KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, Nov. 1, 1968

Order denying respondent's appeals from hearing examiner's orders relating to subpoenas duces tecum directed to a third party.

OPINION OF THE COMMISSION

Before the Commission are two appeals by respondent, dated, respectively, August 28, 1968, and September 25, 1968, each raising a number of separate issues.[1] Since the issues posed by these several grounds for appeal are in large part interrelated, we believe that all should be resolved jointly in a single opinion. The ultimate issue of privilege for certain categories of documents sought by discovery herein cannot be determined until they have been reviewed in detail by the hearing examiner. Accordingly, questions with respect to rulings on this issue may be presented to the Commission upon review of the entire record.

I

By opinion and order of July 2, 1968 [p. 1574 herein], we remanded to the hearing examiner his grant of respondent's application for subpoena duces tecum directed to The United States Pipe and Foundry Company (hereafter U.S. Pipe). In passing upon the problems raised by respondent's intended inquiry into the business records of intervenor U.S. Pipe, we acknowledged that

> Obviously, it may be difficult to separate out some of this raw data which would fall into the area of trade secrets from memoranda and other

[1] To date, four interlocutory opinions have issued herein, in which the chronology of the instant proceeding, which has yet to reach formal hearings, is amply described: Opinion and Order Denying Application for Subpoena Duces Tecum and Request for Release of Confidential Records, dated July 2, 1968 [p. 1579 herein]; Opinion and Order Denying Appeal from Examiner's Order and Request for Oral Argument, dated July 2, 1968 [p. 1574 herein]; Opinion and Order of Remand to Hearing Examiner, dated July 2, 1968 [p. 1571 herein]; Opinion and Order of Remand to Hearing Examiner, dated August 14, 1968 [p. 1593 herein].

documents which would relate to its (U.S. Pipe's) reasons for not entering this market.[2]

At the same time, it was suggested that the breadth of the subpoena would warrant the examiner's consideration on remand. The examiner's post-remand limitation of the subpoena to include only "studies and surveys," (excluding, for example, a report of sales performance upon which a more generalized "study" or "survey" might be based) is responsive to the considerations raised in our opinion.

As amended on remand, the subpoena required production of two classes of documents relating, respectively, to the pre- and post-entry segments of U.S. Pipe's venture into the resorcinol market. Respondent's objections to U.S. Pipe's return on the pre-entry portion relate in the main to the allegedly inadequate volume of information submitted. Respondent urges that U.S. Pipe possesses additional relevant documentary data relating to the pre-entry period, but does not claim that such data would fall within the terms of the subpoena as construed by the examiner. U.S. Pipe submitted no documents in response to the post-entry segment of the subpoena for the asserted reason that it possessed no "study" or "survey," "directly related to the continuance or discontinuance" of its resorcinol production. Here again, it is not argued that U.S. Pipe does in fact possess documents returnable under this portion of the subpoena, as construed. Return on the subpoena was made on August 5, 1968. Respondent subsequently moved that the examiner either certify to the Commission that U.S. Pipe had failed to comply with the subpoena or, in the alternative, order further production thereunder. Respondent also moved for the issuance of a wholly new subpoena covering matters which, in respondent's view, had been excluded from the scope of the first subpoena by the examiner's erroneous construction thereof. These motions were denied by order entered August 19, 1968, from which respondent now appeals.[3]

The suggestion to restrict the post-remand scope of the subpoena to "studies and surveys" originated with the respondent. This phraseology was adopted by the examiner after careful consideration and discussion on remand. We can neither credit, nor,

[2] Opinion and Order Denying Application for Subpoena Duces Tecum and Request for Release of Confidential Information, dated July 2, 1968, p. 4 [pp. 1621, 1622].

[3] Respondent's Brief on Appeal, dated August 28, 1968, indicates that it is filed "[p]ursuant to Sections 3.35(b) and 3.23(a) of the Commission's Rules of Practice," without indication of which of its three separate grounds for appeal are filed under each. Upon examination, the first and third ground for appeal prove to be of the class for which application for permission to appeal must be sought pursuant to Section 3.23(a) while the remaining issue is subject to direct appeal under Section 3.35(b).

indeed, could we possibly evaluate respondent's present contention that the phrase "studies and surveys" was given an unexpected or overly technical interpretation by the examiner in judging the adequacy of U.S. Pipe's return.

We find no fault in the examiner's construction of the subpoena or with his finding of compliance thereunder. Accordingly, respondent's application for leave to appeal from the examiner's finding of compliance is denied.

It is apparent, at the same time, that respondent's second application for subpoena duces tecum was not spurious. The examiner denied this application without prejudice upon his finding that:

> . . . it would be improvident to issue a new subpoena covering a broader field than that previously issued while the Federal Trade Commission had under consideration an appeal from the protective order of the undersigned . . . limiting the scope of depositions. . . .[4]

As sole support for its appeal from this ruling, respondent urges that discovery of documentary material must precede the taking of depositions. Upon the issuance of this opinion, questions of procedural priority among currently pending discovery orders and applications therefor will necessarily be raised and considered *de novo* in proceedings before the examiner. Accordingly, respondent's appeal is now moot, and will be denied. However, it is evident that the inability of U.S. Pipe to make a return on the post-entry portion of respondent's original subpoena duces tecum raises some doubt whether the purposes of pre-hearing discovery under the Commission's Rules of Practice may be fulfilled herein without a grant, in some form, of respondent's second application for subpoena duces tecum.

Objections to such disclosure on the part of U.S. Pipe are well taken. Cost, price, production and similar data are of a kind traditionally protected against compulsory disclosure in judicial proceedings. However, the often confidential nature of such material is not equivalent to an absolute privilege against its disclosure.[5] Even assuming that each item requested by respondent's second application for subpoena duces tecum is of a kind for which strict secrecy would be justified as a matter of sound business practice, a claim of privilege for such material cannot succeed if the need for its continued secrecy is found to be outweighed by its importance to the party seeking production in

[4] Order Denying Application for Subpoena Duces Tecum, issued August 19, 1968.

