Commissioner MacIntyre concurred in the result.

KOPPERS COMPANY, INC.

Docket 8755. Order, July 2, 1968

Order granting respondent's request to file interlocutory appeal and vacating hearing examiner's order directing hearings in more than one city by restricting hearings to Pittsburgh only.

ORDER GRANTING RESPONDENT'S INTERLOCTORY APPEAL AND VACATING EXAMINER'S ORDER FOR HEARINGS IN MORE THAN ONE PLACE

This matter having come before the Commission on the request by respondent Koppers Company, Inc., pursuant to Rule 3.23(a) for permission to file an interlocutory appeal from the order of the examiner dated May 17, 1968, granting the motion of complaint counsel to hold hearings in three cities, New York, Pittsburgh, and Birmingham, Alabama; and

The Commission having considered said request, the order of the examiner dated May 17, 1968, and all of the memoranda directed to the examiner by the parties including complaint counsel's motion of April 29 and affidavit of May 10 and respondent's opposition memorandum of May 6 and answer of May 16; and

The Commission believing that counsel supporting the complaint has clearly failed to carry the burden of establishing the presence of "unusual and exceptional circumstances" required to justify the holding of hearings in more than one place under Section 3.41(b) of the Commission's Rules in accordance with the Commission's order of April 9, 1968, in *Universe Chemicals*, Docket 8752 [73 F.T.C. 1259]:

It is ordered, That the respondent's interlocutory appeal be granted.

It is further ordered, That the hearing examiner's order granting complaint counsel's motion for hearings in more than one place be vacated and that the hearings be held only in Pittsburgh.

Commissioner MacIntyre did not concur.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, July 2, 1968

Order denying application of respondent for subpoena duces tecum and for the release of confidential information.

OPINION OF THE COMMISSION

Respondent herein, charged with violating Section 5 of the Federal Trade Commission Act, on March 28, 1968 applied to the hearing examiner, under § 3.34(b) of the Commission's Rules of Practice, for a subpoena duces tecum directed to complaint counsel to produce the records which it listed contained in the Commission's files, or, in the alternative, for the production of such records pursuant to § 3.36 of the Commission's Rules of Practice. The examiner, on March 28, 1968, certified the application (which he treated as a motion) to the Commission, holding that he was without power to grant or deny the request under §3.22(a) of the Commission's rules. The examiner recommends that the application be denied on a number of grounds: first, because it has not been shown that there has been a refusal by complaint counsel to exhibit the documents sought; secondly, it has not been shown that there are documents of the kind desired; thirdly, the subpoena, if issued, would be so broad as to be unreasonable; and, finally, that the application might better await the disclosure of complaint counsel's evidence, which would permit a more limited request based on the facts that respondent would be required to meet.

Simultaneously with the filing of the application, respondent, through its attorney, sent a letter to the Commission, requesting, pursuant to the provisions of the new public information law (81 Stat. 54 (1967); 5 U.S.C. § 552, as amended, referred to hereafter as the Public Information Act), that the Commission make available to Koppers Company, Inc., copies of listed documents. The specifications of this request essentially duplicate those in the application for subpoena duces tecum, although there are some differences.[1]

Respondent, on April 3, 1968, filed with the Commission a memorandum in connection with the certification of the subpoena duces tecum. Complaint counsel filed a memorandum on April 17, 1968, in opposition to both requests and respondent, on April 23, 1968, filed a further memorandum in reply.

Before considering the merits of the request for information it is necessary to comment on the procedural aspects of seeking the

[1] One main item of information sought in the letter request which does not seem to be covered in the subpoena application is that which reads as follows: "Any opinion, order, statement of policy or directive by a Member or Members of the Federal Trade Commission which would state those reasons for the issuance of the complaint against this company (Dkt. 8755). On this request the Commission would make available to the respondent any documents coming within the terms of this specification which are on the public record. However, respondent has not identified any such documents, and an examination of the Commission's records reveals that there are none described on the public record.

documents directly from the Commission under the Public Information Act. The Commission's rules do not provide for a release of confidential information by direct request in an adjudicative case. Respondent concedes in its letter of March 28, 1968, that the information sought is for use by the respondent in preparation of its defense in the instant proceeding. In such circumstances the Commission's rule § 3.36 is applicable. This rule requires that application be made in the form of a motion to the examiner, who must certify such to the Commission with his recommendation. This precludes a direct request under § 4.11 of the Commission's rules.[2] Nevertheless, in this instance, since the request under the Public Information Act largely duplicates the application to the hearing examiner, we will not exclude it from our consideration because of the improper procedural approach but will view it as a supplement to the application filed with the examiner.[3]

