Order denying motions to quash several subpoenas duces tecum directed to officials of ready-mix concrete companies, and further providing that the subpoenaed documents be turned over to an accounting firm selected jointly by Commission and respondent's counsel.

## ORDER ENTERTAINING AND DENYING APPEALS FROM HEARING EXAMINER'S DENIAL OF MOTIONS TO QUASH OR LIMIT SUBPOENAS

In January 1965, the Commission issued the complaint in this case charging that respondent's acquisitions of ready-mix concrete firms in Kansas City, Missouri, Memphis, Tennessee, and Cincinnati, Ohio, during the period from September 1963 through

January 1964, violated Section 7 of the amended Clayton Act. On the application of respondent's counsel, the hearing examiner on January 27, 1966, entered an order for the taking of depositions and the issuance of subpoenas *duces tecum* to 33 portland cement manufacturers and 30 ready-mix concrete distributors and their officials, many of whom have moved to quash or limit these subpoenas. On April 12, 1966, the hearing examiner heard oral argument and conducted a conference on the motions to quash or limit the subpoenas. Thereafter, on April 28, 1966, the hearing examiner issued an order denying the motions to quash but modifying and limiting the subpoenas in some respects. The matter is now before the Commission on the appeal from the hearing examiner's order of a number of those persons subpoenaed.

Section 3.17 of the Commission's Rules of Practice provides that an appeal to the Commission from the hearing examiner's ruling granting or denying a motion to limit or quash any subpoena "will be entertained by the Commission only upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing will better serve the interests of justice." The Commission has determined that the requisite showing has been made in this case and it therefore entertains the appeals.

Complaint counsel and respondent's counsel have stipulated, for the purposes of this proceeding only, that if a cement consumer had or has one or more of the relationships described below with a portland cement manufacturer, then during the existence of that relationship, the cement consumer is likely to be influenced to buy a significant part of its cement requirements from such manufacturer:

(1) Any debt due of a cement consumer to a manufacturer which has been owing for more than 60 days;

(2) Debts of a cement consumer guaranteed by a cement manufacturer;

(3) Any lease between a cement manufacturer and a cement consumer for assets used by the consumer in the production or distribution of ready-mixed concrete or concrete products;

(4) Any lease-purchase agreement between a cement manufacturer and a cement consumer for assets used by the consumer in the production or distribution of ready-mixed concrete or concrete products;

(5) Any right or option of a cement manufacturer to acquire any of the stock or assets of a cement consumer;

(6) Any sale of equipment or other property where the deferred purchase price is secured by lien or retention of title by a cement manufacturer to a cement producer;

(7) The furnishing of equipment or other property by a cement manufacturer to a cement consumer without charge or for a consideration less than the fair value of the property;

(8) Any contribution of capital by a cement manufacturer to a cement consumer;

(9) The placing or retaining on the payroll of a cement manufacturer of any officer or employee of a cement consumer; and

(10) The presence on the Board of Directors of a cement consumer of one or more directors common to a cement manufacturer.

The subpoenas at issue here seek documents and writings which reflect any of these relationships* for the years 1963 through 1965 and, as modified by the hearing examiner, the geographic area covered is that defined in the complaint. The hearing examiner's order provided that the subpoenas may be complied with by mailing the specified papers to respondent's counsel in lieu of personally appearing and testifying. The order contains further provisions with reference to the copying of documents and disclosure of their contents, all designed to protect the confidentiality of the information submitted in response to the subpoenas.

Appellants launch a broadly based attack on the validity of the subpoenas. They argue first that the subpoenas constitute an effort on the part of respondent to engage in a discovery proceeding unauthorized by the Commission's Rules. We disagree. By the subpoenas, respondent proposes to gather evidence by which it expects to prove certain aspects of the structure of the cement and ready-mix markets in the relevant geographical areas. The subpoenas cover a limited and specified class of documents relating to specifically defined relationships—relationships which constitute elements of the economic setting in which the challenged mergers took place. On this basis, we reject appellants' contention that "respondent's purpose is not to obtain evidence but to conduct an expedition in the hope of discovering something helpful."