[5] *Covey Oil Co.* v. *Continental Oil Co.*, 340 F. 2d 993, 999 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965). *Communist Party of the U.S.* v. *Subversive Activities Control Board*, 254 F. 2d 314, 321. (D.C. Cir. 1958).

maintaining or refuting issues raised in litigation. In the present context, respondent seeks disclosure of the confidential business records of U.S. Pipe to assist in its preparation of a defense to the charge contained in complaint paragraph seven, which reads, in pertinent part, as follows:

> Among the effects of respondent's acts and practices as above alleged in attempting to discourage and/or foreclose the entry of actual or potential rival producers into the resorcinol market, but not limited thereto, has been the failure of United States Pipe and Foundry Company to establish itself in the commercial resorcinol market as an alternate producer and/or viable competitor.

While we venture no opinion as to the kind or quality of evidence that would constitute a *prima facie* showing under this section, it would be patently improper to accept into evidence testimony of officers of U.S. Pipe, or documents from its files, in support of paragraph seven while at the same time honoring U.S. Pipe's assertion of a privilege against disclosing documents that might contradict such a showing. Moreover, without inquiry into contemporaneous business records, it would be difficult or impossible to establish whether U.S. Pipe's resorcinol venture was commercially viable and thus that it would have succeeded in the commercial resorcinol market had the alleged acts and practices of the respondent not taken place.

In the absence of a generalized "study" or "survey" of U.S. Pipe's post-entry experiences, it seems certain that respondent would be denied an adequate opportunity to prepare a defense under paragraph seven without some form of access to the very "raw data" that we suggested in our previous opinion [6] might not in fact be needed.

Upon a renewed application for subpoena duces tecum, the examiner is of course free to consider alternative methods whereby the conflicting considerations of secrecy on the one hand and disclosure on the other may be reconciled. There is, for example, the procedure adopted in Commission hearings in the matter of *Mississippi River Fuel Corporation,* Docket No. 8657 (Order issued June 8, 1966 [69 F.T.C. 1186] and July 15, 1966 [70 F.T.C. 1759]), whereby sensitive trade information can be submitted to an independent third party for analysis. Possibly suitable would be a procedure as yet untried in Commission hearings by which the party seeking protection could be required to prepare a non-confidential summary of the sought-for documents for inclusion in the record.[7] The examiner may also conduct an *ex parte,*

[6] *Supra,* n. 2.

[7] See E. Gellhorn, *The Treatment of Confidential Information By The Federal Trade Commission: The Hearing,* 116 U. Pa. L. Rev. 401, 422-423 (1968).

in camera examination of documents for the purpose of excising portions thereof before disclosure is made to the respondent. See, e.g., *Machin* v. *Zuckert*, 316 F. 2d 336, 341 (D.C. Cir.) *cert. denied*, 375 U.S. 896 (1963).[8]

Each of these proposed discovery techniques contains inherent drawbacks, however, and may in some instances impair substantially the value of information sought by respondent. The examiner must consider, in any given instance, whether the ends of justice would be better served by disclosure directly to the respondent, with such reasonable safeguards against misuse as have already been utilized in this proceeding with reference to *in camera* materials and the use of materials obtained by deposition.

In the third, and last, portion of respondent's appeal dated August 28, 1968, permission is sought to appeal from an order of the examiner [9] denying respondent's motion, pursuant to Section 3.36 of the Commission's Rules of Practice, for the production of documents in the possession of the Commission. Documents sought by this motion fall into two groups. First, disclosure was sought of all documents received by complaint counsel in response to a survey of manufacturing firms undertaken for purposes of investigation relative to this proceeding. Section 3.36 of the Commission's Rules of Practice provides that motions for the production of documents in the confidential records of the Commission:

> . . . shall specify as exactly as possible the material to be produced, the nature of the information to be disclosed . . . and shall contain a statement showing the general relevancy of the material . . . together with a showing that such material . . . is not available from other sources by voluntary methods or through other provisions of the rules in this chapter.

Denial of the first part of respondent's motion was based upon the examiner's view that respondent should be required to seek direct voluntary production of the survey responses from the companies surveyed. Respondent argues that such efforts, if attempted, would probably be unavailing, and urges that the examiner's application of the "other sources" requirement of Section 3.36 was thus arbitrary and unjust.

It was the examiner's view in denying respondent's motion that

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[8] Such an *in camera* examination would be advisable as an initial matter in any event. *Westinghouse Electric Corporation* v. *City of Burlington*, 351 F. 2d 762, 770 (D.C. Cir. 1965); *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654, 662 (1960); *Freeman* v. *Seligson*, D.C. Cir. No. 20,478, June 28, 1968.

[9] Order Denying Production of Confidential Records of Federal Trade Commission, dated August 19, 1968.

no determination of the protection, if any, to be afforded to portions of the survey responses containing possibly privileged matter could be made unless, upon a refusal of voluntary disclosure, the companies surveyed were allowed to appear herein in response to compulsory process.

As an initial matter, it may be possible to determine the intentions of the surveyed companies regarding the contents of their submissions by inquiry into the conditions upon which such documents were received by complaint counsel. If information obtained by survey was received upon the understanding that it could be divulged as necessary in Commission proceedings,[10] it would be clear that confidential treatment was neither sought nor desired, and data received on this basis could be reached by motion to produce with no risk of inadvertently divulging the trade secrets of third parties. To the extent that complaint counsel would not be free, without more, to place survey documents on the record herein, the necessity, if any, for their protection may best be raised by the firms from which they were received, and production should be sought from this quarter, as suggested by the examiner's ruling.

The second group of documents sought by motion to produce consist of "all" documents received by complaint counsel from U.S. Pipe that are relevant to this proceeding. Respondent's original motion for production of such documents was denied by opinion and order of July 2, 1968.[11] At that time, we held respondent's motion to be premature, as respondent had yet to exhaust its opportunities to obtain discovery directly from U.S. Pipe by subpoena duces tecum. This situation has not been altered. Moreover, respondent argued before the hearing examiner that, in seeking disclosure of documents received by complaint counsel from U.S. Pipe, it was motivated "solely" [12] by its desire to determine the adequacy of U.S. Pipe's return on a prior subpoena demanding copies of all documents supplied by U.S. Pipe to complaint counsel. It is evident that respondent's efforts to uncover U.S. Pipe's putative noncompliance with process, would, at this time, be better directed toward further discovery in preparation for formal hearings. Accordingly, we find that respondent's motion for the production of confidential documents in the possession of complaint counsel was properly denied, and

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[10] We note in this connection that several documents received in response to the survey have been listed by complaint counsel for introduction as Commission exhibits.