The request for documents, as the examiner found, is extremely broad. The application covers all documents from January 1, 1962, to the date of the application (March 28, 1968), in the following categories:

1. All documents of any nature, kind or description, including mechanical recordations, prepared by or otherwise received from United States Pipe and Foundry Company relating or referring to the domestic production and sale of resorcinol or which in any way relate or refer to this respondent or any officers or employees thereof;

2. All documents of any nature, kind or description prepared by or received from fifteen companies listed (including such as Goodyear Tire and Rubber Company, United States Rubber Company, Deering-Millekin Company, and others), whose officer, employees or representatives have been identified by complaint counsel as being persons who may be called to testify on behalf of the complaint;

3. All documents, including correspondence, of any nature, kind or description received by the Commission in connection with this matter from companies other than those referred to in specification number 2, above;

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[2] Moreover, § 3.22 of the rules states that during the time a proceeding is before a hearing examiner, all motions therein, except those filed under § 3.42(g) [Disqualification of hearing examiner] *shall be addressed to the hearing examiner* and if within his authority shall be ruled upon by him. Any motion upon which he has no authority to rule is to be certified to the Commission with his recommendation.

[3] In this connection, it should be pointed out that the materials which may be obtained by a party under § 3.36 of the Rules (now and prior to the amendment of that Rule on May 1, 1968) is more broad than the material which is available to the public under the Public Information Act.

4. All signed statements received from any individual which relate, refer to or otherwise concern the domestic production and sale of resorcinol and resorcinol products;

5. All documents, to the extent not produced in response to prior paragraphs, which reflect, refer to or otherwise concern the potential, contemplated or actual entry of a company into the market for the domestic production and sale of resorcinol;

6. All documents, studies and surveys which reflect, refer to or otherwise concern competitive conditions or practices involving the domestic production and sale of chemicals other than resorcinol;

7. All documents of any nature, kind or description which reflect, refer to or otherwise concern the revisions by this respondent of all contracts for the sale of resorcinol in December 1966 whereby all customers were released from contractual obligations to purchase in excess of 50 percent of their resorcinol requirements from Koppers;

8. Such documents of any nature, kind, description or origin which would show that this proceeding is brought as a means of ensuring the competitive survival or prosperity of United States Pipe and Foundry Company.[4]

Subsection (b) of Rule 3.36 (unchanged by the May 1, 1968, amendment), the rule here applicable, specifies as to a motion seeking confidential Commission materials or information as follows:

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

Respondent, seeking in the alternative to justify its request under § 3.36, cites circumstances which it argues go to the relevancy of the documents. It makes no further showing. It does not meet, or even attempt to meet, the other requirements of Rule 3.36. There is no showing as to the reasonableness of the scope of the application, nor is there a showing that such material or information is not available from other sources by voluntary meth-

[4] The request made under the Public Information Act differs on some of the specifications, as stated above, but in view of our disposition of the matter we will not discuss the particulars of such differences.

ods or through other provisions of the rules in the chapter.[5]

Respondent, in its reply of April 23, 1968, suggests, apparently for the first time, certain considerations which might bear on a claim of the unavailability from other sources of the documents sought under Specification 1. It mentions, for instance, that it has obtained discovery from United States Pipe and Foundry and, having what it believes to be some reason to question the completeness of the material produced, is now pressing for discovery from complaint counsel. It cannot use its mere assumptions as to incompleteness as a basis for claiming that the requested documents are not available from other sources. In any event, any such justification, if that is what it is, should have been made in the first instance to the hearing examiner so that he would have had all the facts and circumstances necessary to an informed determination and recommendation under § 3.36.

We are, by separate Opinion and Order, remanding the appeal of U.S. Pipe from the Orders of the hearing examiner with respect to the Subpoena Duces Tecum directed to it by Koppers to the hearing examiner with directions to reconsider his orders in the light of that opinion. In view of that determination, it is our conclusion that the respondent's request for U.S. Pipe documents from the Commission is premature.

