it hereby is, denied.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commission.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, June 28, 1968

Order denying motion by 14 cement companies to strike respondent's appeal brief relating to subpoenas directed to them.

OPINION OF THE COMMISSION

JUNE 28, 1968

On June 10, 1968, respondent filed an appeal from the hearing examiner's order dated May 29, 1968, "Modifying Subpoenas Duces Tecum, In Respondent's Behalf, Directed Against Third Party Concrete Companies." On June 13, 1968, movants (fourteen third party concrete companies) filed with the Commission a motion to strike respondent's appeal brief and dismiss respondent's appeal.[1]

The stated basis for this motion is the fact that page 15 of the respondent's appeal brief:

> . . . quoted at length from the Hearing Examiner's comments made at page 1577 of the transcript. However, the transcript of the prehearing conferences, including the transcript of the hearing from which Lehigh quotes, has, pursuant to § 3.21(c) of the Commission's rules, not been made public. Moreover, these hearings with regard to movants' motion to quash was [sic] held without movants' being present.[2]

Movants assert that they would be denied due process if the Commission considers the appeal and the brief since the relevant prehearing conference was held without their knowledge and because Lehigh is relying upon part of the record unavailable to movants.

The quoted transcript excerpt at issue here does not deal with the merits of movant's position. It is clear that at no time during the entire prehearing conference of May 24, 1968, was there any discussion of the merits of movants' or respondent's positions relating to the then pending motions to quash subpoenas duces tecum issued to third parties on respondent's behalf. Movants have neither particularized the manner in which they have been prejudiced nor have they made a request for access to the relevant portions of the transcript. There is no justifi-

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[1] On June 14, 1968 [p. 1284 herein] the Commission granted movants (1) permission to file a consolidated appeal and answering brief, and (2) an extension of time to file until July 1, 1968.

[2] Motion to Strike the Appeal Brief, p. 2 (June 13, 1968).

cation for granting the more drastic remedy requested when movants have failed to either seek the logical remedy afforded by access, or to explain why access would be unsatisfactory.

Even though we find no merit in movants' contentions, we nevertheless adopt the suggestion of respondent.[3] To avoid further disputation, we shall strike the prehearing conference excerpt quoted at page 15 of respondent's appeal brief to which movants take offense. An appropriate order will be entered.

Commissioner MacIntyre did not participate.

Order Denying Motion to Strike Appeal Brief and to Dismiss Appeal

On June 10, 1968, respondent filed an interlocutory appeal from the hearing examiner's order of May 29, 1968. On June 13, 1968, movants (fourteen third party concrete companies) filed with the Commission a motion to strike respondent's appeal brief and dismiss respondent's appeal.

For the reasons stated in the accompanying opinion, the Commission has determined that the motion should be denied. Accordingly,

It is ordered, That the motion to strike the appeal brief of Lehigh Portland Cement Company and dismiss its appeal filed by M. E. Rinker, president of Rinker Materials Corp.; J. D. Monroe, comptroller of MPS Industries, Inc.; D. W. Reading, president of Oolite Industries, Inc.; Thomas N. Kearns, president of Meekins, Inc.; S. Howard Banaszak, president of Banaszak Concrete Corporation; W. L. Currie, president of Central Concrete Co., Inc.; James F. Dawson, owner of Mobile Ready-Mix; A. L. Sattee, executive vice president of Maule Industries, Inc.; Louis C. Schilling, president of I. E. Schilling Co.; Carl H. Moritz, general manager of Burnup & Sims, Inc.; Roy B. Loughlin, president of Dixie Concrete, Inc.; Kenneth D. Buzard, president of Powermix, Inc.; Douglas A. Brooks, vice president of Erwin Concrete Corporation; and Murray S. Simpson, president of Super Concrete Corporation be, and it hereby is, denied.

It is further ordered, That the excerpt of the hearing examiner's comments made at page 1577 of the prehearing conference of May 24, 1968, which is quoted by respondent be, and it hereby is, stricken from page 15 of respondent's June 10, 1968, appeal brief.

By the Commission, with Commissioner MacIntyre not participating.

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[3] Opposition to Motion to Strike the Appeal Brief, p. 2 (June 18, 1968).

THE BENDIX CORPORATION ET AL.

Docket 8739. Order, June 28, 1968

Order remanding to hearing examiner complaint counsel's request for issuance of subpoenas ad testificandum to certain federal employees.

Order Remanding with Instruction

Upon consideration of the hearing examiner's certification, filed June 21, 1968, of complaint counsel's application requesting the issuance of subpoenas ad testificandum directed to certain employees of government agencies:

It is ordered, That the matter be, and it hereby is, remanded to the hearing examiner for such action within his regular authority as he deems appropriate with respect to the request for subpoenas herein certified.

STAR OFFICE SUPPLY CO. ET AL.

Docket 8749. Order, June 28, 1968

Order granting leave to file appeal from ruling of hearing examiner relative to witness interview reports.

Order Granting Leave to File Interlocutory Appeal

Upon consideration of complaint counsel's request, filed May 27, 1968, for permission to file an interlocutory appeal from rulings of the hearing examiner on May 21, 1968, relating to the production of interview reports with complaint counsel's witnesses and the striking of the direct testimony of two such witnesses:

It is ordered, That leave be, and it hereby is, granted to complaint counsel to file an interlocutory appeal from said rulings.

Commissioner Elman dissents.