition as the examiner may direct.

Time and place for appearance: 10:00 a.m.,
at Room 486 of the United States Courthouse
and Federal Office Building, 219 South
Dearborn Street, Chicago, Illinois. 60604

It is further ordered, That the hearing examiner shall, within five (5) days after receiving all relevant and necessary information from

respondent, or if respondent should fail or refuse to appear or to produce such information, within five (5) days of such failure or refusal, transmit to the Commission findings of fact regarding respondent's financial condition.

AFFIDAVIT OF FINANCIAL STATUS

Notice to Respondent: This form must be filled out under oath, and witnessed by a notary public. Supplying false answers or failing to provide all material facts called for by the questions may subject you to fine or imprisonment, or both, under Federal law.

The above-named respondent, _____ being first duly sworn, deposes and makes under oath the following statement regarding his marital status, residence, employment, and financial status:

I. MARITAL STATUS:

- a. Single__ Married__ Separated__ Divorced__
- b. Dependents: Wife__ Children, No. __ Others, No. __ and Relationship _____

II. RESIDENCE:

Respondent's address: Street_____ City_____ State_____ Phone_____

2. Other property:

- a. Automobile: Make_____ Model_____ In whose name registered_____ Present value of car_____ \$_____ Amount owed_____ \$_____ Owed to_____ \$_____
- b. Cash on hand_____ \$_____ Cash in banks and savings & loan associations _____ \$_____ Name and addresses of banks and associations: _____

3. Obligations:

- a. Monthly rental on house or apartment_____ \$_____
 - b. Mortgage payments on house (monthly)_____ \$_____
 - c. Other debts:
- | | To whom owed | Amount |
|--------------------------------------|--------------|---------|
| _____ | _____ | \$_____ |
| _____ | _____ | \$_____ |
| _____ | _____ | \$_____ |
| _____ | _____ | \$_____ |
| Total monthly payments on debts_____ | | \$_____ |

4. Other information pertinent to Respondent's financial status:

- a. List any stocks, bonds, savings bonds, interests in trusts either owned or jointly owned: _____

- b. List any future source of income you might receive such as a pension, social security, or unemployment compensation and the year when such future source of income is anticipated to become due:

Signed-----

(Respondent)

Subscribed and sworn before me

this ----- day of ----- 19-----

MAREMONT CORPORATION

Docket 8763. Order and Opinion, Oct. 22, 1970

Order granting respondent's motion for a waiver of page limitation, denying all other motions of the respondent, and returning case to hearing examiner for trial.

OPINION AND ORDER DENYING INTERLOCUTORY REQUESTS AND REMANDING TO HEARING EXAMINER

This matter is before the Commission upon respondent's interlocutory appeal and requests for leave to appeal as follows: (1) Respondent's Appeal from Order Denying Applications for Issuance of Subpoenas *Duces Tecum* filed October 27, 1969; (2) Respondent's Request for Leave to File Interlocutory Appeal from Order Denying Discovery Applications filed October 27, 1969; (3) Respondent's Request for Leave to File Interlocutory Appeal from Order Scheduling Hearings filed October 27, 1969; and finally (4) Respondent's Request for Leave to File Interlocutory Appeal from Order Denying Request for Certification to the Commission of "Motion to Dismiss or, in the Alternative, for Plenary Hearing on Commingling of Functions and Ex Parte Communications," filed November 10, 1969.¹ Complaint counsel filed a response to this latter request on November 12, 1969.

On November 3, 1969, subsequent to the filing of its October 1969 interlocutory requests and prior to any Commission action thereon, and prior to the filing of its November 1969 request to appeal,

¹ Respondent also on October 27, 1969, filed a document entitled "Emergency Motion for Stay of Hearing Examiner's Order of October 16, 1969." This request was mooted by respondent's action to enjoin the Commission and by the Commission's order issued November 6, 1969 [76 F.T.C. 1081] cancelling hearings for the interim. Additionally, respondent on October 27, 1969, moved for a waiver of page limitation so as to permit one extra page for its request to appeal as to the scheduling of hearings which motion will be granted.

respondent filed suit in Federal district court against the Federal Trade Commission and its Commissioners seeking declaratory and injunctive relief, claiming that the Commission was violating its constitutional and statutory rights. On November 4, 1969, the U.S. District Court for the Northern District of Illinois, Eastern Division issued an order restraining the Commission from conducting hearings or otherwise going forward with this proceeding until further order of the Court; *Maremont Corporation v. Federal Trade Commission, et al.*, Civil Action No. 69 C 2266. The Commission thereupon on November 6, 1969, issued its order cancelling the hearings then set to begin November 12, 1969, "pending the district court's disposition of the Commission's motion to dismiss * * *, and pending the Commission's decisions on the interlocutory matters in this proceeding which are now before the Commission."

The district court thereafter on January 5, 1970, dismissed the complaint filed by respondent and respondent appealed. Pending appeal, the district court entered an order restraining the Commission from holding any further hearings.

