ORDER DENYING RESPONDENT'S MOTION TO REOPEN HEARINGS

Respondent has moved for an order reopening the hearings herein before the hearing examiner for the purpose of presenting

evidence relevant and material to the issue of whether the Commission should include in any final cease and desist order to be issued herein a prohibition against disseminating or causing the dissemination of any advertisement in connection with the offering for sale, sale or distribution of any drug within the meaning of the Federal Trade Commission Act which misrepresents directly or by implication the efficacy of such drug. In its motion papers respondent states that this issue was "suggested for the first time by the Commission in its decision *In the Matter of American Home Products Corporation,* Docket 8641" [70 F.T.C. 1524].

We cannot agree with the premise of respondent's claim—that the scope of the order which may be entered by the Commission herein was not at issue in the case until the Commission's decision in the *American Home Products* case. The order issued by the Commission in *American Home Products* was formulated pursuant to the established principle that the Commission has "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" (*Jacob Siegel* v. *Federal Trade Commission,* 327 U.S. 68, 611 [1945]). The *American Home Products* decision in no way represented a departure from existing law. Thus respondent herein has or should have been aware from the inception of this proceeding of the Commission's "wide latitude for judgment" (*id.* p. 613) in selecting an appropriate form of relief, and it had full opportunity to introduce at the hearing below any evidence relevant to the scope of the order. Therefore, there would appear to be no necessity for the reopening of this proceeding. This does not preclude respondent from making any argument it wishes to make with regard to the scope of the order which may be entered in this case.

Accordingly, it is hereby

Ordered, That respondent's motion be and it hereby is denied in its entirety.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order, Feb. 2, 1967

Order denying complaint counsel's request to file an interlocutory appeal from hearing examiner's granting of respondents' application for depositions and issuance of subpoenas duces tecum.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission upon the request of complaint counsel, pursuant to § 3.20 of the Commission's Rules of

Practice, for permission to file an interlocutory appeal from the hearing examiner's order filed January 9, 1967, granting respondent's applications for depositions and the issuance of subpoenas duces tecum.[1] Respondents have filed an answer thereto opposing such request.

The Commission, on October 13, 1966, issued an order instructing the examiner, upon making such provisions as he deemed necessary to assure respondents an opportunity for future discovery in the circumstances mentioned, to "direct the respondents to commence, as soon as possible, their pretrial submissions and procedures as ordered in Prehearing Order No. 1." The examiner thereafter, on October 20, 1966, filed an amendment of Prehearing Order No. 1, ordering the filing by respondents of itemized pretrial submissions. Respondents thereupon filed a submission pursuant to the examiner's order and an application for depositions and the issuance of subpoenas duces tecum involving the ten "resources" or suppliers designated by complaint counsel in response to Item 1(a) of the original Prehearing Order No. 1.[2]

Complaint counsel, in their request for permission to file interlocutory appeal, state that the order of the hearing examiner permits respondents to depose and to obtain documents from the principal suppliers they intend to rely on to prove price concessions in asserted violation of Section 2(a) of the Clayton Act and that the taking of the depositions will be to a large extent a duplication of the trial of the case. We do not believe, however, complaint counsel have sufficiently demonstrated they can show that the hearing examiner has erred in granting respondents' application. The hearing examiner, as has been noted in prior matters, has broad discretion in discovery proceedings. *American Brake Shoe Company,* Docket No. 8622 (order issued September 1, 1965) [68 F.T.C. 1169]. The examiner, in this instance, has based his order upon a finding of a showing of good cause by the respondents and we have no reason to dispute this finding.

[1] While complaint counsel has filed a request under Rule 3.20, it should be pointed out that since the matter concerns a ruling by the examiner on a request for issuance of subpoenas, direct appeal to the Commission could have been taken pursuant to § 3.17 of the Rules. See *American Brake Shoe Company,* Docket No. 8622 (order issued September 1, 1965) [68 F.T.C. 1169], and *Best & Co., Inc.,* Docket No. 8669 (order issued June 28, 1966) [69 F.T.C. 1199].

