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 respondent and fourteen third parties. On January 11, 1968, subpoenas duces tecum were issued to eighty-one ready-mixed concrete companies on behalf of respondent. On January 25, 1968, thirty-six additional subpoenas duces tecum were issued to port-

land cement manufacturers on behalf of respondent. Subsequently, forty-seven ready-mix firms and twenty-two portland cement manufacturers complied with the subpoenas. Motions to quash were filed by twenty-nine ready-mix firms and thirteen portland cement firms.[1]

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 respondent'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 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 georgraphic 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* 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, fourteen 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.[2]

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[1] Six firms receiving subpoenas had neither filed motions nor fully complied with the subpoenas as of the dates of the examiner's rulings on the motions to quash.

[2] Order Modifying Subpoenas Duces Tecum, p. 4 (May 29, 1968), p. 5 (June 14, 1968).

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 countervailing 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.

Neither the Commission nor the courts have given recognition to an absolute trade secret privilege.[3] The revelation of a trade secret will be compelled if it is indispensable to the proceeding.[4] Nevertheless, the Commission and the courts have hesitated to order disclosure absent a clear showing of immediate need for the requested information. Once disclosure is deemed necessary, conditions have usually been imposed which limit the use of the information only to the litigation and which prevent disclosure to nonparty competitors.[5]

The techniques by which protection has been provided vary as much as the subjects protected. The procedure adopted in *Mississippi River* has been used on a number of occasions.[6] Nevertheless, it is not the only available solution. At this juncture, we are uncertain that the examiner gave adequate consideration to whether all the information at issue was entitled to protection and, if so, whether the *Mississippi River* treatment provides the best available resolution to the opposing interests of the respondent and the third parties.

[3] See generally, E. Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: The Hearing*, 116 U. Pa. L. Rev. 401 (1968).

[4] *Federal Trade Commission* v. *Frederick A. Clarke*, 3 S.&D. 406 (S.D. Cal. 1941), *aff'd*, 128 F. 2d 542 (9th Cir. 1942).

[5] E. Gellhorn, *supra* note 3, at 409.

[6] See, *e.g.*, *Cities Service Oil Co.* v. *Celanese Corporation*, 10 F.R.D. 458 (D. Del. 1950); *Empire Rayon Yarn Co.* v. *American Viscose Corp.*, 160 F. Supp. 334 (S.D.N.Y. 1958).

The test to apply to requests for confidential protection of business records and trade secrets is whether public disclosure will cause a clearly defined serious injury. It has been suggested that, for a fair resolution of a business secret claim, an examiner should consider, in determining whether disclosure will cause serious injury, such factors as:

1. How many people have knowledge of the supposedly "secret" information? Will disclosure increase that number significantly?

2. Does the contested information have any value to the possessor? To a competitor? Is that value substantial?

3. Did the party possessing the information incur any expense in this development? Has he had a sufficient opportunity to realize an adequate return on that investment?

4. What damage, if any, would the possessor of the secret suffer from its disclosure? What advantages would his competitors reap from disclosure?

5. What benefits are likely to flow from disclosure? To whom? Are they significant? In this connection, what is the public "need" for disclosure? Can it be satisfied in any other way? [7]

Because of the possibility that the examiner's impending mandatory retirement might have occurred prior to the completion of this litigation, the parties have recently agreed to the substitution of a new hearing examiner. Under the circumstances, we believe it appropriate to return this matter to the new examiner for reconsideration.[8] An appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER OF REMAND TO HEARING EXAMINER

Upon consideration of the appeals of respondent and fourteen third party concrete companies from the hearing examiner's rulings of May 29, 1968, and June 14, 1968, and for the reasons stated in the accompanying opinion:

It is ordered, That this matter be remanded to the hearing examiner for further consideration.

By the Commission, with Commissioner MacIntyre not participating.

[7] E. Gellhorn, *supra* note 3, at 422-423. The intriguing suggestion has also been offered that to protect the Commission's concern about an incomplete public record, while also preventing unwarranted disclosure, the party seeking protection could be required to prepare a non-confidential summary of the document or testimony for inclusion in the public record. *Id.*

[8] The examiner appears to have given adequate consideration to the geographic scope of the subpoenas addressed to portland cement companies. However, in light of our disposition of the primary basis for these appeals, we believe it is appropriate to give the new examiner an opportuntiy to make his own judgment on this aspect also.