The Circuit Court of Appeals for the Seventh Circuit rendered its decision on such appeal on September 3, 1970, and affirmed the decision of the district court. *Maremont Corporation v. Federal Trade Commission, et al.*, 431 F.2d 124 (7th Cir. 1970); 1970 Trade Cases, ¶73310 [8 S. & D. 1233]. It also ordered on September 22, 1970, that the district court's order of January 16, 1970 restraining the Commission from further proceeding pending the appeal be vacated.

Thus, the Commission is now free to continue with the interrupted proceedings in this matter.

I

Respondent's appeal under Section 3.35(b) of the Commission's rules is from the examiner's order issued October 16, 1969 denying its application for issuance of subpoenas *duces tecum*. This appeal is cross referenced to respondent's other request filed contemporaneously with the appeal which seeks leave to file interlocutory appeal from the same order of the examiner insofar as it denies other discovery motions made by respondent. The other motions denied were (a) respondent's motion for access to special industry survey and (b) its motion for renewed consideration of certain discovery requests.

On the appeal from the order denying subpoenas, respondent generally challenges the appropriateness of the examiner's ruling and contends his action is arbitrary. Similarly as to the requests to appeal involving the special industry survey and other discovery matters discussed below, respondent's challenge is chiefly directed to the ex-

aminer's exercise of his discretion in denying their requests. In connection with the subpoenas the hearing examiner ruled as follows:

Respondent's third application was made *ex parte*, for the issuance of discovery subpoenas *duces tecum* to 13 manufacturers of automotive parts. The specifications for said subpoenas call for a vast array of sales data, broken down by nine customer classifications and multiple geographic areas, and considerable other data and documents, including names of customers and financing of customers. The data requested cover a minimum period of three years and, in some instances, five years. Based on extensive experience in similar cases, the examiner would estimate that it will take over six months to accomplish even minimal compliance with said subpoenas, assuming no motions to quash, limit or for protective orders were filed. Were such motions to be filed, and typical interlocutory appeals taken, a delay of at least one year would ensue. The vast bulk of the data and documents sought by respondent are either plainly irrelevant, or their relevance has not been adequately demonstrated in its application. Considering the lateness of the hour and the dubious relevance of much of what is sought, the examiner is not disposed to issue the requested subpoenas *duces tecum*, and await the filing of the usual third-party motions. Should the relevance of any of the data be demonstrated after the start of hearings, respondent may renew its application on a more limited basis, and appropriate arrangements can be made to recess the hearings to permit discovery necessarily deferred. (Order Denying Discovery Applications, filed October 16, 1969, Pgs. 4 and 5)

The hearing examiner has broad discretion in the discovery area. There has been no showing here of any abuse of his discretion. Moreover, the examiner has indicated that if the relevance of the data should later be demonstrated, respondent may renew its application, albeit on a more limited basis. We do not believe that this appeal has been justified under the Commission's Rule Section 3.35 (b) and it will, accordingly, be denied.

II

The request to appeal from the examiner's order filed October 16, 1969, so far as it denies respondent's other two motions, in effect raises for reconsideration matters previously presented to the Commission. On the "motion for renewed consideration of certain discovery requests," the examiner notes that he previously denied such requested discovery by his order of April 7, 1969; that a request for permission to appeal such order of denial was denied by the Commission; and that respondent has presented no substantial reason for modifying his prior order. The examiner notes that the type of discovery sought would only result in protracted delay and serve no constructive purpose.

The respondent's second motion denied seeks "access to special industry survey." The examiner concluded that this request was actually a motion for reconsideration of his order of April 2, 1969, denying such request, and as to which a request to appeal was also denied. The

examiner states that respondent has advanced no substantial new reason not previously considered by him and that were he to grant the request, it would result in a delay of from six months to a year or more. Finally, the examiner suggested that to the extent any of such material may be relevant for defense purposes, respondent may renew its application at the end of complaint counsel's case-in-chief.

On both these matters involving pretrial discovery, the examiner, as stated, has broad discretion and no showing is made that he abused his discretion. There has been no adequate showing here as required by Commission Rule Section 3.23 to justify an interlocutory appeal. Such requests will therefore be denied.

III

The respondent, in its remaining document filed October 27, 1969, requests leave to file an appeal from the examiner's order scheduling hearings filed October 17, 1969. Respondent raises two main points in this request.

The first relates to the examiner's conclusion that the proceeding is ready for trial. Respondent's argument under this point concerns details of the availability to respondent of complaint counsel's evidence including "basic statistical evidence." A part of respondent's complaint seems to be that there have been delays in the turning over of this material particularly in its final form, and that it therefore needs more time to prepare its defense. This point was, of course, made about one year ago. The intervening period has assuredly given respondent ample time to review the materials and prepare its defense. We recognize that respondent's argument goes somewhat beyond merely seeking additional time, *i.e.*, it seems to be suggesting that it is not receiving the production of certain of the documents to which it is entitled for the purpose of preparing its defense. It claims for instance it has not been furnished "summaries" of the expected testimony of some 40 out of 75 witnesses which complaint counsel has indicated they will call, allegedly in defiance of the hearing examiner's order.