[11] Opinion and Order Denying Application for Subpoena Duces Tecum and Request for Release of Confidential Records, dated July 2, 1968 [p. 1579 herein].

[12] Motion for the Production of Confidential Documents, dated August 8, 1968, p. 6.

respondent's application for leave to appeal from this ruling is denied.

II

By opinion and order of July 2, 1968 [p. 1571 herein], we remanded to the hearing examiner his initial denial of respondent's application for leave to take depositions of six named officials of U.S. Pipe. In a subsequent action[13] we upheld, in all respects save one, a post-remand order of the examiner in which the requested depositions were granted subject to several conditions designed to assure the confidentiality of such material as might merit this protection. In particular, we affirmed the examiner's decision to exclude officials of the party respondent from the taking of depositions. In subsequent proceedings before the examiner, U.S. Pipe voluntarily withdrew its objection to the attendance of one of respondent's officers, its Secretary and General Counsel. This concession was adopted by the examiner in his order authorizing the taking of depositions. Respondent now, "with great regret," again raises the issue of attendance by its officers. It is urged that all officers of the party respondent must be permitted to attend as a matter of right. We have previously affirmed the examiner's exclusion of all officers of the respondent on the basis that their assistance in technical matters would not under the terms of the order authorizing depositions be required. The instant appeal merely reargues questions previously raised, and will accordingly be denied.[14]

In connection with this appeal, respondent urges that the affidavits it is required to file with the Secretary of the Commission indicating portions of the deposition transcript disclosed to corporate management personnel infringe upon the confidentiality of attorney-client communications. Respondent omits to mention that the filing procedure complaint of actually *permits* attorney-client communications, *i.e.*, disclosure of the deposition transcript, by allowing disclosure during the time in which U.S. Pipe must determine whether portions of the transcript warrant

[13] Opinion and Order of Remand to Hearing Examiner, dated August 14, 1968 [p. 1593 herein].

[14] We are aware that Rule 30(b) of the Federal Rules of Civil Procedure has been held to prevent a District Court from excluding *bona fide* officers of a party from the taking of depositions. *Queen City Brewing Co.* v. *Duncan*, 42 F.R.D. 32, 33 (D.C. D. Md. 1966). Section 3.33 of the Commission's Rules of Practice contains language that parallels the pertinent provisions of Federal Rule 30(b). Nevertheless, the taking of depositions is not equivalent to a judicial trial, with the attendant characteristics of a public hearing, *Dunlap* v. *Reading Co.*, 30 F.R.D. 129, 130-31 (D.C.E.D. Pa. 1962), and we do not view Federal Rule 30(b), as construed, to embody a constitutionally compelled requirement of due process affecting deposition proceedings under Section 3.33 of the Commission's Rules.

protection by motion for a protective order. Moreover, disclosure of the contents of the required affidavits would be available only for the purpose of determining compliance with the restrictions of the examiner's order against improper disclosure by respondent of material obtained by deposition. Lastly, we reject respondent's blanket assumption that disclosure by the affiant of the portion of the deposition transcript shown to him necessarily "forces disclosure of the consultation." Such a possibility seems remote. In any event, a resolution of this issue would depend upon the facts involved, and, accordingly, none will be attempted at this time.

Jointly with the above appeal, respondent has applied for leave to appeal, pursuant to Section 3.23 of the Commission's Rules of Practice, from an order of the examiner dated September 17, 1968, placing *in camera* certain documents produced by U.S. Pipe. Initially, respondent argues that the examiner has exceeded his authority in entering this order.

Section 3.45(a) of the Commission's Rules of Practice specifies that access to *in camera* material "shall" be limited to "respondents, their counsel, authorized Commission personnel, and court personnel concerned with judicial review. . . ."

In essence, respondent contends that the word "respondents," as it appears above, must be read as requiring that access to *in camera* material must in all cases be granted to as many persons as can qualify as a legal representative, however defined, of a "respondent." The limitations imposed by the examiner on access to and use of *in camera* documents do not exceed those controlling disclosure of the deposition transcript. Clearly, the examiner's authority to create protective provisions based on the facts and circumstances of each case would be severely limited by respondent's construction of Section 3.45(a).[15]

Additionally, respondent questions the adequacy of the showing upon which the examiner determined that documents of U.S. Pipe were deserving of *in camera* treatment. We need not consider this contention, for, even assuming that the showing was inadequate, the effect upon respondent could hardly be of such a magnitude that, pursuant to Section 3.23(a) of the Commission's Rules "a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice." Accordingly, respondent's application for leave to appeal is denied.

Commissioner MacIntyre concurred in the result.

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[15] In District Court proceedings, it is established that access to material obtained by subpoena may be denied to the parties themselves. *Covey Oil Co.* v. *Continental Oil Co., supra,* n. 5 at 999.

ORDER DENYING INTERLOCUTORY APPEALS AND REQUESTS FOR PERMISSION TO FILE INTERLOCUTORY APPEALS

Upon consideration of respondent's appeals dated August 28, 1968, and September 25, 1968, and for the reasons stated in the accompanying opinion,

It is ordered, That the appeals of respondent from the hearing examiner's orders of August 19, 1968, and September 17, 1968, be, and they hereby are, denied, and

It is further ordered, That respondent's applications for leave to appeal from the hearing examiner's orders of August 19, 1968, and September 17, 1968, be, and they hereby are, denied.

Commissioner MacIntyre concurred in the result.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Nov. 22, 1968

Order denying appeals from 38 third parties from a hearing examiner's order directing parties to comply with subpoenas duces tecum.

OPINION OF THE COMMISSION

This matter is before the Commission upon the appeals of numerous third parties.[1]

On January 11, 1968, subpoenas duces tecum were issued to 81 ready-mixed concrete companies on behalf of respondent. On January 25, 1968, 36 additional subpoenas duces tecum were issued to portland cement manufacturers on behalf of respondent. Subsequently, 47 ready-mix firms and 22 portland cement manufacturers complied with the subpoenas. Motions to quash were filed by 29 ready-mix firms and 13 portland cement firms.