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order, Aug. 8, 1968

Order granting leave to file appeal from hearing examiner's order and for Phillips Petroleum to file comments.

ORDER GRANTING PERMISSION TO FILE AN INTERLOCTORY APPEAL

This matter is before the Commission on respondent's request for leave to file an interlocutory appeal from the hearing examiner's order of July 19, 1968, and for summary reversal of that order. The Commission has determined that the request for permission to file the interlocutory appeal should be granted and the request for summary reversal of the hearing examiner's order be denied. The Commission has further determined that the Phillips Petroleum Company should be granted an opportunity to file whatever comments it deems appropriate within five (5) days after service of respondent's appeal brief upon it. Accordingly,

It is ordered, That respondent's request for permission to file an interlocutory appeal from the order of the hearing examiner dated July 19, 1968, be, and it hereby is, granted.

It is further ordered, That respondent's request for the summary reversal of that order be, and it hereby is, denied.

It is further ordered, That Phillips Petroleum Company be, and it hereby is, authorized to file whatever comments it deems appropriate in response to respondent's appeal within five (5) days after service upon it of the appeal brief.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Aug. 9, 1968

Order denying respondent's appeal from hearing examiner's order refusing to quash subpoenas duces tecum.

OPINION OF THE COMMISSION

This matter is before the Commission upon the interlocutory appeal of respondent. This appeal, filed pursuant to § 3.35(b) of the Commission's rules of practice, is based upon the hearing examiner's order of March 21, 1968, denying respondent's motion to quash complaint counsel's subpoena duces tecum.

The subpoena, directed to respondent, seeks specific evidentiary market data concerning five acquisitions. The hearing examiner concluded that the specifications are "utterly precise and specific" and that "no suggestion to the contrary has been made [by

respondent] or implied." [1] Respondent's appeal is based upn the sole ground that the subpoena constitutes "a postcomplaint investigation in contravention of the Commission's Rules of Practice as articulated in the Commission's decision in *All-State Industries of North Carolina, Inc.*, Docket 8738 (Nov. 13, 1967) [72 F.T.C. 1020]." [2] Complaint counsel invoke the *All-State* decision in support of their assertion that the subpoena is properly within the bounds of reasonable postcomplaint discovery.

Because of numerous questions which have risen as a result of the earlier *All-State* decision, we have recently issued a supplemental clarifying opinion. The original opinion in *All-State* held that the hearing examiner's order requiring respondent to give complaint counsel access to certain files for examination and copying was in fact in the nature of an investigational subpoena. We then stated:

> While there may be innumerable instances where such broad specifications may be generally relevant, reasonable in scope, and within the bounds of proper discovery, *it is incumbent upon the moving party, in explaining the reasonableness of scope, to offer some explanation for the failure to specify the needed documents more exactly and for the failure to obtain the requested information by other less burdensome means* ***.[3]

In *All-State*, the requisite showing was not made by complaint counsel. Hence, we granted the respondent's motion to quash. In this matter, it is clear that complaint counsel and the hearing examiner considered the *All-State* guidelines. Further, the hearing examiner's March 21, 1968, order specifically finds that complaint counsel convincingly made the necessary explanations. The order indicates that the examiner scrutinized the subpoena from every possible viewpoint. The examiner stated that with utmost care and diligence he read, analyzed, evaluated, and tabulated "every scrap of respondent's memoranda and supporting affidavits." [4] The examiner also devoted an entire prehearing conference to a detailed discussion of complaint counsel's subpoena request.[5] We, therefore, conclude that the examiner was well aware of the Commission's rules of practice and precedents, and that he carefully applied them to the present situation. Respondent has failed to make a satisfactory showing that the examiner abused his discretion or acted in an arbitrary or capricious manner.

More importantly, the Commission's policy (articulated in the

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[1] Order Denying Motion to Quash, p. 5 (March 21, 1968).

[2] Appeal to the Commission, p. 2 (April 2, 1968).

[3] *All-State Industries of North Carolina*, p. 7 (November 13, 1967), (emphasis added) [72 F.T.C. 1020, 1025].

[4] Order, p. 16.

[5] Tr. 205-404.