[2] Respondents, in their submission, state that they are now "prepared to begin their pretrial discovery by taking depositions suggested by the Commission" and will subsequently "be able to commence the other discovery suggested in the Commission's order." This we believe concerns a misconstruction on the Commission's October 13, 1966, ruling. The opinion there, while discussing respondents' apparent discovery needs which respondents themselves had previously suggested, makes no determination that respondents are required to or should engage in certain discovery procedures or in any procedure not covered by Prehearing Order No. 1. This is clear from the precise terms of the Commission's order directing the commencement of pretrial procedures. Respondents must justify each request and all requests for pretrial discovery in accordance with the Commission's Rules and we believe that is what the examiner has required on the application here involved.

The examiner, of course, must be vigilant and firm in preventing any abuse of the Commission's procedures. The Commission's Rule on depositions (§ 3.10(a)) reads in part:

> Such order [as to a deposition] may be entered upon a showing that the deposition will constitute or contain evidence relevant to the subject matter involved and that the taking of the deposition will not result in any undue burden to any other party or *in any undue delay of the proceeding*. . . . (Emphasis supplied.)

As the Commission pointed out in *Topps Chewing Gum, Inc.*, Docket No. 8643 (order issued July 2, 1963) [63 F.T.C. 2196, 2198]:

> . . . care must be taken that depositions are not substituted for continuous hearings required by these Rules and that they are not used as a means to delay the disposition of the proceeding. . . .

There is no indication here that the examiner will not follow the letter and the spirit of the Commission's Rules and prevent any misuse of the pretrial discovery procedures.

In the circumstances, we do not believe that complaint counsel have justified their request for permission to file an interlocutory appeal as provided for under § 3.20 of the Commission's Rules. Accordingly,

It is ordered, That the request of complaint counsel for permission to file an interlocutory appeal from the hearing examiner's order granting respondents' application for depositions and issuance of subpoenas duces tecum, filed January 9, 1967, be, and it hereby is, denied.

LEHIGH PORTLAND CEMENT COMPANY, Docket No. 8680
MARQUETTE CEMENT MANUFACTURING COMPANY, Docket No. 8685
MISSISSIPPI RIVER FUEL CORPORATION, Docket No. 8657

Orders and Opinion, Feb. 6, 1967

Orders denying respondents' motions to vacate complaints and remanding proceedings to hearing examiner for hearings.

OPINION OF THE COMMISSION

BY ELMAN, *Commissioner:*

In each of these three separate cases, in which the Commission issued complaints alleging violations of Section 7 of the Clayton

Act, as amended,[1] the respondents have filed motions to dismiss or suspend the proceedings. Since these motions raise the same questions, they will be dealt with in a single opinion.

On April 22, 1966, the Commission announced that it would hold a public hearing for the purpose of developing a general enforcement policy with regard to vertical mergers in the cement industry (Appendix A). The hearing was held on July 11–13, 1966; and on January 3, 1967, the Commission issued a Statement of Enforcement Policy with Respect to Vertical Mergers in the Cement Industry (Appendix B).

In essence, the respondents assert that the Commission acted improperly, and denied them a fair hearing, by conducting a general industrywide inquiry into vertical mergers in the cement industry while these particular complaints were pending.

As appears from the Commission's Statement of Enforcement Policy:

> The Commission early became concerned with vertical mergers in the cement industry in the course of carrying out its statutory duties in the enforcement of the antitrust laws. Complaints were issued at the outset initiating a series of adjudicative cases. The trend of acquisitions, however, continued. By the end of 1965 no fewer than 40 ready-mixed concrete companies had been acquired by leading cement companies, while several large ready-mixed companies had entered into the manufacture of cement. Many cement companies had indicated that while they were opposed to this development, they might be forced in the future to acquire major customers to protect their outlets from further foreclosure. Various segments of the industry requested the Commission to clarify, as soon as possible, the legal status of such mergers. The Commission, therefore, determined to consider the problem on an industrywide basis to determine whether its current approach to vertical mergers in these industries was correct and effective, or whether it should be supplemented. (Pp. 1–2.)

The Statement sets forth certain criteria which will be followed by the Commission in identifying those vertical acquisitions in the cement industry which will receive the Commission's immediate attention and, if the facts should so warrant, will result in the issuance of complaints challenging their legality. These criteria have been promulgated as part of a general *enforcement* policy for the guidance of the staff and of industry members and their counsel, who might otherwise be uncertain of the Commission's enforcement intentions in this area. The Statement pointedly emphasizes, however, that "the issues in any proceeding instituted by the Commission will be decided on the merits of that case." (P. 9.)