All third-party motions to quash claimed that some of the information sought by various subpoena specifications was highly confidential and should not be divulged to respondent or respond-

[1] The following interlocutory appeals from the hearing examiner's order have been filed:

(a) Memorandum in Support of Appeal by Ready-Mix Companies from the Hearing Examiner's Order of September 24, 1968 (October 21, 1968) (14 firms);

(b) Memorandum in Support of Appeal to Commission from Hearing Examiner's Order of September 24, 1968 (October 21, 1968) (15 firms);

(c) Memorandum in Support of Appeal by Six Cement Companies from the Hearing Examiner's Order of September 24, 1968 (October 21, 1968);

(d) Memorandum in Support of Appeal of Marquette Cement Manufacturing Company from the Hearing Examiner's Order of September 24, 1968 (October 21, 1968);

(e) Appeal by National Gypsum Company from Order Directing Third-Party Cement and Ready-Mixed Concrete Manufacturers to Comply with the Examiner's Orders Modifying Subpoenas Issued in Respondent's Behalf (October 7, 1968); and

(f) Appeal of Dundee Cement in Response to Order Directing Third-Party Cement and Ready-Mix Concrete Manufacturers to Comply with the Examiner's Orders Modifying Subpoenas Issued in Respondent's Behalf in this Proceeding (October 7, 1968).

ent's counsel but only to an independent accounting firm in accordance with the procedure utilized in *Mississippi River Fuel Corporation*, Docket No. 8657 (orders issued June 8, 1966 [69 F.T.C. 1186], and July 15, 1966 [70 F.T.C. 1759]). The portland cement firms also claimed that the subpoenas were unduly broad as to geographic scope.

On May 29, 1968, the original hearing examiner ruled on the motions to quash the January 11, 1968, subpoenas, and on June 14, 1968, he ruled on the motions to quash the January 25, 1968, subpoenas. The examiner ruled that the subpoenas should be modified and that much of the sales and pricing data called for by various specifications should be submitted to a disinterested accounting firm which would compile and present the material to respondent's counsel in such a manner that no individual company's confidential arrangements or data would be revealed. The examiner also ordered that the geographic scope of the subpoenas directed to the portland cement manufacturers should be restricted.

Respondent filed two appeals from these rulings on the primary ground that the restrictive *Mississippi River* [2] confidentiality procedure impairs respondent's right to prepare adequately for cross-examination and needlessly prejudices respondent's ability to conduct an effective defense, especially when sufficient protection can be afforded by other, less prejudicial, means. Many third parties filed answers defending the examiner's ruling. Additionally, 14 third parties also filed appeals on the ground that the examiner should have included even more subpoena specifications in the *Mississippi River* treatment ordered.

The examiner stated in his orders that inasmuch as some of the specifications in this proceeding are similar to those at issue in the *Mississippi River* case and despite some misgivings as to the propriety of this treatment in this instance, he nevertheless was bound by Commission precedent to order the use of the same procedures.

The Commission on August 2, 1968, issued an order remanding the matter to the new examiner for reconsideration. In our opinion remanding this matter, we stated *inter alia*:

> We believe that the examiner has incorrectly interpreted our decisions in the *Mississippi River* case. The Commission in that case neither stated nor implied that henceforth such treatment was to be mandatory. We merely held that under the facts of that proceeding the treatment ordered was appropriate. The Commission was, and is, loath to substitute its judgment for the examiner's judgment on such matters. This requires, however, that the examiner must actively and independently evaluate all of the counter-

[2] *Mississippi River Fuel Coropration*, Docket 8657 (order issued June 8, 1966), pp. 4–5 [69 F.T.C. 1186, 1189].

vailing factors in reaching his decision. The examiner, because of his proximity to the case, is, in the first instance, in a far better position to assess the multitude of variables inherent in the delicate balancing of interests between the respondent's need to know sensitive information and the third party's need to protect the same valuable information from his competitor. It is indeed conceivable that, depending on the particular facts, similar specifications may require dissimilar treatment in order to insure the most equitable resolution of these conflicting interests. Because of the examiner's misconstruction of the *Mississippi River* opinions, we are not convinced that such evaluation has been given to this matter.[3]

Following the Order of Remand, appellants cited no additional facts and filed no further briefs with the hearing examiner. On September 24, 1968, after having "carefully reviewed all the documents," pleadings and rulings pertaining to these discovery questions, the examiner ordered appellants to comply with the subpoenas duces tecum.[4]

Although the examiner declined to order the requested *Missippi River* treatment for the third-party data, the examiner did fashion a protective order which restricted disclosure of the information at issue to respondent's trial attorneys. Furthermore, to assure against any possibility that the particular information sought in this case would be used for any competitive purpose, the examiner ordered that the data could only be made available to complaint counsel to the extent that the information is to be used in respondent's defense; that no copies shall be made of the materials except those to be used as exhibits in the hearing; that all materials which do not become a part of the official record will be returned to the third parties; and that no information will be made public until further order of the examiner.[5]

Appellants' objections to this order of the examiner are the same as those raised against the previous examiner's orders. In essence, the appellants assert that requested information dealing with financial relationships between cement manufacturers and ready-mixed concrete firms is trade secret information whose disclosure to respondent Lehigh or to the trade at large would cause irreparable injury to appellants.[6]

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[3] *Lehigh Portland Cement Company*, Docket 8680 (order issued August 2, 1968), p. 3 [p. 1587, herein].

[4] Order Directing Third-Party Cement and Ready-Mixed Concrete Manufacturers to Comply with the Examiner's Orders Modifying Subpoenas issued in Respondent's Behalf in this Proceeding (September 24, 1968).

[5] *Id.* at p. 3.

[6] Appellants also asserted that the examiner failed to order "*in camera* treatment for any information introduced" in evidence by respondent. See, *e.g.*, Memorandum in Support of Appeal by Ready-Mix Companies from the Hearing Examiner's Order of September 24, 1968, p. 5 (October 21, 1968). This assertion is obviously premature. There is a possibility that none of the information will be offered into evidence. If respondent does offer any of the information into evidence, appellants will have every opportunity to urge *in camera* treatment for the information. Until such time, the examiner specifically prohibited respondent's counsel from disclosing any such information to Lehigh, to the trade at large, or to the public.

