

ASH GROVE CEMENT CO.

Docket 8785. Opinion and Order, Oct. 14, 1969

Order denying respondent's motion that complaint be dismissed on grounds of alleged prejudgment and remanding case to hearing examiner.

ORDER AND OPINION DENYING MOTION TO DISMISS THE COMPLAINT

This matter is before the Commission upon the hearing examiner's certification of respondent's motion, filed September 16, 1969, requesting the Commission "to dismiss the complaint on the grounds that a fair trial of the issues has been made impossible by prejudgment on the part of the Commission."

Respondent contends that it will be unable to obtain a fair hearing and an impartial decision on the issues raised by the complaint because the Commission allegedly has already prejudged all or certain of the significant issues raised in the complaint in asserted contravention of the Commission's Rules of Practice, the Administrative Procedure Act, the Federal Trade Commission Act, the Clayton Act, and respondent's constitutional right to a fair hearing conducted according to the law.

Respondent states that the alleged prejudgment of the issues is demonstrated by reference to (1) the Commission's Enforcement Policy With Respect To Vertical Mergers In The Cement Industry, dated January 3, 1967; (2) the claimed adoption by the Commission of the staff Economic Report on Mergers and Vertical Integration in the Cement Industry, published in April of 1966; and (3) the Commission's asserted reliance upon the aforementioned Economic Report in certain prior adversary proceedings.

The issue raised by this motion is the same as that presented recently to the Commission in *Missouri Portland Cement Company*, Docket No. 8783 (order and opinion issued August 13, 1969 [p. 1064 herein]). The Commission denied the request there and will do so in this matter for the same reasons. Respondent has made no showing in the references to the prior actions of the Commission in the cement industry to justify its charge that the Commission has prejudged the issues in this case. The courts have held that agencies are not disqualified by such prior investigations and reports. *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948); *Pangburn v. Civil Aeronautics Board*, 311 F.2d 349 (1st Cir. 1962). Accordingly,

It is ordered, That respondent's motion to dismiss the com-