[1] The complaint in *Lehigh Portland Cement* was issued on April 1, 1966; in *Marquette Cement Manufacturing Company*, on May 20, 1966; and in *Mississippi River Fuel Corporation*, on January 22, 1965.

In conducting a general study of vertical mergers in the cement industry, and publicly announcing its enforcement policy with respect thereto, the Commission has carried out its statutory obligation "to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." (*Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411, 413.) Respondents seem to be contending that the Commission, in order to formulate such a general enforcement policy, was compelled to declare a moratorium on bringing or continuing with Section 7 cases in this area—and, in practical effect, to immunize from challenge under Section 7 any acquisitions involved in complaints pending before the Commission. However, considerations of fairness and efficient administration of the law require no such extraordinary result.

Respondents proceed on the premise that the background information which has been acquired by the Commission as a result of making a broad survey of the problem of vertical mergers in the cement industry will prejudice the adjudication of particular cases. The premise is erroneous. It has not heretofore been thought that the expertise of an administrative agency constitutes a ground for challenging the fairness of its decision-making process. On the contrary, federal agencies have a duty to bring such expertise, based on their accumulated knowledge and experience, to the consideration of particular cases. *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793. Wise enforcement policy cannot be formulated in a factual vacuum. The determination of what cases, or kinds of cases, to bring is a crucial part of the administrative process. An agency must exercise sound discretion in such regard, and its discretion must be *informed.* By informing itself on the competitive problems raised by vertical acquisitions in the cement industry—as a basis for determining the general enforcement policy it should pursue in this area—the Commission has in no way prejudiced any particular cases, whether pending or brought in the future.

Contentions similar to those made here were rejected by the Supreme Court almost twenty years ago in *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683. One of the respondents in that case argued that the Commission was prejudiced and biased against the Portland cement industry generally, had prejudged the issues before it, and that the industry and the respondent could not receive a fair hearing. In support of its charges, the respondent introduced copies of Commission reports made to Congress or to the President, as required by Section 6 of the Federal Trade Commission Act. The Court stated that the reports, and testimony

given by members of the Commission before Congressional committees, made clear that at least some members of the Commission were of the opinion that the basing point system under attack was unlawful. The language of the Court in response to this argument is directly applicable to the issues raised here:

> Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are "unfair," from any cease and desist order by the Commission or any other governmental agency.
>
> There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *United States* v. *Morgan*, 313 U.S. 409. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress. For Congress acted on a committee report stating: "It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63rd Cong 2d Sess 10–11. 333 U.S. at 701–02.

See also *Pangburn* v. *C.A.B.*, 311 F. 2d 349 (1st Cir. 1962), where the court stated:

> Upon examination of the foregoing cases, we cannot say that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required. Particularly is this so in the instant case where the Board's prior contact with the case resulted from its following the Congressional mandate to investigate and report the probable cause of all civil air accidents. If we were to accept petitioner's argument, it would mean that because the Board obeyed the mandate of Section 701, it was thereupon constitutionally precluded from carrying out its responsibilities under Section 609. 311 F. 2d at 358.

The Commission reiterates that the respondents in these cases have in no way been prejudiced by the Statement of Enforcement Policy issued on January 3, 1967. In each case the burden of proving the allegations of the complaint remains with complaint counsel, and has in no degree been shifted to the respondents. In each case, adjudication by the hearing examiner and the Commission will be made on the record, in accordance with the Administrative Procedure Act. In each case, the hearing afforded the respondents will be full and fair, in the same measure as if no Statement of Enforcement Policy had been issued. If the Commission's expertise has been enlarged as a result of the general inquiry conducted by it in connection with formulating the Statement of

Enforcement Policy, that fact neither prejudices the respondents' rights nor constitutes any reason for dismissing these proceedings. Respondents are entitled to have their cases adjudicated by Commissioners with open minds, not empty ones.

Commissioner MacIntyre did not participate.

APPENDIX A

NOTICE OF PUBLIC HEARING ON VERTICAL INTEGRATIONS IN THE CEMENT INDUSTRY

Notice is hereby given that the Federal Trade Commission will hold a public hearing before the full Commission on June 6, 1966, to afford all interested parties an opportunity to present their views on the subject of vertical mergers in the cement industry.