All-State opinions), of requiring complaint counsel to have evidence sufficient to support a *prima facie* case before issuance of the complaint, is merely an internal "housekeeping" matter. It is not a matter of concern to a respondent or the hearing examiner in dealing with a request for discovery after complaint. In dealing with discovery requests, the sole criteria to be applied is that set forth in §§ 3.31 through 3.37 of the rules of practice. No legal right has been conferred upon a respondent, and no burden imposed upon the reviewing courts, to police the implementation of the Commission's internal policies concerning the conduct of its staff.

The examiner has held that complaint counsel's discovery request has met the reasonable objective standard set forth in the rules of practice—*i.e.*, the documents are relevant and the scope of the subpoena is reasonable.

Since respondent has failed to demonstrate that these standards have been ignored or misapplied by the examiner, we deny the appeal. An appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER DENYING INTERLOCTORY APPEAL

This matter is before the Commission upon the interlocutory appeal of respondent. This appeal, filed pursuant to § 3.35(b) of the Commission's rules of practice, is based upon the hearing examiner's order of March 21, 1968, denying respondent's motion to quash complaint counsel's subpoena duces tecum.

For the reasons stated in the accompanying opinion, the Commission has determined that the respondent's appeal should be denied. Accordingly,

It is ordered, That the appeal of Lehigh Portland Cement Company from the March 21, 1968, ruling of the hearing examiner on the motion to quash subpoenas duces tecum be, and it hereby is, denied.

By the Commission, with Commissioner MacIntyre not participating.

ALL-STATE INDUSTRIES OF NORTH CAROLINA, INC., ET AL.

Docket 8738. Supplemental Opinion, Aug. 9, 1968

A supplemental opinion clarifying an interlocutory order dated November 13, 1967, 72 F.T.C. 1020, as to the Commission's policy in ordering postcomplaint discovery.

SUPPLEMENTAL CLARIFYING OPINION OF THE COMMISSION

On November 13, 1967 [72 F.T.C. 1020], the Commission issued an order and opinion dealing with an interlocutory procedural matter in this proceeding. In view of questions that appear to have arisen as a result thereof, the Commission deems it appropriate to issue this supplemental clarifying opinion.

In the previous opinion in this case, the Commission stated that its "rules are not intended to provide for comprehensive postcomplaint investigation, but only postcomplaint discovery." In making this distinction the Commission did not intend to change the standards which the Rules of Practice establish for dealing with applications for discovery, whether at the instance of complaint counsel or respondents. From the standpoint of avoiding delay in the disposition of adjudicative proceedings, every matter should be adequately investigated before complaint issues. However, we must emphasize that nothing in Section 3.34 nor in any other provision of the Commission's Rules of Practice gives a respondent in an adjudicative proceeding the right to put into litigation the adequacy of the precomplaint investigation conducted by the Commission or its staff. The administrative guidelines laid down by the Commission internally do not confer upon a respondent a legal right—and on the reviewing courts the burden—to police the implementation of the Commission's housekeeping rules in this regard.

Were it otherwise, the hearing examiner, the Commission, and a reviewing court would be confronted with the well-nigh impossible task of determining, not whether the allegations of the complaint are supported by evidence, but whether the precomplaint investigation was proper or sufficient. The proceeding would become converted into a trial of the scope and adequacy of the precomplaint investigation. To introduce such collateral matters into the hearing would invite inexcusable delay.

The Commission's Rules, like the Federal Rules of Civil Procedure, establish objective standards for dealing with discovery matters in the light of the issues raised by the complaint. A discovery request made by complaint counsel is not open to objection on the ground that the materials sought should have been in hand at the time of issuance of the complaint. Such request should be ruled upon without inquiry into whether the materials sought should or could have been obtained in an earlier stage of the proceeding. We emphasize again that the purpose of the discovery provisions of the Rules of Practice is to avoid rather than create opportunities for delay.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, Aug. 14, 1968

Order remanding case to hearing examiner for further consideration of depositions to be taken from six officials of a third party.

OPINION OF THE COMMISSION

By order and opinion of July 2, 1968 [p. 1571 herein], the Commission remanded to the hearing examiner respondent's application to take depositions of six named officials of United States Pipe and Foundry Company ("U.S. Pipe"). On remand, the examiner on July 9 issued an order, which was modified by a subsequent order of July 18, in which the requested depositions were authorized subject to several conditions that, in the examiner's view, would assure the continuing confidentiality of such information in the hands of U.S. Pipe as should be found to merit this protection. We now have before us another appeal by respondent, in which certain of these procedural safeguards are challenged as improper or impractical. U.S. Pipe has filed a brief as a third party intervenor opposing the appeal.[1] Complaint counsel has also filed a brief in opposition.

