

Acting Director of the Bureau of Mines, United States Department of Interior be, and it hereby is, denied.

It is further ordered, That this matter be returned to the hearing examiner for further proceedings in accordance with the Commission's rules and consistent with the Commission's views expressed herein.

FIRESTONE TIRE & RUBBER COMPANY

Docket 8818. Order and Opinion, Oct. 23, 1970

Order granting SOUP, Inc., leave to intervene in case for the limited purposes of 1) presenting evidence of public interest, 2) presenting briefs and oral argument, and 3) exercising certain discovery rights.

REGARDING REQUEST OF SOUP, INC., FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL FROM AN ORDER OF THE HEARING EXAMINER DENYING ITS AMENDED MOTION TO INTERVENE

STATEMENT BY MACINTYRE, *Commissioner*:

A few law students have formed a corporation styled Students Opposing Unfair Practices, Inc. (hereinafter referred to as "SOUP").

SOUP, on September 1, 1970, filed with the hearing examiner in this matter a motion to intervene in this proceeding. The hearing examiner by order dated September 18, 1970, denied SOUP's amended motion on the ground that it had "failed to show good cause" as required by Section 5(b) of the Federal Trade Commission Act. That provision of law provides that "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene" in a proceeding by counsel or in person. Thereafter, on September 25, 1970, SOUP filed with the Commission its request for leave to file an interlocutory appeal from the hearing examiner's denial of its amended motion to intervene. Answers were filed by counsel for respondents and counsel in support of the complaint in opposition to that request. Thus was put in issue the validity of the hearing examiner's order denying the motion of SOUP to intervene as a full party with all the rights of parties in this proceeding.

I fully agree with the stated view of the majority that where substantial issues of law or fact appear to be involved in the request of persons wishing to present them to the Commission in a proceeding those persons should be heard and allowed to present the information they say they have about the issues. Likewise, I agree with the majority that in considering a request from persons to present information to the Commission we should weigh the additional factors involving the

expenditure of the Commission's limited resources and the prospects for a longer and more complicated proceeding. With these problems in focus I have proposed to the Commission that it grant SOUP, Inc., the privilege of a hearing to the extent that the hearing examiner be instructed to permit SOUP to participate in this proceeding for the limited purpose of presenting the evidence specified in its amended motion to intervene, filed September 1, 1970, at the conclusion of the complaint counsel's case-in-chief and that he be further instructed to reconsider SOUP's requests for disclosure and for leave to file *in forma pauperis*. Moreover, it has been my position that the Commission should not only thus hear SOUP, Inc., but should provide an opportunity for SOUP, Inc., to present briefs and argument to both the hearing examiner and the Commission if necessary to fully inform the Commission regarding any information it has bearing on the issues here and its views about such information and the issues. The majority of the Commission has not seen fit to adopt the proposal I made. Instead, the Commission ordered and directed the hearing examiner "to permit SOUP to intervene for the limited purposes" of presenting certain evidence and in filing certain briefs and argument and in exercising certain discovery rights which would be available to a party litigating the issues in question. I did not concur in the decision of the Commission to issue that order because I am convinced that the Commission will not be able because of that action to adjudicate and conclude this matter within a reasonable period of time. It does not require imagination or speculation to determine why that is so, neither does it require imagination nor speculation for us to know that when justice is delayed it may by that fact be denied.

OPINION AND ORDER GRANTING LIMITED INTERVENTION

This matter concerns a question of vital importance to the effective functioning of the Commission's adjudicatory process: the scope of the privilege of intervention and participation in Commission adjudications by responsible representatives of the consumer interest. In passing upon the motion now before us, the Commission is afforded an opportunity to clarify its previous position on this question in *In re Campbell Soup Co.*, Docket 1741, May 25, 1970 [77 F.T.C. 664].

The complaint in this proceeding, issued June 29, 1970, charges respondent with false and deceptive advertising with respect to the price and safety of its tires. On July 29, 1970, Students Opposing Unfair Practices, Inc. (hereinafter SOUP) filed a motion to intervene, for leave to proceed *in forma pauperis*, and for disclosure. The motion was opposed by both respondent and complaint counsel. By order issued August 21, 1970, the hearing examiner denied the motion

on the ground that no good cause for intervention had been established. Thereafter, on September 1, 1970, SOUP filed an amended motion to intervene, for leave to proceed *in forma pauperis*, and for disclosure, this time explaining in some detail the reasons for its belief that good cause exists for intervention in this case. The reasons were as follows: consumers are within the zone of interests sought to be protected by the FTC Act; SOUP is recognized as a responsible representative of the consumer's interests; members of SOUP have a personal stake in the outcome of the proceeding; this is an aggravated case, directly involving the health and safety of the public; the proposed order is inadequate to protect the public interest because it contains no provision for restitution and no affirmative disclosure provision to counteract the residual effects of respondent's deceptions; and SOUP desires to introduce factual and expert evidence on the residual effects of respondent's advertisements to prove the need for an affirmative disclosure provision in the final order. Respondent and complaint counsel again opposed the motion.