In December 1964, the Commission announced its investigation into acquisitions by producers of cement of ready-mixed concrete and concrete products companies. The investigation was conducted initially by securing special reports from industry members on pertinent matters. The Division of Industry Analysis of the Commission's Bureau of Economics, based upon information contained in the aforesaid reports and other information and data available to it, has published a staff report entitled, "Economic Report on Mergers and Integration in the Cement Industry." Requests for copies should be addressed to: Division of Industry Analysis, Bureau of Economics, Federal Trade Commission, Pennsylvania Avenue and Sixth Street, NW., Washington, D.C., 20580.

The Commission is of the opinion that it would be in the public interest, as the next step in its investigation, to hold a public hearing. The purpose of the hearing is to secure additional information and to afford the Commission the benefit of the views of all concerned to assist the Commission in reaching a determination as to what action, if any, it should take.

As the Commission originally announced, it is endeavoring to obtain information "on pertinent matters such as the structure of the cement-producing and principal cement-consuming industries, the nature of the relevant product and geographical markets, the causes and business reasons underlying such acquisitions in these industries, and the probable effects of such acquisitions on competitive conditions of the markets and industries involved." These subjects have been dealt with at some length in the Bureau of Economics' industry report. While the Commission has not approved, disapproved or passed upon the matters contained in that report, it is desirable that parties who wish to participate in the hearing direct their comments to matters contained in the report.

The basic purpose of this hearing is to provide an appropriate means for "organizing and appraising the general economic facts involving industry and market structure that are so important under Section 7" (*Permanente Cement Co.*, F.T.C. Docket No. 7939, decided April 24, 1964, p. 9 [65 F.T.C. 410, 494]), in relation to vertical mergers in the cement industry. The hearing is intended to elicit, not specific "adjudicative" facts relating to specific cases or parties, but general "legislative" facts which will help the Commission decide questions of law, policy, and discretion. See 1 Davis, *Administrative Law* § 7.02, p. 413 (1958).

Interested parties are hereby invited to submit any information or comments pertinent to these matters or other aspects of the general subject of vertical integration in the cement industry. Written data, views or arguments concerning the subject matter of the hearing may be filed with the Secretary, Federal Trade Commission, Pennsylvania Avenue and Sixth Street, NW., Washington, D.C., 20580, not later than May 31, 1966. To the extent practicable, persons wishing to file written presentations in excess of two pages should submit twelve copies.

The oral hearing will be held at 10:00 a.m., e.d.t., on June 6, 1966, in Room 532 of the Federal Trade Commission Building, Pennsylvania Avenue and Sixth Street, NW., Washington, D.C. Any person desiring to present orally his views at the hearing should so advise the Secretary of the Commission not later than May 31, 1966, and estimate the time required. The Commission may impose reasonable limitations upon the length of time allotted to any person. Oral presentations should not constitute mere duplications of prior written submittals. Copies of oral presentations or summaries thereof may be submitted at the time of the oral hearing.

The data, views or arguments presented orally or in writing will be available for examination by interested persons at the Federal Trade Commission, Washington, D.C.

Issued: April 22, 1966.

By the Commission without the concurrence of Commissioner MacIntyre.

APPENDIX B

COMMISSION ENFORCEMENT POLICY WITH RESPECT TO VERTICAL MERGERS IN THE CEMENT INDUSTRY

JANUARY 3, 1967

Vertical mergers and acquisitions are today the most significant, critical and important problem faced by the cement and ready-

mixed concrete industries. Beginning in the late nineteen-fifties a trend of acquisitions of leading ready-mixed concrete producers by cement manufacturers began which now threatens to transform the structures of both industries. This vertical merger movement is of vital importance to the public, and to each of the industries involved. Cement and concrete are basic building materials essential to the nation's economy.