As a general rule, the Commission is reluctant to engage in interlocutory consideration of pretrial discovery orders issued by hearing examiners. It has been our experience that the procedures provided by the Commission's Rules of Practice offer practicable and effective discovery mechanisms that depend for their effective administration upon the discretion of the examiner, within proper limits, to fashion orders authorizing discovery on the basis of firsthand consideration of the particular facts and circumstances of each case.

We have recently had occasion to restate our views of the relative functions of the Commission and the hearing examiner in the process of pretrial discovery as it relates to the question of privilege:

> 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 countervailing 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

[1] Also before us is respondent's appeal from the examiner's denial of its motion to stay the taking of depositions pending the determination of this appeal.

may require dissimilar treatment in order to insure the most equitable resolution of these conflicting interests. ***

Neither the Commission nor the courts have given recognition to an absolute trade secret privilege. The revelation of a trade secret will be compelled if it is indispensable to the proceeding. Nevertheless, the Commission and the courts have hestitated to order disclosure absent a clear showing of immediate need for the requested information. Once disclosure is deemed necessary, conditions have usually been imposed which limit the use of the information only to the litigation and which prevent disclosure to *** competitors.[2]

Questions of necessity on the one hand and the importance of continuing secrecy on the other have been presented and argued before the hearing examiner. The order of July 18, 1968, reflects the examiner's resolution of these competing interests *pro tem.* We will briefly consider the points raised by respondent's appeal.

The examiner's order prohibits inquiry into the "details of U.S. Pipe's manufacturing processes" and inquiry "concerning privileged matters." The latter restriction is a primary tenet of the discovery process, and its inclusion in the order is entirely proper. The former limitation is merely an elaboration or application of the order's central limitation that witnesses may be deposed

only upon such matters, for purposes of discovery, that are alleged in those paragraphs in the complaint in this matter concerning which, by prior designation of counsel supporting complaint, such witnesses will testify at the trial of this matter; or upon matters reasonably related thereto.

Complaint counsel state in their brief in opposition to this appeal that they will not seek to elicit from officials of U.S. Pipe any information relating to manufacturing processes of U.S. Pipe or patent licensing policies of respondent. This being so, the "details" of U.S. Pipe's manufacturing processes do not appear to be necessary for cross-examination or reasonably related to any of the allegations of the complaint. We intend no final determination of the question at this juncture. At this interlocutory stage of the case, our determination is limited to the narrow question whether the examiner's preliminary decision to restrict inquiry into "details" of U.S. Pipe's manufacturing processes is so unreasonable as to constitute an abuse of discretion. On the facts before us, we do not so find.

Respondent challenges the examiner's determination to limit attendance at the taking of depositions to exclude officials of the party respondent and to prohibit any disclosure of testimony

[2] *Lehigh Portland Cement Company,* Docket No. 8680, interlocutory opinion issued August 2, 1968 [p. 1587 herein].

elicited therein without prior notice to U.S. Pipe so that a motion for a protective order could be made.

Regarding attendance at the taking of depositions, respondent's desire to include an official of the party respondent is apparently based on its misapprehension that inquiry into the technical details of U.S. Pipe's manufacturing processes will be permitted, thus requiring the presence of an official of the party respondent to render guidance and assistance in technical matters. Since the order prohibits this line of inquiry, we see no merit in respondent's argument. We are concerned, however, that the nondisclosure provisions of the order may unduly infringe upon the ability of counsel for respondent to prepare his defense. We find no fault with the basic prohibition of disclosure affecting all parties attending the depositions. However, it may be that a more flexible form of order may be devised by the examiner which would allow attorney-client discussions to the extent they are necessary to prepare for and assist in the defense of this action without jeopardizing the secrecy of information elicited from U.S. Pipe or permitting its use for purposes outside the scope of this litigation. See, *e.g.*, *Ames Co.* v. *Bostich, Inc.*, 235 F. Supp. 856, 857 (1964). Accordingly, we are remanding the matter for further consideration in the light of this opinion.