This Commission can appreciate the serious consequences of unwarranted disclosure of sensitive business information. However, it seems clear to us that the examiner has carefully considered our previous opinion (quoted in part above) remanding the prior appeals on the identical issues. The examiner's order indicates a thoughtful and workable balancing of the conflicting interests inherent in any such situation. On the one hand, the September 24, 1968, order has provided for the preservation of the requested pretrial discovery information in a manner which respondent finds useful and satisfactory in preparing for cross-examination and for preparation of defense. On the other hand, the order carefully prevents the alleged injuries which might flow from disclosure of the data to Lehigh or to the trade at large by restricting its availability to respondent's counsel alone.

We find that the examiner has carefully attempted to consider the particular facts of this discovery dispute and has tailored a protective order which attempts to fully and fairly balance the potentially conflicting needs of respondent and the third parties. Inasmuch as appellants have failed to present any convincing evidence that the examiner has abused his discretion, we deny the appeals. An appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER DENYING INTERLOCUTORY APPEALS

Upon consideration of the appeals of 38 third parties from the hearing examiner's order of September 24, 1968, and for the reasons stated in the accompanying opinion:

It is ordered, That the third-party appeals from the September 24, 1968, order of the hearing examiner directing third-party cement and ready-mixed concrete manufacturers to comply with the examiner's order modifying subpoenas duces tecum issued in respondent's behalf be, and they hereby are, denied.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner in order that he may set a new effective date for his order of September 24, 1968, and for such other further proceedings as may be appropriate.

Commissioner MacIntyre not participating.

THE J. B. WILLIAMS COMPANY, INC., ET AL.

Docket 8547. Findings and Opinion, Dec. 2, 1968

Findings of Commission that respondents have failed to comply with order inhibiting them from misrepresenting the effectiveness of "Geritol" liquid and tablets.

FINDINGS AND OPINIONS OF THE COMMISSION CONCERNING COMPLIANCE WITH ORDER TO CEASE AND DESIST

The Commission, after reviewing the report of compliance in this matter, tentatively concluded therefrom that respondents might not be acting in compliance with the final order entered herein. Therefore, at the direction of the Commission, a public hearing was held on November 14, 1968, at which eight of the television commercials prepared by respondents and shown or published since the cease and desist order became final were viewed by the Commission in the presence of respondents' counsel and their chief executive officers, *viz.*, Mr. Matthew Rosenhaus, chairman of the board, The J. B. Williams Company, Mr. Henry E. Shultz, vice-president and general counsel, The J. B. Williams Company, and Mr. Edward Kletter, chairman of the board, Parkson Advertising Agency. The Commission heard argument directed to the question whether respondents, by disseminating these commercials, have violated the order to cease and desist. The eight television commercials viewed at this hearing were agreed by counsel to be fairly representative of all commercials for Geritol shown on television from December 31, 1967, the date when the order of the Commission became final, and October 28, 1968. In addition, the scripts and films of the twenty-one other television commercials for Geritol broadcast during this period of time have been furnished to the Commission.

We conclude that respondents, in the preparation and dissemination of the television commercials in question, have failed to comply with the final order of the Commission in this matter. As was clearly stated in our original opinion in this case, the major vice of the previous advertising for Geritol was that it created the overall impression that Geritol is a remedy for tiredness in more than a small minority of persons, an impression which is false and misleading.[1] This was recognized by the Court of Appeals for the Sixth Circuit in affirming the Commission's order, after first modifying it by deleting one paragraph therefrom.[2] See 381 F. 2d at 889–90. The Court of Appeals stated at page 891:

> The Commission has found, and we have agreed, that the advertisements create the impression that iron deficiency anemia causes most tiredness. . . .

[1] It is the overall impact of the entire commercial to which our attention is directed when considering possible deception therein. *Carter Products, Inc.* v. *Federal Trade Commission,* 323 F. 2d 523, 528 (5th Cir. 1963); *J. B. Williams Co.* v. *Federal Trade Commission,* 381 F. 2d 884, 889 (6th Cir. 1967) (judicial review of the Commission's order in this matter).

[2] The Court of Appeals deleted from the Commission's order original paragraph 1(f) which prohibited representations that iron deficiency anemia can be self-diagnosed. The Court stated: "The danger to be remedied here has been fully and adequately taken care of in the other requirements of the Order." 381 F. 2d at 891.

It is this representation that Geritol is good for most tiredness which is the inherent vice of the advertisements. [Emphasis added.]

The commercials broadcast for Geritol since the order in this matter became final not only fail to comply with the order but, in many instances, have so forcefully left the viewer with the overall impression—*i.e.*, that Geritol is a generally effective remedy for tiredness—that they are no less objectionable than the commercials denounced by the Commission when it issued the original order herein. For example, five of the eight commercials viewed at the hearing of November 14, 1968, depict the transformation of a wan, lackadaisical housewife into a veritable tigress. Typical of these five is the commercial entitled "Man Coming Home" (CX G-537-30-MA-REV. # 2). This depicts a smiling husband entering his home, where he is dismayed by the sight of his wife. She is in curlers, tired looking and leaning against the doorway. Moreover, the kitchen appears to have been untouched for some time, being strewn with unwashed pots and pans. The husband, feigning anger, draws a pistol from his jacket and fires it at his now apprehensive wife. From the pistol emerges a flag reading "Iron-poor tired blood? Try Geritol." A card reading "later" appears on the television screen, followed by the same setting but with remarkable differences. The household is spotless. The haggard-looking woman seen at the beginning of the commercial now is attractively coiffured and made up, and in the wording of the script for this commercial, "garbed in a slinky gown." Her husband enters to find her so attired and posing against the piano with "a 'come hither' expression" and a rose in her mouth. She literally sweeps her husband off his feet by embracing him passionately and enthusiastically, as the commercial ends with the words "Feel stronger fast" appearing on the screen, and the audio portion of the commercial advising the viewer that "If you're tired because of iron-poor blood, Geritol can help *you* feel stronger fast. Maybe not *this* fast. But fast." (Emphasis in script.)