The question on the completeness of the production ordered seems to us to be quite clearly a matter concerning procedure and the conduct of the trial which should be left to the hearing examiner's discretion. We do not believe there has been a showing he has abused his discretion in scheduling the formal hearings to begin especially since as indicated above respondent has now had an additional year for preparation.

The second point respondent raises on this request is the assertion that the examiner erred in selecting Washington, D.C. as the appro-

prate place for trial. On this issue of venue the examiner held as follows: "In the considered judgment of the examiner hearings will proceed with far more expedition, and will cause much less overall inconvenience if they are held in Washington, D.C." He also indicated that should it become necessary to recess at the end of complaint counsel's case-in-chief he would give further consideration to a request from respondent as to the necessity for setting *defense hearings* in Chicago.

We are of the view that the examiner here appropriately exercised his discretion in balancing the various interests on this matter of place of trial. See also the court's discussion of this issue in *Maremont Corporation v. Federal Trade Commission, supra*. There has been no showing here to justify an appeal under Section 3.23 of the Commission's rules; therefore, respondent's request will be denied.

IV

Finally, respondent on November 10, 1969, subsequent to the day the Commission was restrained in the interim from further proceedings filed a request titled as follows:

Respondent's Request for Leave to File Interlocutory Appeal from Order Denying Request for Certification to the Commission of "Motion to Dismiss or, in the Alternative, for Plenary Hearing on Commingling of Functions and Ex Parte Communications."

Respondent claims that it was error for the hearing examiner not to certify its motion concerning alleged *ex parte* activities asserting that the motion was addressed to the Commission's administrative discretion. Respondent attached to its request a copy of its motion entitled:

Motion to Dismiss or, in the Alternative, for Plenary Hearing on Commingling of Functions and Ex Parte Communications.

Since the motion is in fact before us as if it had been certified, we believe it is unnecessary in the circumstances here to consider the assertion of error for failure to certify. We will go immediately to consideration of the motion.

Respondent in its motion, bases its claim of *ex parte* communications on the statements made by complaint counsel relative to the role in this proceeding of Steven Nelson, an economist employed by the Commission. It is averred that complaint counsel stated among other things in their motion filed September 16, 1969, contending for Washington, D.C. as the place of trial that Mr. Nelson "is frequently consulted by the Commission and senior staff members regarding factual background and policy in the automotive parts industry. * * *" It claims that this admission constitutes an acknowledgement of a violation of

the Commission's own rules, the Administrative Procedure Act and the constitutional guarantees of due process.

Complaint counsel in their response filed November 12, 1969, attached their response to the examiner on this issue and an affidavit of Mr. Nelson. In the latter document, Mr. Nelson states, among other things:

Since my participation in helping to prepare the staff recommendation to the Commission that a proposed complaint should issue against Maremont Corporation, I have had no *ex parte* communications of any kind, written or verbal, by way of advice or otherwise, concerning the Maremont complaint (D. 8763) or any aspect thereof with the Hearing Examiner, the Commission, any Commissioner or any member of any Commissioner's personal staff.

The court in *Maremont v. Federal Trade Commission, supra* in considering this issue held that the facts outlined to them "do not constitute a violation of the doctrine of separation of functions." The Commission concludes on the basis of Mr. Nelson's affidavit and on the basis of the knowledge of the Commissioners that Mr. Nelson since the issuance of the complaint here under Part 3 of the Commission's rules has not engaged in *ex parte* communications concerning the Maremont matter of any kind with the Commission, with any Commissioner or any officer or employee of the Commission connected with the decisional process. Furthermore, there will be no such communications. We believe there has been a complete separation of functions in this matter fully in accord with the letter and the spirit of Sec. 5(c) of the Administrative Procedure Act and the Commission's rules. Respondent's requests in its motion to dismiss or in the alternative for plenary hearing on alleged commingling of functions and *ex parte* communications filed October 23, 1969, will be denied. Accordingly,

It is ordered, That respondent's motion for a waiver of page limitation on its request to appeal as to the scheduling of hearings be, and it hereby is, granted.

It is further ordered, That respondent's appeal filed October 27, 1969, from the order denying applications for the issuance of subpoenas *duces tecum* be, and it hereby is, denied.

It is further ordered, That respondent's request filed October 27, 1969, for leave to file interlocutory appeal from order denying discovery applications be, and it hereby is, denied.

It is further ordered, That respondent's request filed October 27, 1969, for leave to file interlocutory appeal from order scheduling hearings be, and it hereby is, denied.

It is further ordered, That respondent's motion to dismiss or, in the alternative for plenary hearing on commingling of functions and *ex parte* communications filed with the hearing examiner and treated

as having been certified to the Commissioner on November 10, 1969, be, and it hereby is, denied.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for further proceedings in accordance with the Commission's Rules of Practice.

ASH GROVE CEMENT CO.

