Order extending time for third party to comply with subpoena and denying motion to quash.

OPINION OF THE COMMISSION

This matter is before the Commission upon the motion of

[1] *Koppers Company, Inc.*, Docket No. 8755, November 1, 1968 [p. 1621 herein].
[2] *Lehigh Portland Cement Co.*, Docket No. 8680, August 2, 1968 [p. 1585 herein].
[3] Section 3.23 Commission's Rules of Practice.

United States Pipe and Foundry Company to extend the return date on the subpoena duces tecum issued at respondent's request, to a date no earlier than ten business days following receipt by U.S. Pipe of the Commission's order and opinion on its appeal from the examiner's order of December 3, 1968, modifying the subpoena and otherwise denying the motion to quash. In the same order, the examiner denied U.S. Pipe's motion for a stay of the return of the aforesaid subpoena except to the extent of postponing the return date to December 10, 1968.

The record reveals that on December 9, 1968, counsel for U.S. Pipe advised the examiner by phone that he had filed an appeal by mail from the examiner's order and would not appear at the December 10, 1968, prehearing conference. On December 10, 1968, the examiner certified the failure to respond to the subpoena as modified with the recommendation to the Commission that prompt action be taken to compel production under the subpoena. On December 11, 1968, the examiner certified the motion of U.S. Pipe to extend the return date of the subpoena with the recommendation that it be denied because it was for substantially the same relief previously denied by order dated December 4, 1968.

The record further reveals that on December 10, 1968, U.S. Pipe filed with the Commission (1) its application to extend the return date as described above and (2) its appeal and brief from the examiner's order denying the motion to quash.

The Commission is reluctant to intervene in this matter once again but feels that there are certain aspects of the proceeding which require it so to do. While the question of respondent's subpoena of the records of U.S. Pipe has been before the examiner and the Commission a number of times, what is of concern here is a new subpoena issued by the examiner pursuant to the Commission's opinion dated November 1, 1968 [p. 1621 herein]. Taking into account all the time factors involved, the subpoena in question was originally dated November 20, 1968, and was modified by oral order of the examiner dated December 3, 1968, at which time the date of return was extended until December 10, 1968.

Since the examiner also otherwise denied the motion to quash on the same date, it can thus be construed that the return date was set within the time during which Rule 3.35, as that time is computed under Rule 4.3, permits U.S. Pipe to appeal to the Commission from denial of the motion. The Commission has no wish to see this sort of cloud descend on these proceedings at

this stage, for if it denied U.S. Pipe's motion and took action at this time to compel production under the subpoena, a very real question would exist as to whether U.S. Pipe had, by construction of the Rules, been effectively denied its right of appeal.

While the Commission is, by the accompanying order, granting the motion by U.S. Pipe for an extension of time to respond to the subpoena, it does not agree that U.S. Pipe will need as much as ten days from the date of receipt of the Commission's order and opinion on its appeal from the denial of its motion to quash to do so. In view of all that has gone before, the Commission feels that U.S. Pipe should be prepared to proceed within five days following the Commission's action in the event the Commission decides to deny the appeal. The question would, of course, become moot if the Commission's decision was to grant the motion to quash.

Commissioner MacIntyre concurred in the result.

ORDER EXTENDING RETURN DATE ON SUBPOENA DUCES TECTUM

The Commission has given consideration to the application by United States Pipe and Foundry Company, filed December 10, 1968, to extend the return date on the subpoena duces tecum to a date no earlier than ten business days following receipt by the company of the Commission's order and opinion on the company's appeal, filed on the same day, from the hearing examiner's denial of the motion to quash said subpoena.

It appearing, for reasons stated in the accompanying opinion, that adequate justification exists for granting said motion in view of the time factors involved,

It is ordered, That the time allowed for the company to make return on the subpoena dated November 20, 1968, as modified December 3, 1968, be, and it hereby is, extended until five business days following receipt by the company of the Commission's order and opinion on the appeal from the examiner's order modifying the subpoena and otherwise denying the motion to quash.

By direction of the Commission with Commissioner MacIntyre concurring in the result.

No. 261. Promotional assistance based on percentage of purchases during a fixed time period.

The Commission was requested to render an advisory opinion with respect to the legality of a supplier's proposed promotional program under an outstanding Commission order which, in pertinent part, prohibits the supplier from making promotional payments to its customers in a discriminatory manner. According to information provided by the supplier, all its sales are made to retailer customers—distributors or other intermediaries are not utilized in the distribution of the supplier's products.

Under the proposed program as set forth and explained by the supplier, promotional allowances would be made available to all customers of the supplier and could be applied by the customers to the costs incurred by them in three categories of advertising and promotional activity: Point-of-sale materials, cooperative advertising in daily and Sunday newspaper listed in Standard Rate and Data; and so-called other store promotions, including advertising in newspapers not listed in Standard Rate and Data, catalog and local radio and T.V. advertising, envelope stuffers, and sales incentive programs and contests.

Further, the amounts of such allowances would be determined at the rate of 7 percent of each participating customer's net purchases from the supplier in a six-month period, although this figure could be adjusted within any given trading area (defined by Management Survey of Metropolitan County Areas) as operating experience requires. In the case of Standard Rate and Data newspapers, the allowances could be applied to two-thirds the cost of such advertising, and for all other forms of eligible advertising and promotional activity, allowances could be applied to the full cost of the activity. In all cases, and whether any customer chooses to participate in any or all of said categories of advertising and promotional activity, the supplier's total contribution to the customer's cost would be subject to the 7 percent of purchases limit. Allowances earned but not used by any customer in a

* In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are currently published in the Federal Register.