Respondents, in their advertising and in their defense of the propriety of that advertising, continue to treat that portion of the population suffering from tiredness as equal to that portion of the population which experiences tiredness due to iron deficiency anemia. As stated in our original opinion, there is no basis for equating iron deficiency or iron deficiency anemia with tiredness. We found that many people with *mild* iron deficiency anemia exhibit no tiredness symptoms, that many people with *severe* iron deficiency anemia do not exhibit the symptoms of tiredness dis-

played in the advertisements for Geritol,[3] and that the number of people experiencing tiredness symptoms as a result of deficiency of the ingredients of Geritol is "infinitesimally small." (P. 13) [68 F.T.C. at 545].[4]

In paragraph 1(d) of our order, we prohibited any advertisment representing that the use of Geritol will be beneficial in the treatment of tiredness unless the claim of effectiveness was expressly limited to those persons whose symptoms were due to iron deficiency, iron deficiency anemia, or deficiency of vitamins contained in the product, "and further, unless the advertisement also discloses clearly and conspicuously that: (1) in the great majority of persons who experience such symptoms, these symptoms are not caused by a deficiency of one or more of the vitamins contained in the preparation or by iron deficiency or iron deficiency anemia and (2) for such persons the preparation will be of no benefit." Counsel for respondents contended at the hearing on November 14, 1968, that this provision of the order was being complied with by the following statement which is announced in the audio portion of all Geritol commercials telecast during the time in question: "The great majority of tired people don't feel that way because of iron-poor blood and Geritol won't help them," which is immediately followed by such phrases as "but it *is* a medical fact that many of the millions of people who have iron-poor blood are tired and need Geritol" (*e.g.*, CX G–537–45–MA–REV # 2, emphasis in script), or "but millions do have iron-poor blood and you could be one of the many who are tired for that reason and need Geritol" (*e.g.*, CX G–208–40).

We reject respondents' contention that the announced disclosure complies with the order. We find that the disclosure is negated and rendered meaningless when it is viewed in the whole context of the advertising, and further, that the disclosure itself is made insufficient by the use of such general terms as "millions" and "many" immediately following it. Moreover, in obscuring and negating the disclosure, respondents have not only failed to comply with paragraph 1(d) of the order, but have also contravened the provisions of 1(c) and 1(e). These paragraphs prohibit, respectively, any representation that Geritol will be of benefit in relieving tiredness in more than a small minority of persons and any representation that tiredness is a generally reliable indication of iron deficiency or iron deficiency anemia.

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[3] The primary symptoms of severe iron deficiency include such things as cracks at the corner of the mouth, brittle or spoon-shaped fingernails, early graying of hair, and a smooth, sore tongue (opinion, p. 10, n. 7 [68 F.T.C. 481, 543]; See 381 F. 2d at 888-89).

[4] And see 381 F. 2d at 888–90 where the Court of Appeals upheld these findings.

Respondents should have been aware of the requirements surrounding the use of the affirmative disclosure in any advertisement recommending Geritol as a remedy for tiredness. We informed them in the opinion accompanying our order that the mere recitation of the words of paragraph 1(d) of the order would not be in compliance with the order if the disclosure was negated or obscured by the overall impression created by the advertisement in which the disclosure was contained. At p. 15 [68 F.T.C. at 547] of the opinion, it was stated:

This affirmative disclosure is necessary in every instance in which Geritol is advertised as a treatment for the relief of the tiredness symptoms. The purpose of such disclosure is to remove the likelihood of deception inherent in any claim of effectiveness for Geritol on the tiredness symptoms, even though such claim be limited to tiredness symptoms due to iron or vitamin deficiency. It seems obvious, however, that the likelihood of the public being deceived into believing that other than a small minority of tired persons will find relief for these symptoms by taking Geritol will continue to exist if in any advertisement the other representations are inconsistent with the facts affirmatively disclosed.[5] Such other claims can only serve to confuse and thereby deceive, thus nullifying the purpose of the required disclosure. Therefore, *in advertising in which an affirmative disclosure is required, respondents may make no representations, directly or by implication, which in any way negate or contradict the facts which are affirmatively disclosed. In other words, if despite the affirmative disclosure, any advertising conveys the impression that Geritol will be of benefit in relieving tiredness generally or in other than a small minority of persons with such symptoms, such advertising will be deceptive and in violation of the order* to be entered herein. Emphasis added.

We do not believe that any prospective consumer viewing the commercials in question would consider that the disclaimer limits the claims of relief from tiredness in the manner required by our order. Indeed, the visual impact of several of these commercials, in the primarily visual medium of television, is so strong that it is doubtful that any audio disclaimer run in conjunction with the visual images would be sufficient to protect the viewing public from being left with the erroneous overall impression that Geritol is a generally effective remedy for tiredness.[6]

The presentation of these commercials is such that the viewer is left not only with an erroneous impression as to the capabili-

[5] Commission's footnote: "Under this order, as under similar orders requiring affirmative disclosure of facts necessary to prevent an otherwise unqualified claim from being false or misleading, the disclosure must be made in immediate or close proximity with the claim and with equal prominence. The advertisement, regarded as a whole, should not leave any impression negating or obscuring the necessary affirmative disclosure, for otherwise the order would be rendered nugatory."

[6] We are not swayed by the argument of respondents that the Commission could not judge satisfactorily the impact of these commercials on the viewing public because they were shown to the Commission at a public hearing in a different setting than that involving the "average"

ties of Geritol in providing relief from tiredness, but also with an erroneous impression as to the length of time in which Geritol will provide relief. Use of such terms as "later" and "Feel stronger fast," while perhaps not objectionable in themselves, cannot be considered in compliance with the order when these phrases are presented in conjunction with visual presentations such as that described in the "Man Coming Home" commercial. Viewing of such commercials leaves the clear impression that Geritol will be effective in relieving tiredness almost instantly, certainly within a very short period of time. Such an impression violates the provisions of paragraph 1(f) of the order which prohibits the representation that the use of Geritol will increase the strength and energy of the body in any time less than that in which the consumer may actually experience improvement. Although the precise time in which relief will be experienced is not readily determined, it is clear that the time is considerably longer than that indicated by the commercials. (See p. 4 of our original opinion in this matter [68 F.T.C. at 538].)

Respondents have contended that the Commission will, in effect, destroy their right to advertise Geritol if such commercials as those in question are not permitted. However, as was noted in our original opinion (p. 14) [68 F.T.C. at 546], there were two courses by which we could have prevented the deception inherent in the advertising for Geritol: (1) by requiring the omission from such advertising of all reference to the effectiveness of Geritol on tiredness symptoms, or (2) by requiring an express statement of the limitations of the effectiveness of Geritol on such symptoms, if any claim of effectiveness on these symptoms is made. Respondents plainly have no right to convey to the public the false and misleading impression that Geritol is a generally effective remedy for tiredness.[7]

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viewer of the commercials. We have given such factors due consideration, which is the case in each of the many instances where we are called upon to use our expertise in determining whether a television commercial is false and misleading.