Docket 8785. Order and Opinion, Oct. 22, 1970

Order granting appeals of respondent from hearing examiner's order granting motions to quash subpoenas directed to two concrete companies, striking the hearing examiner's orders relative thereto, denying respondent's motion for issuance of subpoena to Acting Director of Bureau of Mines, and returning case to examiner.

OPINION AND ORDER RULING ON INTERLOCUTORY APPEALS AND MOTION
CERTIFIED TO THE COMMISSION

This matter is before the Commission upon two separate interlocutory appeals filed by the respondent on September 21, 1970, and upon the hearing examiner's certification to the Commission of a motion by respondent for the issuance of a subpoena *duces tecum* to a government official, filed September 25, 1970. Each of the appeals deal with an order of the hearing examiner granting (one conditionally and the other without prejudice) the motion of a third party to quash a subpoena *duces tecum* issued to it at the instance of respondent.

I

The first appeal we will consider is that filed on September 21, 1970, from the hearing examiner's order conditionally granting the motion of Denny Concrete Company (Denny) to quash a subpoena *duces tecum* served upon its president, J. Gilbert Denny, at the instance of respondent. In its motion filed September 3, 1970, Denny states among other things that "the scope of the Subpoena is unreasonable in that much, if not all, of the requested data has no relation to Respondent's business and to require Denny Concrete Company to compile and produce the data would place an onerous burden, physically and economically, on the company."

The hearing examiner conditionally granted Denny's motion in an order filed September 11, 1970. He held that Denny had not carried its burden of showing that its various allegations should be granted, with the apparent exception of that above quoted. Stating that the Commission's rules are silent on the question posed by the claim of onerous burden, the hearing examiner applied Rule 45(b)(2) of the

Federal Rules of Civil Procedure. Rule 45(b) in its entirety reads as follows:

(b) For Production of Documentary Evidence.

A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

Respondent in appealing from such ruling argues principally (1) that Denny did not ask for the relief granted; (2) that a mere claim of economic burden with no specification of expense would not support a motion to quash and (3) that respondent is unaware of any precedent of applying Federal Rule 45(b) (2) in Commission practice.

Commission adjudicative proceedings are not governed by the Federal Rules of Civil Procedure; rather they are conducted under the Commission's own duly promulgated Rules of Practice. We would add however, that while the Federal rules are not applicable, the standards developed by the courts in interpreting such rules are frequently informative and useful in applying the Commission's rules to specific situations. *L. G. Balfour Company*, Docket No. 8435, 62 FTC 1541, 1546, footnote 14 (order on interlocutory appeal issued May 10, 1963).

As to the appeal in issue we hold that, not as a general rule but in a particular instance where justice and fairness so demands, the examiner's powers are sufficiently broad to require the payment by a respondent of appropriate and determinable expenses connected with compliance by a third person with a subpoena issued at the instance of a respondent. Additionally, if fairness so demands, it is further within the examiner's authority to require that such payment be made in advance.¹

Such relief should not be given automatically on a mere claim of economic burden. Moreover, we believe the expenses claimed should be of an unusual nature, *i.e.*, something more for example than the costs of routinely pulling records from files in the ordinary situation. In this instance, Denny has not specified the expenses which it will allegedly incur. It seems to us therefore that it would be difficult if not impossible at least without negotiations for respondent to tender in advance the cost of the production. Where no specific costs are men-

¹ Cf. *Miller v. Sun Chemical Corp.* (D.C. N.J. 1952), 12 F.R.D. 181; *Fox v. House*, 29 F. Supp. 673, 677 (D.C.E.D. Okla. 1939); *State Theatre Co. v. Tri-State Theatre Corp.* (D.C. Neb. 1951), 11 F.R.D. 381; *Ulrich v. Ethyl Gasoline Corp.* (D.C.W.D. Ky. 1942), 2 F.R.D. 357.

tioned, and the examiner nevertheless determines that there are or might be unusual expenses for which compensation should be made by respondent in advance, it seems to us that as a practical matter some determination should be made of the amount of such unusual expenses or at least an approximation thereof so that the tender can be made by the respondent. We leave it to the examiner to work out the best procedure for accomplishing the result we have outlined.

In the circumstances, we will grant the appeal, strike the examiner's order conditionally granting Denny's motion to quash and return the matter to the examiner for further consideration in light of our views expressed herein.

II

The second appeal for our consideration is that filed by respondent September 21, 1970, from the hearing examiner's order granting the motion of Olathe Ready-Mix Co. (Olathe) to quash subpoena *duces tecum*. Olathe moved on August 31, 1970, to quash subpoena *duces tecum* served upon its president, Delton E. Davis, at the instance of respondent. The hearing examiner in his order filed September 11, 1970, granted the motion to quash without prejudice to the reissuance of a new subpoena *duces tecum* subject to its conformity with the legal requirements described in his order. In such order he refers to the Rule 45 (b) and (c) of the Federal Rules of Civil Procedure, and the requirements thereof.