ORDER OF REMAND TO HEARING EXAMINER

Upon consideration of the appeal of respondent from the hearing examiner's ruling of July 18, 1968, and for the reasons stated in the accompanying opinion,

It is ordered, That the matter be remanded to the hearing examiner for further consideration.

STAR OFFICE SUPPLY CO. ET AL.

Docket 8749. Order and Opinions, Sept. 18, 1968

Order granting complaint counsel's appeal and vacating the hearing examiner's rulings to strike the testimony of witnesses when complaint counsel would not produce investigators' field reports. Interprets *Jencks* doctrine.

OPINION OF THE COMMISSION

This matter is before the Commission upon complaint counsel's interlocutory appeal from certain rulings of the hearing examiner, of May 21, 1968, relating to the production of interview reports as to witnesses. On such date the hearing examiner struck the direct testimony of witnesses Walter J. Kroll and Arthur C.

Rochon upon complaint counsel's refusal to release pretrial reports of interviews held with these witnesses. The Commission granted complaint counsel permission to appeal June 28, 1968 [73 F.T.C. 1288]. Complaint counsel filed their interlocutory appeal in the matter July 8, 1968, and respondents filed an answer thereto on July 18, 1968.

The witnesses involved were called by complaint counsel to testify on May 21, 1968. Both had been interviewed previously by Commission investigators and reports as to these interviews were prepared. Mr. Kroll was interviewed by David W. DiNardi, Commission attorney, on October 15, 1965. The report was prepared some weeks later, on November 2, 1965. Arthur C. Rochon was interviewed by Commission attorney John J. McNally (one of counsel herein) on August 4, 1965. The report on Rochon indicates that it was dictated on November 1, 1965. Neither report is signed by the witness. The witnesses had not seen nor approved the reports and, specifically, they had not been shown the reports prior to their testimony to refresh their recollection.

The hearing examiner, at the request of respondents' counsel, ordered the production by complaint counsel of the interview reports with witnesses Kroll and Rochon prior to cross-examination. Complaint counsel, although having previously produced interview reports as to other witnesses, objected to this order of production on the grounds that such reports were not substantially verbatim but were mere summaries and that they had not been shown to or approved by the witnesses. The hearing examiner received these interview reports and ordered that they be made available to respondents' counsel, with certain paragraphs deleted.[1] When complaint counsel refused to release the reports, he granted motions to strike the testimony of the witnesses. The examiner indicated that if interview reports of further witnesses were of like import he would order that these also be turned over to respondents' counsel.

The examiner seemed to wholly ignore the prior rulings of the Commission on the subject of production of pretrial interview reports with witnesses. He indicates the view that interview reports generally should be produced by complaint counsel. While he queried the investigators who had conducted the interviews on the issue of whether or not they attempted to accurately report what the witness had said, he made no attempt, so far as the record discloses, to determine whether these reports contained the

[1] On the Kroll report he excepted from production the third and fourth paragraphs on page 2 (tr. 745), and in the Rochon report he excepted from production the first two paragraphs (tr. 789).

witnesses' own statements as defined by the applicable law. His holding, rather, seemed to be on the general ground of his determination that production was necessary in "fairness" to respondent and his conclusion that the reports contain no confidential material.[2]

The Commission has set down detailed instructions on the question of the production of interview reports in such prior cases as *Inter-State Builders, Inc.*, Docket No. 8624 (order issued April 22, 1966) [69 F.T.C. 1152], and *L. G. Balfour Company*, Docket No. 8435 (order issued April 22, 1966) [69 F.T.C. 1118]. These cases hold that interview reports are not to be released for inspection where the witness interviewed has testified on direct unless such reports satisfy the requirements of the so-called Jencks Act for the production of witnesses' prior statements (18 U.S.C. § 3500 (1958)). Under Section (e) of such Act, a statement subject to production is defined to mean

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a *substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.*" (Emphasis supplied.)

In this case, since the interview reports in question were not signed or otherwise adopted or approved by the witnesses, the issue turns on whether these can be construed to be substantially verbatim recitals of the oral statements of the witnesses recorded contemporaneously. In *Inter-State Builders, supra*, we held that "summaries" of witnesses' statements made by an attorney or investigator should not be produced. In the *Balfour* case, *supra*, we ruled that interview reports in the Commission's files "ordinarily are agents' summarizations" and that "the examiner, if he orders an interview report produced, has the obligation of making concrete findings that the prerequisites of Section (e) of the Jencks Act have been met." Nowhere in the examiner's statements is there a clear indication that he applied the Jencks Act standard.