*The hearing examiner's order modified the subpoenas to require data as to debts owing for more than 90 days rather than the 60 days stipulated.

Although it is not necessary to decide now, and we do not decide, whether the type of evidence that respondent seeks to elicit by the subpoenas will constitute a defense to the Section 7 violations charged in this case, it does appear that the material sought is relevant to an appraisal of market conditions in the cement industry and pertinent to the issues in this case. Respondent is entitled to gather such information for purposes of making its defense. It is clear that the information sought would not be given voluntarily and that it is available to respondent only through compulsory process. If respondent is denied the opportunity to collect this material, it will be unable to lay the foundation for whatever legal arguments, based on market conditions, it may wish to make. It is to be emphasized that the Commission does not imply its acceptance or rejection of any legal argument that respondent may choose to make in its defense. We merely hold that respondent is not to be foreclosed, at this stage of the proceeding, from attempting to make its defense by being denied the opportunity to obtain the necessary evidence. We also reject appellants' contentions that some items of the subpoenas are not relevant.

Appellants contend also that respondent's real purpose is to gather highly confidential competitive data which will be "of incalculable value to respondent in competing with movants." The Commission believes that the data sought is not of so confidential or sensitive a nature as appellants claim and, moreover, that the protective provisions of the examiner's order render it highly unlikely that the material submitted by appellants can be put to unfair or improper competitive use by respondent. However, out of an abundance of caution and in order to avoid any possibility that the allegedly confidential data will be improperly used, we direct that material submitted in response to the subpoenas 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 manner that no individual company's confidential arrangements or data will be revealed. This shall be in addition to the protective provisions already contained in the examiner's order. The request for oral argument is denied.

*It is so ordered.*

Commissioner MacIntyre not participating.

# MODERN MARKETING SERVICE, INC., ET AL.

# C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY

*Dockets 3783, 4589. Order, June 9, 1966*

Order denying respondents' request to either terminate case or to defer filing of proposed findings until the Supreme Court has ruled on *F.T.C.* v. *Jantzen, Inc.*, 356 F. 2d 253 (9th Cir. 1966), but granting a 30 day extension to prepare findings.

## ORDER DENYING RESPONDENT'S MOTION TO TERMINATE PROCEEDING, OR, IN THE ALTERNATIVE, TO DEFER FILING OF PROPOSED RECOMMENDATIONS AND GRANTING REQUESTED EXTENSION OF TIME FOR FILING RECOMMENDATIONS

This matter is before the Commission upon the hearing examiner's certification, under § 3.6(a) of the Commission's Rules of Practice, of a motion of respondent, Nash-Finch Company, filed May 4, 1966, requesting that the proceeding be terminated, or, in the alternative, that the filing of proposed recommendations and other submissions with the examiner be deferred until such time as the United States Supreme Court has ruled that the Commission has authority to conduct a proceeding for enforcement of a pre-1959 Clayton Act order which was commenced subsequent to the enactment of the Clayton Act Finality Act. In addition, respondent, on May 6, 1966, filed a motion to extend from June 9, 1966, to August 9, 1966, the time to file its proposed recommendations with the examiner, in the event that its May 4, 1966, motion is denied.

In his certification of May 20, 1966, the examiner recommended that the Commission deny both parts of the first motion and grant the second.

Respondent's contention in support of the requested termination is that the Commission has no authority to prosecute this proceeding, inasmuch as all statutory provisions for the enforcement of pre-1959 Clayton Act orders, by a proceeding commenced after July 23, 1959, were repealed by enactment of the Clayton Act Finality Act. Respondent cites in support the recent decision of the Court of Appeals for the Ninth Circuit in *Federal Trade Commission* v. *Jantzen, Inc.*, 356 F. 2d 253 (1966).

Respondent supports its alternative request for a deferment of the filing of proposed recommendations until the Supreme