Olathe, in its motion to quash, claimed that the specifications of the subpoena 1 through 10 would require it to transport virtually every corporate record that it has maintained for the years specified, which it asserts "would be unduly burdensome, oppressive and unreasonable." Olathe further asserts that respondent has not tendered to it "the necessary witness fees nor the necessary costs of transporting the records requested in the specifications to Washington, D.C."

The examiner in his order granting Olathe's motion states as he did in the Denny matter that the Commission's rules are silent on the questions posed thereby and that therefore he would resort to Rule 45 of the Federal Rules of Civil Procedure. While he states that the subpoena is subject to Rule 45(b)(2) of the Federal rules, he apparently specifically applied Rule 45(c), the relevant part of which states as follows:

Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him the fees for one day's attendance and the mileage allowed by law.

Respondent argues in this connection among other things (a) that Rule 45(c) is inapplicable to Commission proceedings, (b) that the question is in fact covered by Commission Rule 4.5 (a) and (c), (c)

that Olathe's motion does not ask for the relief granted and (d) that if Rule 45(b) (2) governs, it was improperly applied.

We have previously stated that the Federal Rules of Civil Procedure do not govern Federal Trade Commission adjudicative proceedings. The Commission's rules on the payment of fees and mileage provide that: "Any person compelled to appear in person in response to subpoena shall be paid the same fees and mileage as are paid witnesses in the courts of the United States." (Section 4.5(a)) and that "The fees and mileage referred to in this section shall be paid by the party at whose instance deponents or witnesses appear." (Section 4.5(c)) Such provisions, as we construe them, are not explicit on the question of advance payments. Normally, in Commission proceedings, fees and mileage are paid at the time the witness actually appears. However, the examiner has discretion in such matters and he has sufficient authority in particular circumstances where justice and fairness so require to direct that the payment of such fees and costs be made in advance. On the question of transportation costs, if these are found to be unusually burdensome and fairness requires that a respondent at whose instance the material is being transported pay such costs, the examiner in such circumstances also has the authority to require the payments be made in advance. However, as in the Denny matter above, a determination should be made on the amount of such costs so that an advance tender can as a practical matter be provided. To the extent that the examiner is requiring in this instance advance payment for other production costs, whatever they may be, the same considerations apply here as in the Denny matter for a determination of such costs.

Accordingly, we will grant the appeal as to the Olathe matter, strike the hearing examiner's order quashing the subpoena directed to Olathe and return the matter to the hearing examiner for his further consideration in light of the views expressed herein.

III

The final issue before us in this proceeding concerns the certification to the Commission by the examiner on September 25, 1970, of the motion by respondent for the issuance of a subpoena *duces tecum* to a government official with the examiner's recommendation of denial. Respondent on September 8, 1970, moved pursuant to Rules 3.37 and 3.22(a) of the Commission's Rules of Practice for the issuance of a subpoena *duces tecum* to Dr. Earl T. Hayes, Acting Director of the Bureau of Mines, United States Department of Interior. The specification for the requested subpoena was attached to the application. The subpoena seeks the production of source material from which the

statistical tables and summaries from Bureau of Mines publications specified were prepared. The tables in issue, were offered and received in evidence as Commission Exhibits 49 through 55 and 68 and 69. Respondent claims that it has been denied the chance to inspect the basic data from which the tables were drawn and that it has been denied the opportunity for cross-examination of complaint counsel's evidence due to the fact that complaint counsel assertedly did not call a witness familiar with the data. It asserts that the information it seeks is necessary in order to afford it the right of cross-examination regarding the referred to exhibits.

Complaint counsel answered on September 18, 1970, contending that respondent has not shown the necessity for and the relevancy of the specified material as required by 3.37(b) of the Commission's rules. Further, complaint counsel state they do not intend to ask Dr. Hayes or any other official of the Bureau of Mines to testify concerning the exhibits. They assert the exhibits were offered pursuant to 28 U.S.C. 1733, which they argue exists to prevent officials of the government from frequent appearances to testify about official documents.

The hearing examiner in recommending that the motion be denied observes that among other things the request would appear to require a lengthy and burdensome production task not necessary to any appropriate discovery purpose in the case and would lead in his opinion to delay in the trial of the matter on the merits.

It appears that the issue here relating to the receiving into the record of the Bureau of Mines statistical tables and the purpose for which such were received has been previously considered in some form by the hearing examiner and the Commission on two occasions. The first was in connection with the examiner's order of June 15, 1970, denying respondent's application for a subpoena to produce documents from the Commission's files. An appeal from that order was denied by the Commission by its order issued July 15, 1970, upon the ground, among others, that no showing had been made that the hearing examiner had abused his discretion. The second occasion was that of the hearing examiner's order of August 19, 1970 in which he denied some of the specifications of subpoenas including those which called for the underlying statistical information submitted to the Bureau of Mines by the ten companies to whom the subpoenas were directed. The Commission in its order and opinion of September 18, 1970, denied respondent's appeal from that order.