By order of September 18, 1970, the hearing examiner denied SOUP's amended motion on the ground that SOUP "has again failed to show good cause to support the motion." On September 25, 1970, SOUP filed with the Commission a request for leave to file an interlocutory appeal from the denial of its amended motion to intervene. The Commission has determined that SOUP's request should be granted, and that it should be allowed to intervene in this proceeding, with all of the rights of a party, for the limited purpose of presenting evidence and argument on the issue of the proper remedy and scope of the final order in this case.

Section 5(b) of the Federal Trade Commission Act provides that "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by Counsel or in person." Section 3.14 of the Commission's Rules of Practice provides that "The hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper." These provisions clearly reflect the fact that intervention in Commission adjudications is a matter of privilege, and that its grant or denial is a discretionary matter, to be decided on the basis of the particular facts and circumstances involved in each case in which intervention is sought.

In re Campbell Soup Co., Docket 1741, May 25, 1970, suggests the type of considerations that properly influence the grant or denial of a motion for intervention in a particular matter. Although that case

concerned a motion for intervention in consent order proceedings, which are not proceedings governed by Section 5(b) of the Act or Section 3.14 of the rules, the principles announced therein are generally applicable to the question of intervention in adjudication. The thrust of our opinion in *Campbell Soup* is that before the Commission will allow intervention into its proceedings, it must be demonstrated that (1) the persons seeking such intervention desire to raise *substantial* issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding in that case, when considered in light of other important matters pending before the Commission. This second factor means a determination that such additional expenditure is fully consistent with the Commission's own assessment of overall priorities governing the allocation of its own resources. A finding of this nature should be one prerequisite to an ultimate judgment that "good cause" exists to permit intervention in a particular case.

But we wish to emphasize that satisfaction of the above standard, or of any other test or formula, will not automatically result in a right of intervention. As stated previously, the exercise of discretion on a question of intervention depends on an assessment of all of the facts and circumstances of a particular case, and each grant or denial will have minimal, if not non-existent, precedential value. But as further guidance for future applicants, we would suggest the following additional factors which will generally be considered: the applicant's ability to contribute to the case; the Commission's need for expedition in the handling of the case; and the possible prejudice to the rights of original parties if intervention is allowed.

The Commission applauds the efforts and enthusiasm of groups such as SOUP to fight for the public interest by means of participation in the work of federal agencies serving the same public interest. We are also very cognizant of the potentially great contribution to the work of such agencies, including our own. *Cf. Office of Communications of the United Church of Christ v. FCC*, 359 F. 2d 994 (D.C. Cir. 1966). But there are important countervailing considerations which must be weighed in the balance: the need to maintain an orderly and efficient adjudicative procedure and the need to control resource allocation on the basis of a system of established priorities. The public would be ill-served by an agency whose proceedings were vulnerable to disruption and agonizing delay by means of the proliferation of

parties and other participants. Furthermore, the need for public interest intervenors in FTC proceedings is substantially less than the need for such intervention in the proceedings of other agencies. Unlike some other agencies, the FTC has a built-in public interest prosecutor in all of its proceedings; our adjudications are truly adversarial, without intervention of any kind. Therefore, it is reasonable to require a substantial showing of special circumstances justifying intervention in a particular case.

In allowing intervention in the present case, we are beginning a delicate experiment, one requiring caution and close observation. Nothing in this opinion should be construed as a permanent or irreversible policy decision; we have many apprehensions concerning this step, and we find a need for a period of probation.

It now remains to explain why, in this particular case, the Commission has determined that SOUP has made a sufficient showing of "good cause" to justify allowance of intervention, consistent with the views expressed in this opinion. SOUP has raised the issue of the necessity for affirmative disclosure relief in a case that involves a public safety danger, a category of cases in which such relief may be especially appropriate. See *Campbell Soup, supra*, at 21,423. Furthermore, this issue and this type of case is high on the list of our own priorities. The Commission believes that intervention in this case may contribute to a fuller appreciation of the need for stronger remedies generally in Commission cases. We do not believe that in this particular case the grant of intervention will unduly lengthen or complicate the case, or that it will prejudice the rights of the respondent.

Having considered all of the views and arguments contained in all of the briefs submitted by SOUP, by respondent, and by complaint counsel in connection with this matter.

It is ordered, That SOUP's request for leave to file an interlocutory appeal from the hearing examiner's order denying its motion to participate as a party in these proceedings be, and it hereby is, granted.

It is further ordered, That the examiner be, and hereby is, directed to permit SOUP to intervene for the limited purposes of:

- (1) presenting, at the conclusion of complaint counsel's case-in-chief, relevant, material, and noncumulative evidence on the issue of whether the proposed order to cease and desist adequately protects the public interest;

- (2) presenting, with respect to said issue, briefs and oral argument in such manner and to such an extent as the examiner may deem reasonable; and

- (3) exercising, with respect to said issue, such discovery rights as the examiner shall deem reasonable and necessary.