The Commission early became concerned with vertical mergers in the cement industry in the course of carrying out its statutory duties in the enforcement of the antitrust laws. Complaints were issued at the outset initiating a series of adjudicative cases. The trend of acquisitions, however, continued. By the end of 1965 no fewer than 40 ready-mixed concrete companies had been acquired by leading cement companies, while several large ready-mixed companies had entered into the manufacture of cement. Many cement companies had indicated that while they were opposed to this development, they might be forced in the future to acquire major customers to protect their outlets from further foreclosure. Various segments of the industry requested the Commission to clarify, as soon as possible, the legal status of such mergers. The Commission, therefore, determined to consider the problem on an industry-wide basis to determine whether its current approach to vertical mergers in these industries was correct and effective, or whether it should be supplemented. An industry-wide investigation was commenced, and on April 26, 1966, a Staff Economic Report on "Mergers and Vertical Integration in the Cement Industry" was published. Thereafter, Public Hearings on the problem were held in July 1966, and oral presentations and written statements from the industry were received.

The Federal Trade Commission has concluded that vertical mergers and acquisitions involving cement manufacturers and consumers of cement, particularly ready-mixed concrete companies, can have substantial adverse effects on competition in the particular market areas where they occur. This conclusion of the Commission is based upon prior cases involving such mergers and acquisitions, its own experience in merger policy enforcement, the industry-wide investigation of the problem which culminated in the published report of the staff on "Mergers and Vertical Integration in the Cement Industry," and upon the "Public Hearings" of the Commission held in July 1966.

Based on the information now available to the Commission it appears that the recent trend of vertical acquisitions has involved, almost invariably, leading high volume ready-mixed concrete producers located in major urban areas. Because urban areas contain

concentrations of people and industry, they account for the most intense day-to-day construction activity and consequent cement demand, and thus constitute the choice high-volume centers for cement sales. Cement companies therefore concentrate their sales effort upon the urban areas. In recent years, for example, the great majority of over 230 newly constructed cement distribution terminals have been located so as to serve particular metropolitan centers. Distinguishable competitive features usually characterize different urban areas. Different prices generally prevail from one to another, and each is marked by unique supply and demand characteristics. In summary, metropolitan centers are focal points of cement demand and are regarded by cement companies as key marketing areas. It is within these centers that the effects on competition resulting from vertical acquisitions tend to be most keenly felt.

Such urban markets, within which vertical mergers and acquisitions take place, are often highly concentrated on both the supply and demand sides. Cement is a heavy, bulky product economically impractical to ship very far except by water. For this reason, almost all cement is sold and used comparatively near the site of production. Cement production is decentralized and is based upon a network of geographically scattered plants which ship directly, or through terminals, to consumers in adjacent markets. Most urban markets therefore are served by comparatively few producers. Out of the fifty largest metropolitan markets in the United States, 19 had five or fewer cement companies soliciting sales, and an additional 19 had only five to ten suppliers. Illustrative are: Seattle—3; Miami—6; Tampa—6; San Francisco—4; Portland (Oreg.)—4; Denver—2; Detroit—9; Jacksonville—7. A survey conducted of 22 "top" cement markets and 11 "secondary" markets by one of the industry participants in the public hearings showed 25 had only three to eight suppliers. Notwithstanding the possibility of some technical improvements in bulk rail transportation of cement, it nevertheless appears that today the geographic area practicable for any given cement producing plant to service is a limited one. From the information known to us to date, it seems improbable that any fundamental change in the relative concentration of available cement suppliers servicing particular metropolitan markets, as well as larger regions, will occur in the foreseeable future.

Similarly, although there are well over 4,000 ready-mixed concrete producers in the United States, the major needs of most urban areas are supplied by a few sizeable ready-mix firms. Concrete is a highly perishable commodity of great bulk and weight

and, even more crucially than in the case of cement, high transportation costs in comparison with the selling price limit the area serviceable from a particular plant. Concrete is normally not transported more than five to ten miles from the production site to the construction job of the purchaser. Any given metropolitan area would therefore appear to be a definitive market for concrete production and sale, and it is not likely that there are any outside suppliers actually or potentially available. In most urban centers, the ready-mixed concrete industry is quite concentrated. For example, the four largest ready-mixed concrete companies doing business in San Francisco, Boston, Cleveland, Milwaukee, New York, Buffalo, Philadelphia, Baltimore, Pittsburgh, Kansas City, Memphis, Phoenix, Norfolk, Portland (Oreg.), Seattle, Jacksonville, and Richmond made approximately 50 percent or more of the concrete sales in those cities.