[2] Some of the hearing examiner's statements on the subject follow:

"Well, as I stated before, I believe this information in fairness to Respondent ought to be turned over to Respondent's counsel . . . ." (Tr. 793.)

"Of course I believe the matter is not in the interest of the Commission nor in the interest of the Respondent or in the interest of the public to refuse to turn over these reports, because as far as the hearing examiner can see it, there is nothing in there that should be confidential, and I don't think it would materially affect the situation, but I would not require the Respondent to proceed to cross-examine the witnesses without the opportunity to examine these reports before he does cross-examine the witness. . . ." (Tr. 794.)

The examiner asserted the production was necessary in "fairness" to the respondents but the fact is that, to the contrary, it may be highly unfair to subject a witness to cross-examination on the basis of summaries by a third-party investigator of what the witness was supposed to have said. The Supreme Court of the United States, in *Palermo* v. *United States*, 360 U.S. 343, 350 (1959), in relating the motivating forces behind the enactment of the Jencks Act, stated that there was, among other things, the feeling it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations and interpolations."

We conclude, therefore, that the examiner improperly struck the direct testimony of witnesses Kroll and Rochon without first having expressly determined whether or not the interview reports in question were the witnesses' own statements falling within the terms of the Jencks Act. The examiner is instructed to follow the Commission's pertinent rulings on the production of interview reports not only as to the reports on witnesses Kroll and Rochon but also as to any interview reports relating to witnesses subsequently called in this proceeding. We will grant the complaint counsel's appeal, vacate the examiner's rulings striking the witnesses' testimony and return the case to the hearing examiner for further proceedings in accordance with the Commission's views expressed herein. An appropriate order will be issued to accompany this opinion.

DISSENTING OPINION
SEPTEMBER 18, 1968

BY ELMAN, *Commissioner:*

The Commission again applies in this case what I regard as an erroneous and unfair test for determining the producibility of an interview report: not whether it accurately and reliably records the substance of a witness' statements but whether it is a "substantially verbatim," "contemporaneously recorded" transcription of the witness' "own words." My views are detailed in the two dissenting opinions filed in *Inter-State Builders, Inc.*, Docket No. 8624, April 22, 1966 [69 F.T.C. 1152] and July 28, 1967 [72 F.T.C. 370, 407]. As I there predicted, the Commission's opinions in these cases "in practical effect will serve as a manual on how to write interview reports so as to guarantee not having to produce them." F.T.C. interview reports " 'ordinarily are agent's summarizations.' They are not usually cast in the form of

'substantially verbatim,' 'contemporaneously recorded' transcriptions of witnesses' oral statements. And it is safe to presume that, after today's rulings by the Commission, interview reports are not likely to be cast in that form in the future."

Conspicuous by its absence has been any direction by the Commission to its staff attorneys to draft interview reports in such a form that they will be producible, even under the majority's test. It is just as easy for an investigator to prepare an interview report, not as a "mere summary," but as a "substantially verbatim," "contemporaneously recorded" transcription of the witness' "own words." It should not make any difference whether the interview is conducted at an early or advanced stage of the investigation, or whether it is held in the field or in Washington. Whatever the circumstances, the only function of an interview report is to record, faithfully and objectively, the statements made by the witness. Of course, the Commission attorney should add his own subjective comments and evaluation, but this can and should be done in a separate memorandum which should remain confidential. The only reason which I can see for interspersing such comments and evaluation in an interview report is to make it unproducible under the majority's view of the *Jencks* rule.

Despite all its rationalizations, the Commission is quite content to allow its attorneys to continue drafting interview reports in such a form that they will not be producible. The result, as I stated in *Inter-State Builders*, is that the *Jencks* rule is a dead letter as applied to F.T.C. interview reports. The Commission and its staff use and rely upon interview reports; but, no matter how accurate and reliable they may be in recording a witness' statements, they are not available to a respondent for use in cross-examination. This seems to reflect a singular indifference to considerations of fairness and justice, not to mention the spirit of the Freedom of Information Act.