Commissioner MacIntyre filed a separate statement.

ASH GROVE CEMENT CO.

Docket 8785. Order and Opinion, Nov. 19, 1970

Order granting appeal of two third parties from denial by hearing examiner that certain parts of material subpoenaed be treated as confidential and remanding case to hearing examiner.

ORDER AND OPINION RULING ON A JOINT APPEAL FROM HEARING EXAMINER'S ORDER DENYING CONFIDENTIAL TREATMENT

This matter is before the Commission upon the joint appeal filed October 23, 1970, by Missouri Portland Cement Company (Missouri Portland) and Botsford Ready Mix Company (Botsford), third parties in this proceeding, from the examiner's order filed October 15, 1970, denying their motions to quash certain specifications in the subpoenas served upon them at the instance of respondent or, in the alternative, to grant confidential treatment.

The hearing examiner, in the appealed from order, held in part that to apply the so-called *Mississippi River*¹ confidential treatment as requested would unduly and unreasonably restrict and impair the preparation of respondent's intended defense and its rights of cross-examination. He further held that the circumstances present appeared to allow a departure from *Mississippi River* treatment; however he failed to detail these circumstances. The hearing examiner in a footnote suggests there is support for his position in the "full discussion and legal precedents cited in respondent's answer in opposition to the instant motion filed September 30, 1970." Such answer, however, insofar as we can determine contains no factual recitation distinguishing this case from *Mississippi River*.

Missouri Portland and Botsford in their appeal argue primarily that they should be granted confidential treatment like that awarded in *Mississippi River* because they allege the data is highly confidential business information and disclosure thereof to competitors and potential competitors would assertedly injure their competitive viability.

¹ In the Matter of *Mississippi River Fuel Corporation*, Docket No. 8657, the Commission in an interlocutory order issued June 8, 1966 [69 F.T.C. 1186], directed that materials submitted in response to the subpoenas there in question "should be submitted to a reputable and disinterested accounting firm, to be selected by the hearing examiner in consultation with the parties, which shall compile and present the material to respondent's counsel in such a manner that no individual company's confidential arrangements or data will be revealed." This action is generally referred to herein as the *Mississippi River* treatment. The *Mississippi River* case is now on appeal in the United States Court of Appeals for the Eighth Circuit [454 F.2d 1083]. See also, the Commission's "Order after Remand" in *Lehigh Portland Cement Company*, Docket No. 8680 issued July 31, 1970 [p. 1642 herein] in which *Mississippi River* treatment was granted but with the right to counsel to obtain full disclosure during the hearing if they could show the need therefor.

Respondent answered October 29, 1970, arguing that *Mississippi River* confidential treatment is not required by statute or Commission rule; that such treatment has never been applied to other than quasi-merger information; that the application of such treatment would be a denial of due process to the respondent; and finally that the appellants have assertedly made no showing that any confidential treatment is here required.

Respondent is seeking information here apparently much like that sought in *Mississippi River Fuel Corporation*, Docket No. 8657 [75 F.T.C. 813], the case in which the *Mississippi* formula was originally applied. As to this precedent, the United States Court of Appeals for the District of Columbia in *Crowther (Lehigh)*² held in effect that where the facts have the degree of parallelism indicated between that case and *Mississippi River*, any difference in treatment should be explained. In other words, the Commission must articulate its reasons why a different approach is to be followed: The court stated in part:

What remains essentially unexplained is why the *Mississippi* approach, with its certain protection against individual attribution, is now thought by the Commission to be inadequate or contrary to the public interest. We do not intimate that the Commission could under no circumstances properly arrive at such a conclusion in the course of a balancing process, but it is not enough to explain the Commission's changed feeling by merely asserting that it has struck a new balance. (*Supra*, ¶73,238 at page 88895.)

In light of the court's opinion we believe that the circumstances referred to by the examiner as not requiring the *Mississippi River* treatment in this situation should be clearly and explicitly set forth. The examiner has failed to do so and we therefore are unable to determine whether he ruled correctly or not. There might reasonably be grounds for not applying the *Mississippi River* treatment in this instance, *e.g.*, the apparent lack of any indication here, as in *Mississippi*, that respondent's real purpose is to gather the data for competitive reasons. However, we believe it is the initial responsibility of the hearing examiner to determine and articulate these grounds. If there are no adequate distinguishing features, the *Mississippi River* formula should be used.

On the other hand, it should be clearly recognized that *Mississippi River* treatment is not the only possible means of protecting confidential material. Nothing in this opinion should be construed to restrict the examiner's discretion in reaching a proper balance between the conflicting interests involved in this issue, *i.e.*, the interest of re-

² *Federal Trade Commission v. Crowther*, 430 Fed.2d 510 (D.C. Cir. 1970); Trade Reg. Rep. [1970 Trade Cases] ¶73,238.