The ready-mixed concrete industry is relatively new, having its origins subsequent to World War I and its period of rapid development after World War II. Nevertheless it has already greatly surpassed the cement industry in the total dollar value of shipments. In 1964, the value of all cement produced was $1,190,000,000 whereas the total value of sales of ready-mixed concrete was larger by almost $800,000,000 amounting to $1,987,000,000. Out of a total 1964 cement production in the United States of 368,633,000 barrels, ready-mixed concrete companies purchased about 60 percent. The importance of the ready-mixed concrete firms as cement consumers is even greater in metropolitan centers where there is reason to believe that they account for 70 percent or more of cement purchases.

In any given metropolitan market ready-mixed concrete producers are therefore dominant cement consumers and constitute the crucial link in cement distribution and use. When one or more major ready-mixed concrete firms are tied through ownership to particular cement suppliers, the resulting foreclosure not only may be significant in the short run, but may impose heavy long-run burdens on the disadvantaged cement suppliers who continue selling in markets affected by integration. Acquisitions of leading cement consumers in markets containing comparatively few volume buyers may have the effect of substantially disrupting the competitive situation at the cement level, and, in fact, may set off a "chain" reaction of acquisitions.

Unintegrated ready-mixed concrete producers furthermore may be at a disadvantage in competing with rivals who are integrated cement and concrete manufacturers. This is true not only because of disparities in size and access to capital, and the advantages in-

herent in product and market diversification, but also because of the potential "price squeeze" latent in competition with integrated companies.

The more extensive vertical integration becomes in the cement and concrete industries, the higher tends to be the level of entry barriers in individual metropolitan markets and in larger geographic regions. This can result from a number of causes. Higher capital requirements are necessitated by entry into the production of cement and ready-mixed concrete on an integrated basis. The capital requirements for entry on an integrated basis appear to be double the cost of entry into the production of cement only. But the need for far more capital is not the only problem. Industry executives at the public hearings were unanimous in stating the difficulty of penetrating the ready-mixed concrete industry on a significant scale in markets containing long established ready-mixed concrete producers. New entrants in ready-mixed concrete in integrated markets, of course, may face the additional deterring effect of competition with very large, diversified and integrated rivals.

CRITERIA USED TO IDENTIFY MERGERS WHICH WARRANT IMMEDIATE ACTION

The Commission's characterization of particular organizational developments in the cement and ready-mixed concrete industries and their probable competitive consequences represent the Commission's current knowledge of these matters as revealed by its own experience in various litigated cases, as well as an industry-wide investigation accomplished through survey, staff analysis and public hearings. In view of its extensive activity in the application of Section 7 to forestall anticompetitive mergers, together with its understanding of prospective developments in cement manufacture and distribution, this Commission wishes to make abundantly clear insofar as possible, its future enforcement policy with regard to vertical mergers in the cement and ready-mixed concrete industries. In so doing it is expected that needless litigation may be forestalled. At the same time however it should be noted that the issues in any proceeding instituted by the Commission will be decided on the merits of that case.

I. The Commission has determined as a matter of general enforcement policy to use all the legal weapons at its disposal to proceed against and order the divestiture of those vertical acquisitions which it believes may unlawfully lessen competition in any market. Specifically, the Commission intends to investigate ex-

peditiously every future acquisition by a cement producer of any substantial ready-mixed concrete firm in any market to which such acquiring producer is an actual or potential supplier. Whenever such an investigation reveals the market circumstances described below, the Commission shall issue a complaint challenging the acquisition under Section 7 of the Clayton Act, unless unusual circumstances in a particular case dictate the contrary.

II. In general, the acquisition of any ready-mixed concrete firm ranking among the leading four nonintegrated ready-mixed producers in any metropolitan market, or the acquisition of any ready-mixed concrete company, or other cement consumer, which regularly purchases 50,000 barrels of cement or more annually, will be considered to constitute a substantial acquisition.

III. The determination of the Commission to challenge the acquisition by a cement supplier selling in a market of any of the top four ready-mixed concrete firms therein, or of any cement consumer in such market who regularly buys 50,000 or more barrels annually, does not mean that the acquisition of smaller firms will necessarily be considered lawful or go unchallenged by the Commission. The acquisition of several smaller ready-mixed concrete producers whose cumulative purchases of cement annually approximate those of a ready-mixed concrete company of the foregoing specified size or the acquisition of a cement user which gives to a cement producer that is already integrated forward into the relevant market a substantial position of the foregoing specified size may have at least as severe anticompetitive effects as the acquisition of a single larger firm.