CONCURRING OPINION
SEPTEMBER 18, 1968

BY MACINTYRE, *Commissioner:*

The decision of the majority is amply supported by acts of Congress and the decisions of this Commission and the courts. So is the position of the majority in applying the test of whether an interview report is a substantially verbatim and contemporaneously recorded transcription of the witness' own words as the basis for determining its producibility.

Now the further question has arisen as to whether it is unfair if the Commission should fail to direct its investigators "to draft interview reports in such form that they will be producible, even under the majority's test." For those of us who know the dangers inherent in such an idea and are otherwise informed sufficiently to render proper judgment, we reject such idea and the question, therefore, answers itself. However, for the less informed, perhaps it would be of some benefit to explain that it would be farfetched to require that all interview reports of investigators be made in such form as to be producible on the request of any interested party. This would be true whether the investigators be employees of the local, state or Federal government, and if employees of the Federal government, irrespective of whether they be FBI agents or investigators for the Internal Revenue Service or the Federal Trade Commission. I say that because many of these investigators conduct some interviews only for the purpose of getting leads to persons who may have some information and who may be appropriate as witnesses in proceedings. The persons to whom resort is made for such leads would in some instances not be regarded as appropriate subjects for witnesses. Should such persons who, although knowing nothing about the facts in the proposed proceeding, do nevertheless supply investigators with names of possible witnesses who are believed to know something about the facts, be exposed to the world through records made by investigators? As matters stand at this time, it has been concluded and so ruled by the Congress, the courts and this Commission, that public policy would not be served by such exposure. The teaching of the decision of the majority and the test the majority would apply conforms to that declared public policy.

CONCURRING OPINION
SEPTEMBER 18, 1968

BY NICHOLSON, *Commissioner:*

As pointed out by Commissioner MacIntyre in his concurring opinion, it would be unrealistic to expect or require field attorneys conducting an investigation pursuant to direction of the Federal Trade Commission to prepare substantially verbatim summaries of interviews conducted in such investigations, or even, in most instances, to request an interviewee to ratify any synopsis prepared by the investigating attorney. The reason should seem obvious: At this stage in the proceedings, the investigating attorney is concerned with only one thing; the investigation of a possible violation of the laws enforced by the Federal Trade Com-

mission. In most instances the attorney will not know at that stage whether a complaint will be issued, or even recommended, and certainly will have reached no conclusion as to whether the particular interviewee will or will not be called as a witness.

Formalizing this stage of the investigation would likely inhibit the cooperation of the witness who may have direct knowledge of violation or who may serve only as a lead to other sources of evidence which might be used.

Commissioner MacIntyre fails to point out that the investigation interview should be distinguished from later interviews by a trial counsel. After a complaint has been issued, he is preparing his case for trial with the plan of calling the interviewee as a witness. In this situation the witness should surely be aware that the detailed statement by the trial attorney will be used for purposes of refreshing the witness' recollection at the hearing and should be asked to review any summary or substantially verbatim record which the trial attorney prepares.

In this latter instance the interview reports should not be interspersed with the conclusions and opinions of the trial attorney. Any such observations should be made by the trial attorney in a separate memorandum. Therefore, statements thus prepared by the trial attorney should be made available to respondent's counsel, to comply with the letter and the spirit of the Jencks Act, the *Jencks* decision and the Freedom of Information Act.

ORDER RULING ON INTERLOCTORY APPEAL

This matter is before the Commission upon complaint counsel's interlocutory appeal, filed July 8, 1968, from the hearing examiner's rulings of May 21, 1968, striking the direct testimony of two witnesses called by complaint counsel, and upon respondents' answer thereto filed July 18, 1968; and

The Commission, for the reasons appearing in the accompanying opinion, having determined that the appeal should be granted, the examiner's rulings striking the witnesses' testimony vacated and the matter returned to the hearing examiner for a continuation of the proceeding in accordance with the views of the Commission expressed in its opinion:

It is ordered, That the interlocutory appeal of complaint counsel be, and it hereby is, granted.

It is further ordered, That the examiner's rulings of May 21, 1968, striking the testimony of witnesses Kroll and Rochon, be, and they hereby are, vacated.

It is further ordered, That the hearing examiner continue this

proceeding in accordance with the views expressed in the Com-