In the last referred to Commission order and opinion we stated that the record shows the hearing examiner has considered the substance of respondent's request, heard substantial arguments thereon in pre-trial proceedings and that his order suggests a careful weighing of

the interests in the matter. We refrained however from deciding the correctness of his order one way or another. We ruled only that he did not abuse his discretion and that the merits of the issue would not be reviewed by the Commission at such stage of the proceeding.

It seems to us that what is involved here on the merits as suggested above is a question which again concerns the correctness of the hearing examiner's rulings respecting the receipt of and the purpose of the offering of the Bureau of Mines tables. He in effect has held that respondent's inquiry into the source material is unnecessary because the exhibits were offered only for a limited purpose and that "no proof would be offered or findings of fact proposed as to the competitive effect of the challenged Kansas City vertical mergers as respects the alternative relevant geographic market alleged in the complaint as being the United States as a whole." (Hearing examiner's order filed June 16, 1970, Pgs. 7 and 8)

It is clear that the examiner holds to the same view since in his certification he states that the purpose of respondent's request in various different forms has been previously presented to the examiner and rejected by him and he recommends the denial of the certification for the reasons so stated as well as the other grounds referred to.

The Commission held in the prior orders mentioned that this is a discovery area in which the hearing examiner has broad discretion. To allow the subpoena here sought would have a direct bearing on the examiner's prior rulings and his control of discovery and conduct of the proceedings. We do not reach the question therefore as to whether or not respondent has shown "necessity" and "relevancy" as required by Section 3.37. We hold merely that this matter concerns the hearing examiner's discretion in the discovery area, and that no showing has been made to justify overruling him in effect in his rulings on the question. We do not address ourselves to the correctness of his rulings; we hold only that he has not abused his discretion. Respondent's motion will therefore be denied. Accordingly,

It is ordered, That the respective appeals from the hearing examiner's order conditionally granting the motion of Denny Concrete Company to quash subpoena *duces tecum* and the hearing examiner's order granting the motion of Olathe Ready-Mix Co. to quash subpoena *duces tecum* be, and they hereby are, granted.

It is further ordered, That the respective orders of the hearing examiner filed September 11, 1970, conditionally granting the motion of Denny Concrete Company to quash subpoena *duces tecum* and the motion of Olathe Ready-Mix Co. to quash subpoena *duces tecum* be, and they hereby are, stricken.

It is further ordered, That respondent's motion filed September 8, 1970, for the issuance of a subpoena *duces tecum* to Dr. Earl T. Hayes,

Acting Director of the Bureau of Mines, United States Department of Interior be, and it hereby is, denied.

It is further ordered, That this matter be returned to the hearing examiner for further proceedings in accordance with the Commission's rules and consistent with the Commission's views expressed herein.

FIRESTONE TIRE & RUBBER COMPANY

Docket 8818. Order and Opinion, Oct. 23, 1970

Order granting SOUP, Inc., leave to intervene in case for the limited purposes of 1) presenting evidence of public interest, 2) presenting briefs and oral argument, and 3) exercising certain discovery rights.

REGARDING REQUEST OF SOUP, INC., FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL FROM AN ORDER OF THE HEARING EXAMINER DENYING ITS AMENDED MOTION TO INTERVENE

STATEMENT BY MACINTYRE, *Commissioner*:

A few law students have formed a corporation styled Students Opposing Unfair Practices, Inc. (hereinafter referred to as "SOUP").

SOUP, on September 1, 1970, filed with the hearing examiner in this matter a motion to intervene in this proceeding. The hearing examiner by order dated September 18, 1970, denied SOUP's amended motion on the ground that it had "failed to show good cause" as required by Section 5(b) of the Federal Trade Commission Act. That provision of law provides that "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene" in a proceeding by counsel or in person. Thereafter, on September 25, 1970, SOUP filed with the Commission its request for leave to file an interlocutory appeal from the hearing examiner's denial of its amended motion to intervene. Answers were filed by counsel for respondents and counsel in support of the complaint in opposition to that request. Thus was put in issue the validity of the hearing examiner's order denying the motion of SOUP to intervene as a full party with all the rights of parties in this proceeding.

I fully agree with the stated view of the majority that where substantial issues of law or fact appear to be involved in the request of persons wishing to present them to the Commission in a proceeding those persons should be heard and allowed to present the information they say they have about the issues. Likewise, I agree with the majority that in considering a request from persons to present information to the Commission we should weigh the additional factors involving the

expenditure of the Commission's limited resources and the prospects for a longer and more complicated proceeding. With these problems in focus I have proposed to the Commission that it grant SOUP, Inc., the privilege of a hearing to the extent that the hearing examiner be instructed to permit SOUP to participate in this proceeding for the limited purpose of presenting the evidence specified in its amended motion to intervene, filed September 1, 1970, at the conclusion of the complaint counsel's case-in-chief and that he be further instructed to reconsider SOUP's requests for disclosure and for leave to file *in forma pauperis*. Moreover, it has been my position that the Commission should not only thus hear SOUP, Inc., but should provide an opportunity for SOUP, Inc., to present briefs and argument to both the hearing examiner and the Commission if necessary to fully inform the Commission regarding any information it has bearing on the issues here and its views about such information and the issues. The majority of the Commission has not seen fit to adopt the proposal I made. Instead, the Commission ordered and directed the hearing examiner "to permit SOUP to intervene for the limited purposes" of presenting certain evidence and in filing certain briefs and argument and in exercising certain discovery rights which would be available to a party litigating the issues in question. I did not concur in the decision of the Commission to issue that order because I am convinced that the Commission will not be able because of that action to adjudicate and conclude this matter within a reasonable period of time. It does not require imagination or speculation to determine why that is so, neither does it require imagination nor speculation for us to know that when justice is delayed it may by that fact be denied.