IV. The Commission's intention to challenge all substantial vertical acquisitions does not exempt markets where integration has already occurred. A partially integrated market can still be attractive to a new cement producer who is looking for multiple markets to serve from a large efficient plant, or to attract a manufacturer on the edge of a market who wishes to expand his geographic area of sales. Likewise markets which have witnessed significant vertical integration may still offer inducement to new ready-mixed concrete competitors to enter. The Commission therefore intends to act to preserve the open portions of partially integrated markets to the fullest extent possible.

V. In promulgating a statement of general enforcement policy with respect to integration through mergers and acquisitions, the Commission recognizes that there are other means by which it is possible, to some extent at least, for cement suppliers to exert pressure on consumers of cement. In some cement markets, the acquisition of key aggregates producers can constitute a way by

which ready-mixed concrete companies, and other cement consumers, can be influenced in making their cement purchases and competition can be substantially lessened thereby. The anticompetitive effects usually associated with the acquisition of ready-mixed concrete producers can be brought about in such areas indirectly by the acquisition of aggregates concerns. The Commission therefore will oppose the acquisition of key aggregates suppliers in a market wherever there is reason to believe that such acquisitions may confer upon the acquiring cement company any significant ability to exert anticompetitive "leverage" on cement consumers affecting their freedom to choose cement suppliers.

VI. To carry out this program expeditiously and uniformly, the Commission must know of prospective acquisitions and mergers in advance of their consummation. Accordingly, all portland cement companies will be required to notify the Commission at least 60 days prior to the consummation of any merger or acquisition involving any ready-mixed concrete producer. The Commission will notify all portland cement companies each year, so long as this enforcement policy is in effect, and will require each to file special reports with the Commission under the authority provided by Section 6 of the Federal Trade Commission Act.

This action by the Commission should not be interpreted to mean that cement firms must request Commission approval prior to the consummation of any merger or acquisition. However, the Commission shall continue to provide advisory opinions, as provided by its Rules of Practice, regarding the legality of particular mergers, and invites those contemplating mergers to avail themselves of this program in any situation where they are uncertain as to the legality of a prospective merger.

Chairman Dixon and Commissioner MacIntyre, while approving the enforcement criteria set forth in this statement, did not concur in the action of the Commission in providing for the requirement that special reports be filed with the Commission 60 days in advance of any merger under the authority of Section 6 of the Federal Trade Commission Act.

LEHIGH PORTLAND CEMENT COMPANY, DOCKET NO. 8680

ORDER DENYING MOTION TO VACATE COMPLAINT

This matter is before the Commission upon the certification of the hearing examiner of respondent's motion to vacate the complaint, without prejudice, or to suspend the proceedings. For the reasons set forth in the accompanying opinion of the Commission,

It is ordered, That respondent's motion be, and it hereby is, denied.

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

Commissioner MacIntyre not participating.

MARQUETTE CEMENT MANUFACTURING COMPANY, DOCKET NO. 8685

Docket No. 8685

ORDER DENYING INTERLOCUTORY APPEAL

This matter is before the Commission on respondent's interlocutory appeal from the hearing examiner's denial of respondent's motion to dismiss the complaint. For the reasons set forth in the accompanying opinion of the Commission,

It is ordered, That respondent's interlocutory appeal be, and it hereby is, denied.

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

Commissioner MacIntyre not participating.

MISSISSIPPI RIVER FUEL CORPORATION, DOCKET NO. 8657

ORDER DENYING MOTION TO VACATE COMPLAINT

This matter is before the Commission upon the certification of the hearing examiner of respondent's motion to vacate the complaint, without prejudice, or to suspend the proceedings. For the reasons set forth in the accompanying opinion of the Commission,

It is ordered, That respondent's motion be, and it hereby is, denied.

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

Commissioner MacIntyre not participating.

COLE NATIONAL CORPORATION ET AL.

Docket 8701. Order, Feb. 6, 1967

Order dismissing the complaint in all respects as to respondent Independent Lock Company and granting permission to file an interlocutory appeal.

ORDER GRANTING INTERLOCUTORY APPEAL AND AMENDING COMPLAINT