respondents did not take advantage of this opportunity does not now, at this late date, merit granting their petition for reconsideration. Accordingly,

It is ordered, That respondents' petition for reconsideration be, and it hereby is, denied.

Commissioner Elman dissented.

KOPPERS COMPANY, INC.

Docket 8755. Order and Opinion, January 15, 1969

Order denying third party's motion to modify or quash a subpoena.

OPINION OF THE COMMISSION

This matter is now before the Commission upon the appeal of United States Pipe and Foundry Company from the examiner's order modifying the subpoena and otherwise denying the motion to quash. U.S. Pipe bases its appeal upon twelve separate grounds which are stated at length in its brief and which, to some extent, overlap.

Considered broadly, the grounds for appeal advanced by U.S. Pipe are that the subpoena is void and unenforceable because respondent failed to pay the necessary witness fees and mileage in connection with the return on the previous subpoena; respondent has reopened the entire question of prehearing discovery and now seeks documents not heretofore contemplated by prior Commission opinions on interlocutory appeals in this case and for time periods not previously deemed relevant, including periods subsequent to the complaint; the subpoena seeks to compel production of confidential business information subject to legal privilege; the subpoena is too broad in the range of documents sought; the subpoena is improper because it calls for a document specifically excluded from production in the prior subpoena; it is unlikely that any protective order can be devised which would afford U.S. Pipe sufficient protection against probable abuse by respondent of cost and other confidential figures, and; the examiner has declined to order use of procedures whereby the respondent would obtain the information requested, but in a form which would soften some of the objectionable features of the present subpoena.

In his order denying the motion to quash, production of the documents called for by the subpoena was ordered on condition that the witness fees then in dispute and a witness fee and

travel fee be deposited with the Secretary of the Commission. Further, in the order it was made clear that all references to secret processes would be physically deleted and all documents produced would be held in confidence by counsel until within a specified time counsel for U.S. Pipe moved for a protective order. Following this order, U.S. Pipe filed its present appeal and on December 19, 1968, the Commission extended the return date on the subpoena until five business days following receipt by U.S. Pipe of the Commission's order and opinion on the appeal.

The question of this subpoena was carefully considered by the Commission in its Interlocutory Opinion and Order dated November 1, 1968 [74 F.T.C. 1621]. In that opinion, the Commission pointed out that U.S. Pipe's objections to disclosure of its cost, price, production and similar data were well taken, but that the often confidential nature of such material is not equivalent to an absolute privilege against its disclosure. 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 maintaining or refuting issues raised in litigation.

The Commission added that the examiner was, 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 and, in that connection, made reference to the procedure whereby sensitive trade information could be submitted to an independent third party for analysis, as in *Mississippi River Fuel Corporation,* Docket No. 8657, [69 F.T.C. 1186 and 70 F.T.C. 1759] or to a procedure whereby the party seeking protection could be required to prepare a nonconfidential summary of the documents for inclusion in the record, or to a procedure whereby the examiner may conduct an *ex parte, in camera* examination of documents for the purpose of excising portions thereof before disclosure is made to the respondent. But the Commission went on to point out that:

> 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 all of these situations it is important to remember that the adoption of no one of these techniques is mandatory and they are not intended to be a substitute for the exercise of the sound and responsible discretion of the examiner, who is in a

far better position than the Commission, because of his proximity to the case, to assess the multitude of variables and arrive at an informed decision as to the procedure best to use in the case before him. *Furr's, Inc.*, Docket No. 8581, Interlocutory Opinion, November 18, 1963 [63 F.T.C. 2225]; *Lehigh Portland Cement Company*, Docket No. 8680, Interlocutory Opinion, August 2, 1968 [74 F.T.C. 1585]. As the Commission observed in its *Furr's, Inc.*, opinion "Orderly procedure requires that matters so intimately connected with the conduct of hearings as the terms and conditions of production of documents be left very largely to the responsible judgment of the examiner." Further, as the Commission has previously ruled in this very same matter, unless there is a clear showing of an abuse of discretion the Commission, in the absence of unusual circumstances, will not disturb a ruling of a hearing examiner in matters involving procedure and discovery.

The Commission finds no such unusual circumstances nor any abuse of discretion here. On the contrary, it appears that the examiner has carefully observed the instructions contained in the prior Commission opinions and fashioned a protective order which in his judgment met the needs of the case before him at the same time as he ordered production of the documents and information to which he deemed respondent was entitled for the preparation of its defense. These are the matters which the Commission has directed him to consider and it seems then that U.S. Pipe's appeal is taken not from his failure to adopt any protective measures at all but rather from his failure to adopt other procedures which U.S. Pipe now urges would have been better suited to its needs. This is not a decision with which the Commission is now disposed to interfere.

With the exception of the question raised by controversy involving witness fees, which has been adequately resolved by the examiner's order, the issues raised in this appeal are not new as the subpoena involved has been in litigation for some time and has been the subject of at least two prior Commission opinions, during the course of which questions of scope and relevancy, as well as confidentiality, have been fully debated and carefully considered. While all elements of due process must be observed, if this proceeding is to be conducted with the speed and dispatch which the interests of the public demands, there must be a stage at which debate over this one procedural point ends and the hearings themselves begin. It would seem that the question of this subpoena has reached that stage.

Commissioner MacIntyre concurred in the result.

ORDER DENYING APPEAL FROM EXAMINER'S DENIAL OF MOTION TO QUASH SUBPOENA

Upon consideration of the appeal dated December 9, 1968 by United States Pipe and Foundry Company from the examiner's order modifying the subpoena and otherwise denying the motion to quash, dated December 3, 1968, and for the reasons stated in the accompanying opinion,

It is ordered, That the appeal of the United States Pipe and Foundry Company from the hearing examiner's ruling be, and it hereby is, denied.