OPINION AND ORDER GRANTING LIMITED INTERVENTION

This matter concerns a question of vital importance to the effective functioning of the Commission's adjudicatory process: the scope of the privilege of intervention and participation in Commission adjudications by responsible representatives of the consumer interest. In passing upon the motion now before us, the Commission is afforded an opportunity to clarify its previous position on this question in *In re Campbell Soup Co.*, Docket 1741, May 25, 1970 [77 F.T.C. 664].

The complaint in this proceeding, issued June 29, 1970, charges respondent with false and deceptive advertising with respect to the price and safety of its tires. On July 29, 1970, Students Opposing Unfair Practices, Inc. (hereinafter SOUP) filed a motion to intervene, for leave to proceed *in forma pauperis*, and for disclosure. The motion was opposed by both respondent and complaint counsel. By order issued August 21, 1970, the hearing examiner denied the motion

on the ground that no good cause for intervention had been established. Thereafter, on September 1, 1970, SOUP filed an amended motion to intervene, for leave to proceed *in forma pauperis*, and for disclosure, this time explaining in some detail the reasons for its belief that good cause exists for intervention in this case. The reasons were as follows: consumers are within the zone of interests sought to be protected by the FTC Act; SOUP is recognized as a responsible representative of the consumer's interests; members of SOUP have a personal stake in the outcome of the proceeding; this is an aggravated case, directly involving the health and safety of the public; the proposed order is inadequate to protect the public interest because it contains no provision for restitution and no affirmative disclosure provision to counteract the residual effects of respondent's deceptions; and SOUP desires to introduce factual and expert evidence on the residual effects of respondent's advertisements to prove the need for an affirmative disclosure provision in the final order. Respondent and complaint counsel again opposed the motion.

By order of September 18, 1970, the hearing examiner denied SOUP's amended motion on the ground that SOUP "has again failed to show good cause to support the motion." On September 25, 1970, SOUP filed with the Commission a request for leave to file an interlocutory appeal from the denial of its amended motion to intervene. The Commission has determined that SOUP's request should be granted, and that it should be allowed to intervene in this proceeding, with all of the rights of a party, for the limited purpose of presenting evidence and argument on the issue of the proper remedy and scope of the final order in this case.

Section 5(b) of the Federal Trade Commission Act provides that "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by Counsel or in person." Section 3.14 of the Commission's Rules of Practice provides that "The hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper." These provisions clearly reflect the fact that intervention in Commission adjudications is a matter of privilege, and that its grant or denial is a discretionary matter, to be decided on the basis of the particular facts and circumstances involved in each case in which intervention is sought.

In re Campbell Soup Co., Docket 1741, May 25, 1970, suggests the type of considerations that properly influence the grant or denial of a motion for intervention in a particular matter. Although that case

concerned a motion for intervention in consent order proceedings, which are not proceedings governed by Section 5(b) of the Act or Section 3.14 of the rules, the principles announced therein are generally applicable to the question of intervention in adjudication. The thrust of our opinion in *Campbell Soup* is that before the Commission will allow intervention into its proceedings, it must be demonstrated that (1) the persons seeking such intervention desire to raise *substantial* issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding in that case, when considered in light of other important matters pending before the Commission. This second factor means a determination that such additional expenditure is fully consistent with the Commission's own assessment of overall priorities governing the allocation of its own resources. A finding of this nature should be one prerequisite to an ultimate judgment that "good cause" exists to permit intervention in a particular case.

But we wish to emphasize that satisfaction of the above standard, or of any other test or formula, will not automatically result in a right of intervention. As stated previously, the exercise of discretion on a question of intervention depends on an assessment of all of the facts and circumstances of a particular case, and each grant or denial will have minimal, if not non-existent, precedential value. But as further guidance for future applicants, we would suggest the following additional factors which will generally be considered: the applicant's ability to contribute to the case; the Commission's need for expedition in the handling of the case; and the possible prejudice to the rights of original parties if intervention is allowed.