Although the full impact of the commercials here under review can be appreciated only upon viewing them some indication of their tone may be gained from study of the scripts. Attached hereto are the scripts of three of the films shown at the hearing of Novmber 14, 1968 (CX G–537–30–ML–REV # 2, "Man Coming Home"; CX G–543–40–ALT–REV., "Judge-Book"; CX G–206–30, "Answer Is Yes"). Comparison of these scripts with the scripts for earlier Geritol commercials which were appended to the opinion accompanying the Commission's original order and appended to the court's opinion (381 F. 2d at 893) demonstrates the continuation of the message that Geritol is a generally effective remedy for tiredness.

[7] *Cf. Murray Space Shoe Corp.* v. *Federal Trade Commission*, 304 F. 2d 270, 272 (2d Cir. 1962) (no constitutional right to disseminate false and misleading advertisements); *Slough* v. *Federal Trade Commission*, 396 F. 2d 870, 872 (5th Cir. 1968), Slough's petition for certiorari pending, Sup. Ct. No. 550 (no right to engage in business which can operate only by the use of deceptive practices).

Another argument of respondents is that the commercials are directed toward a specific segment of the population, *viz.*, women of the child-bearing years. The commercials in question, like earlier advertisements for Geritol, are directed to the general population. A listing of the broad range of programs on which these commercials were shown supports our judgment. The message of these commercials was presented on literally every type of program available to a television advertiser, including daytime soap operas, evening news programs, western series, comedy series, network motion picture presentations, and special events such as national political conventions.

As to the argument of respondents that this order is not clear, we reply that not only the members of this Commission but the panel of the Court of Appeals for the Sixth Circuit which reviewed our decision considered this order to fairly apprise respondents "of what is required of them." 381 F. 2d at 891.

The Commission concludes that the commercials in question failed to comply with its order. We hereby advise respondents that, in order to avoid future enforcement proceedings, they discontinue immediately the broadcast of any of the television commercials furnished the Commission at the hearing of November 14, 1968, or any similar commercials. By producing and disseminating these commercials, respondents have ignored the clear terms of the final order.

Respondents are directed to file with the Commission no later than January 31, 1969, a report of compliance showing that such commercials are no longer being broadcast and that respondents are in full compliance with the order to cease and desist. If no such report is filed by that date, or if it is found to be unsatisfactory, the Commission will take such enforcement actions as may be necessary to assure that its order and the decree of enforcement entered by the Court of Appeals do not continue to be flouted by respondents, including certification of the matter to the Court of Appeals with the recommendation that civil contempt proceedings be promptly commenced.

TITLE: "MAN COMING HOME"
COPY CODE: GER-TV-594
TIME: :30
WORD COUNT:65

GERITOL COLOR FILM
#G-537-30-MA-REV #2

TV SCRIPT PARKSON ADVERTISING AGENCY, INC.

1. OPEN ON HUSBAND CLOSING DOOR. HE GLANCES SADLY AHEAD OF HIM.	1. (*MUSIC:* GAY INTRO, BUT CHANGING MOODS TO FIT SCENES THROUGHOUT)

2. CUT TO HIS WIFE IN CURLERS. SHE IS TIRED-LOOKING AND LEANING AGAINST DOOR.	2. *ANNCR. (V.O.):* Now, the great majority of tired people don't feel that way
3. CUT TO HUSBAND APPROACHING HER.	3. . . . because of iron-poor blood . . .
4. CUT TO REVERSE ANGLE AS HE KISSES HER AND STARES AHEAD IN HORROR.	4. . . . and Geritol won't help them, but it is . . .
5. CUT TO MESSED-UP KITCHEN.	5. . . . a medical fact that many of the millions . . .
6. CUT TO HUSBAND, WHO STARTS TO DRAW PISTOL FROM HIS JACKET. HE POINTS IT.	6. . . . of people who have iron-poor blood . . .
7. CUT TO WIFE WITH GUN AGAINST HER NOSE. AS HIS FINGER PULLS TRIGGER, FLAG DROPS FROM IT READING: "IRON-POOR TIRED BLOOD? TRY GERITOL."—SHE READS IT.	7. . . . are tired and need Geritol.
8. CUT TO CARD: "LATER"	8. ——
9. CUT TO INTERIOR SHOT OF HUSBAND ENTERING FRONT DOOR. HE IS DEJECTED. HE LOOKS FORWARD IN SURPRISE.	9. ——
10. CUT TO KITCHEN, WHICH IS NOW CLEAN AND NEAT.	10. ——
11. CUT BACK TO HUSBAND, WHO LOOKS AHEAD AND REGISTERS GREAT SHOCK.	11. ——
12. CUT TO WIFE, WHO IS GARBED IN A SLINKY GOWN. SHE IS POSING AGAINST THE PIANO AND WEARS A "COME HITHER" EXPRESSION. SHE HAS A ROSE IN HER MOUTH AND LOOKS BEAUTIFUL.	12. *(MUSIC: FADE BEHIND) ANNCR. (VOICE OVER):* if you're tired because of iron-poor blood, Geritol can help *you* feel stronger fast.
13. CUT TO HUSBAND AS HE APPROACHES HE RUBS HANDS TOGETHER EXPECTANTLY.	13. *(MUSIC: UP)*
14. CUT TO TWO-SHOT AS HE APPROACHES HIS WIFE. SHE GRABS HIM AND OVERPOWERS HIM WITH A KISS.	14. *(MUSIC: FADE BEHIND) ANNCR. (VOICE OVER):* Maybe not *this* fast.
15. CUT TO PRODUCT SHOT. SUPER "FEEL STRONGER FAST"	15. But fast. *(MUSIC:* PLAYOFF)

TITLE: "BOOK" GERITOL COLOR TAPE
TIME: 40 Seconds #G-543-40-ALT-REV.

(ANNOUNCE RE-RECORDING)
AT NATIONAL STUDIO-7/23/68

TV SCRIPT PARKSON ADVERTISING AGENCY, INC.