Respondent, in its reply memorandum, further asserts that complaint counsel has been ordered to turn over to respondent by May 15, 1968, all documents which he intends to use in his case and that "[t]he subpoena is merely intended to procure any documents received by complaint counsel which he decides not to use in his own case" (p. 4, reply memorandum filed April 23, 1968). This seems to be a different and more limited request from that contained in the specifications of the subpoena. However, the examiner construed the application as a "very broad discovery of all documents in the possession of the Federal Trade Commission dated January 1, 1962, to date relating to the subject matter of the complaint." In any event, respondent cannot serve such a dragnet subpoena on the Commission and then attempt to defend its broad scope by claiming that in fact fewer documents are actually desired than are requested. It would appear that in fact respondent has already received many of the documents which it

[5] Respondent does not contend that any of the materials requested are those which respondent is entitled to by law. Moreover, the sweeping nature of the request and the general justification therefor will admit of no determination on such question. To the extent, however, that there are identifiable documents in the Commission's files coming within this exception no further reference to the Commission is necessary. A request for any such documents would be governed by § 3.34 of the Commission's rules.

seeks under this subpoena.[6] Respondent is under a duty to examine these documents and thereafter determine precisely what additional documents it believes it requires, and is entitled to.

We agree with the examiner that on its face, the application for subpoena duces tecum is, for an adjudicative proceeding, unreasonably broad. The information sought covers a lengthy period (*i.e.*, six years), comprehensively embraces whole files or categories of documents with little or no differentiation or particularization, and the request by its nature seems to be designed to uncover numerous documents in the hope that something useful might turn up. Such a request, we believe, is unreasonable in scope and is not justified under the Commission's rules. See *Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149,153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). As the examiner pointed out in his certification, a more orderly procedure would be for respondent to wait for the disclosure of all of complaint counsel's evidence and on the basis of these documents frame an application for discovery based on the facts which respondent would be required to seek.

Rule § 3.36(b), which will be applied by the hearing examiner under the May 1, 1968, amendment, requires that respondent ". . . shall specify *as exactly as possible* the material to be produced . . ." (emphasis added). This is not to be interpreted to mean a particular identifiable document (the identity of which will frequently not be known to respondent), but it does require greater specificity than a general request for ". . . all documents of any nature, kind or description . . ." so that there can be no doubt exactly what materials must be furnished.

In all the circumstances, we conclude that the request here made is one that has not been presented to the examiner with a reasonable effort to accord with the requirements of § 3.36. The Commission, through amendments of its rules and otherwise, is making serious efforts to expedite the determination and disposition of both adjudicative and non-adjudicative matters. If these ends are to be achieved, it requires that diligent efforts be made, by both the Commission staff and counsel representing respondents and proposed respondents, to initially comply with the letter and spirit of the Commission rules. The Commission will look with

[6] Complaint counsel, in his memorandum of April 17, 1968, asserts that almost all of the documents in Specification 2 have been furnished and that the remaining documents will be furnished; that the statements covered by paragraph 4 are already in respondent's possession; that all specifications under paragraph 5 have been, to the best of complaint counsel's knowledge, delivered to respondent; that documents in paragraph 6, known to complaint counsel, were either obtained from respondent or have already been furnished respondent; and, finally, that complaint counsel has no such documents as those referred to under paragraph 7 other than such already furnished by respondent to the Commission's staff.

disfavor upon any efforts to use its processes of expedition as devices for delay.

Respondent's application for a subpoena duces tecum, including its supplemental request by letter of March 28, 1968, and, in the alternative, its request under § 3.36 for the production of documents will be denied. This, however, will be without prejudice to the respondent to apply for a subpoena duces tecum which it can justify under the Commission's rules. In view of the amendment of Rule § 3.36 on May 1, 1968, any new application will be governed by that Rule, as amended.

An appropriate order will be issued to accompany this opinion.

ORDER DENYING APPICATION FOR SUBPOENA DUCES TECTUM AND REQUEST FOR RELEASE OF CONFIDENTIAL RECORDS

This matter is before the Commission upon the application of Koppers Company, Inc., for subpoena duces tecum or, in the alternative, for the production of confidential records; and

The Commission having considered said application, which was treated by the hearing examiner as a motion and certified to the Commission with recommendation that it be denied, the memorandum in opposition thereto submitted by counsel supporting the complaint and the memorandum by respondent in reply to complaint counsel's opposition; and

The Commission being of the opinion that respondent has not made a showing which would warrant issuance of the subpoena or granting of the request for release of confidential information; therefore, for the reasons set forth in the accompanying opinion,

It is ordered, That the application of Koppers Company, Inc., for subpoena duces tecum and for release of confidential records be and it hereby is denied.

LEHIGH PORTLAND CEMENT COMPANY-

Docket 8680. Order and Opinion, Aug. 2, 1968

Order remanding to the hearing examiner the question of subpoenas directed to third-party concrete companies.

OPINION OF THE COMMISSION

This matter is before the Commission upon the appeals of re-