The Commission applauds the efforts and enthusiasm of groups such as SOUP to fight for the public interest by means of participation in the work of federal agencies serving the same public interest. We are also very cognizant of the potentially great contribution to the work of such agencies, including our own. *Cf. Office of Communications of the United Church of Christ v. FCC*, 359 F. 2d 994 (D.C. Cir. 1966). But there are important countervailing considerations which must be weighed in the balance: the need to maintain an orderly and efficient adjudicative procedure and the need to control resource allocation on the basis of a system of established priorities. The public would be ill-served by an agency whose proceedings were vulnerable to disruption and agonizing delay by means of the proliferation of

parties and other participants. Furthermore, the need for public interest intervenors in FTC proceedings is substantially less than the need for such intervention in the proceedings of other agencies. Unlike some other agencies, the FTC has a built-in public interest prosecutor in all of its proceedings; our adjudications are truly adversarial, without intervention of any kind. Therefore, it is reasonable to require a substantial showing of special circumstances justifying intervention in a particular case.

In allowing intervention in the present case, we are beginning a delicate experiment, one requiring caution and close observation. Nothing in this opinion should be construed as a permanent or irreversible policy decision; we have many apprehensions concerning this step, and we find a need for a period of probation.

It now remains to explain why, in this particular case, the Commission has determined that SOUP has made a sufficient showing of "good cause" to justify allowance of intervention, consistent with the views expressed in this opinion. SOUP has raised the issue of the necessity for affirmative disclosure relief in a case that involves a public safety danger, a category of cases in which such relief may be especially appropriate. See *Campbell Soup, supra*, at 21,423. Furthermore, this issue and this type of case is high on the list of our own priorities. The Commission believes that intervention in this case may contribute to a fuller appreciation of the need for stronger remedies generally in Commission cases. We do not believe that in this particular case the grant of intervention will unduly lengthen or complicate the case, or that it will prejudice the rights of the respondent.

Having considered all of the views and arguments contained in all of the briefs submitted by SOUP, by respondent, and by complaint counsel in connection with this matter.

It is ordered, That SOUP's request for leave to file an interlocutory appeal from the hearing examiner's order denying its motion to participate as a party in these proceedings be, and it hereby is, granted.

It is further ordered, That the examiner be, and hereby is, directed to permit SOUP to intervene for the limited purposes of:

- (1) presenting, at the conclusion of complaint counsel's case-in-chief, relevant, material, and noncumulative evidence on the issue of whether the proposed order to cease and desist adequately protects the public interest;
- (2) presenting, with respect to said issue, briefs and oral argument in such manner and to such an extent as the examiner may deem reasonable; and
- (3) exercising, with respect to said issue, such discovery rights as the examiner shall deem reasonable and necessary.

Commissioner MacIntyre filed a separate statement.

ASH GROVE CEMENT CO.

Docket 8785. Order and Opinion, Nov. 19, 1970

Order granting appeal of two third parties from denial by hearing examiner that certain parts of material subpoenaed be treated as confidential and remanding case to hearing examiner.

ORDER AND OPINION RULING ON A JOINT APPEAL FROM HEARING EXAMINER'S ORDER DENYING CONFIDENTIAL TREATMENT

This matter is before the Commission upon the joint appeal filed October 23, 1970, by Missouri Portland Cement Company (Missouri Portland) and Botsford Ready Mix Company (Botsford), third parties in this proceeding, from the examiner's order filed October 15, 1970, denying their motions to quash certain specifications in the subpoenas served upon them at the instance of respondent or, in the alternative, to grant confidential treatment.

The hearing examiner, in the appealed from order, held in part that to apply the so-called *Mississippi River*¹ confidential treatment as requested would unduly and unreasonably restrict and impair the preparation of respondent's intended defense and its rights of cross-examination. He further held that the circumstances present appeared to allow a departure from *Mississippi River* treatment; however he failed to detail these circumstances. The hearing examiner in a footnote suggests there is support for his position in the "full discussion and legal precedents cited in respondent's answer in opposition to the instant motion filed September 30, 1970." Such answer, however, insofar as we can determine contains no factual recitation distinguishing this case from *Mississippi River*.

Missouri Portland and Botsford in their appeal argue primarily that they should be granted confidential treatment like that awarded in *Mississippi River* because they allege the data is highly confidential business information and disclosure thereof to competitors and potential competitors would assertedly injure their competitive viability.

¹ In the Matter of *Mississippi River Fuel Corporation*, Docket No. 8657, the Commission in an interlocutory order issued June 8, 1966 [69 F.T.C. 1186], directed that materials submitted in response to the subpoenas there in question "should be submitted to a reputable and disinterested accounting firm, to be selected by the hearing examiner in consultation with the parties, which shall compile and present the material to respondent's counsel in such a manner that no individual company's confidential arrangements or data will be revealed." This action is generally referred to herein as the *Mississippi River* treatment. The *Mississippi River* case is now on appeal in the United States Court of Appeals for the Eighth Circuit [454 F.2d 1083]. See also, the Commission's "Order after Remand" in *Lehigh Portland Cement Company*, Docket No. 8680 issued July 31, 1970 [p. 1642 herein] in which *Mississippi River* treatment was granted but with the right to counsel to obtain full disclosure during the hearing if they could show the need therefor.