1. OPEN ON CLOSEUP OF TIRED WIFE LOOKING DESPERATELY UP TOWARD JUDGE.	1. *WIFE* (ON CAMERA): Judge, my husband doesn't pay any attention to me anymore!
2. CUT TO CLOSEUP OF JUDGE LEANING FORWARD, PARTLY IN SURPRISE, PARTLY IN SYMPATHY.	2. *JUDGE* (ON CAMERA): Poor lady! . . . (To Husband) Well?
3. CUT TO HUSBAND PLEADING WITH JUDGE.	3. *HUSBAND* (ON CAMERA): I have Tired Wife!
4. CUT BACK TO JUDGE, WHO IS HORRIFIED AND SHOWS IT. HE LEANS FORWARD TO REPEAT THE LINE IN UTTER DISMAY.	4. *JUDGE* (ON CAMERA): Tired Wife!
5. CUT TO TIRED WIFE AND SUPER: "TIRED WIFE"	5. (SOUND: GONG) *ANNCR.* (V.O.-ECHO): Tired . . . Wife!
6. CUT BACK TO JUDGE AS HE OPENS A LARGE BOOK, TURNS IT AROUND AND HOLDS IT TOWARD THEM. IN IT IS LETTERED: "TIRED DUE TO IRON-POOR BLOOD? TAKE GERITOL"	6. JUDGE (ON CAMERA): Madame, I'm going to . . .
7. MOVE IN TO TIGHTER SHOT OF MESSAGE AS WIFE ALSO MOVES IN AND READS IT.	7. *JUDGE (V.O.):* . . . throw the book at you. WOMAN: GERITOL?!
8. CUT TO WOMAN'S FEET GOING INTO STORE.	8. *ANNCR. (V.O.):* The great majority of tired people don't feel that way because of iron-poor blood and Geritol won't help them . . .
9. CUT TO HEAD SHOT OF WIFE AT GERITOL DISPLAY.	9. but it's a medical fact millions of people have iron-poor blood . . .
10. MOVE IN TIGHTER AS SHE "POURS" TWO GERITOL TABLETS INTO HER HAND.	10. . . . and you could be one of the many who are tired for that reason and need Geritol. Two Geritol tablets give you twice the iron in a pound of calf's liver plus seven vitamins.

11. CUT BACK TO HAPPY HUSBAND AND WIFE WALKING BRISKLY DOWN AISLE OF COURTROOM TOWARD CAMERA. "LATER" IS SUPERED OVER.	11. *ANNCR. (V.O.):* Geritol-iron enters your bloodstream fast, carrying strength . . .
12. CUT TO WOMAN AS SHE APPROACHES JUDGE, STARTS TO OVERWHELM HIM WITH A KISS.	12. . . . throughout your body
13. SHE KISSES JUDGE. SUPER: "NO MORE TIRED WIFE."	13. *ANNCR.* (V.O.-ECHO): No . . . more . . . Tired . . . Wife!
14. MOVE IN ON JUDGE WHO LOOKS AT CAMERA AS IF AN IDEA JUST STRUCK HIM.	14. *JUDGE* (ON CAMERA): Maybe my wife should take Geritol!
15. CUT TO PACKAGE SHOT. SUPER: "FEEL STRONGER FAST."	15. *ANNCR. (V.O.):* Take Geritol—and feel stronger fast!

TITLE: "ANSWER IS YES"
TIME: :30 Seconds

AS TAPED: 6/12/68 GERITOL COLOR TAPE
AT VIDEOTAPE CENTER #G–206–30

TV SCRIPT PARKSON ADVERTISING AGENCY, INC.

1. CLOSE UP OF RALPH BELLAMY.	1. *BELLAMY:* Have you ever asked yourself . . .
2. DISSOLVE TO TIRED LOOKING WOMAN.	2. *WOMAN (O.C.):* "Can iron-poor blood make me tired?
3. CUT TO CU BELLAMY	3. *BELLAMY:* Yes!
4. CUT TO GERITOL BOTTLE	4. You may need Geritol.
5. CUT TO BELLAMY STARTING TO WALK.	5. The great majority of tired people don't feel that way because of iron-poor blood and Geritol won't help them . . .
6. CONTINUES WALK AND STANDS NEXT TO GERITOL DISPLAY. HE INDICATES PRODUCTS.	6. . . . but it's a medical fact, many of the millions of people who have iron-poor blood . . . are tired.
7. CUT TO GERITOL BOTTLES	7. and need Geritol. It could be why you're tired.
8. CUT TO BELLAMY	8. Geritol-iron enters your bloodstream carrying strength throughout your body.
9. CUT TO PRODUCT SHOT. MATTE SUPER: "FEEL STRONGER FAST"	9. So, for iron-poor tired blood take Geritol *Feel Stronger Fast!*

MAREMONT CORPORATION

Docket 8763. Order, Dec. 20, 1968

Order denying respondent's request to appeal from hearing examiner's order relative to the release of certain third-party documents.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission upon respondent's request for leave to file an interlocutory appeal from the hearing examiner's order filed November 21, 1968, granting in part and denying in part respondent's motion for the release of confidential documents.

On October 21, 1968, after a prehearing conference, the hearing examiner filed an order which prohibited the release of certain third-party documents in the possession of complaint counsel to persons other than independent counsel for respondents. The examiner provided for the granting of relief from this ruling upon a proper showing by respondent's counsel. On October 23, 1968, respondent filed a motion requesting permission to release the third-party documents to four of its named employees. The hearing examiner's order of November 21, 1968, amended his order of October 21, 1968, in certain respects, but denied that part of respondent's motion which requested permission to release third-party data disclosing sales figures for certain automotive parts to respondent's four employees. It is this order which is the subject of the present motion.

At the outset, it is important to note that the examiner's orders do not purport to deal with the question of whether the third-party documents should be accorded *in camera* treatment. In his October 21, 1968, order, the examiner expressly denied third-party motions insofar as they sought to confer *in camera* status on their documents when offered in evidence.

The third-party data in issue consists of confidential business information which the third parties would not customarily make public. In this preliminary stage, the examiner was faced with the question whether the need for respondent's four employees to know this sensitive information outweighed the third parties' need for protection. In making his determination, the examiner made it clear on the record that this was not a final ruling but was an interim decision. Specifically, he suggested to respondent's counsel that he consult with complaint counsel or the third parties to resolve any difficulties in the comprehension or interpretation of the data. If difficulties could not be resolved, the examiner's