I

Respondent on October 20, 1970, appealed from the hearing examiner's order filed October 9, 1970, conditionally granting a motion to quash in part and limiting subpoena *duces tecum* issued at the instance of respondent to third party, George W. Garrett, president, Stewart Sand and Material Company (Stewart) Kansas City, Missouri. The appeal was answered by Stewart as well as by complaint counsel.

The contentions made by respondent on this order of the examiner are (a) that the hearing examiner was too restrictive in limiting the return under Specification 1 to the materials concerning the "Kansas City area" and certain other records furnished by Stewart and (b) that the hearing examiner erred in granting Stewart's motion to quash specifications on the ground that respondent has not met the requirements of Rule 45 of the Federal Rules of Civil Procedure.[1]

So far as this appeal concerns the hearing examiner's application of Rule 45 of the Federal Rules of Civil Procedure, it will be granted for the reasons stated in our order and opinion issued in this proceeding on October 22, 1970 [p. 1660 herein]. The matter will be returned to the hearing examiner for appropriate action consistent with the Commission's views therein expressed. This appeal in all other respects will be denied for the reason that no sufficient showing has been made as required by Section 3.35(b) of the Commission's Rules of Practice.

II

Respondent on November 12, 1970, appealed from the hearing examiner's order of October 30, 1970, denying motions and applications for third party discovery subpoenas *duces tecum*. Respondent attached to its appeal the affidavit of Norman A. Fordyce. Complaint counsel filed an answer to such appeal on November 20, 1970 and respondent filed a reply on November 24, 1970.

The order appealed from in this instance covers various requests for the issuance of subpoenas to third parties including Lone Star

[1] Stewart in its answer asserts among other things that respondent on more than one occasion has failed to timely serve it with important documents concerning subpoenas issued against it. Complaint counsel also makes the point in its answer that Stewart was not timely served in this instance. The record contains a certificate of service showing that Stewart on the 9th day of November 1970 was served various documents to complete the service concerning respondent's appeal. Thus, it appears that service has been completed and that there has been sufficient time for Stewart to have further answered if it had desired to do so. In the circumstances we will consider the appeal, although in the future, failure to comply with the Commission's rules relating to the timely service of documents may require appropriate corrective action.

Stewart's further charge that respondent was late in filing this appeal is without substance. Respondent was not served with the examiner's October 9th order until October 13th; therefore, respondent's filing of its appeal on the 20th of October was timely under the Commission's rules.

Ready Mix Concrete Company, Geiger Ready Mix Company and twenty "certain concrete manufacturers." Respondent argues that the examiner's denial of the requested discovery is arbitrary, capricious, and violative of its due process rights.

The examiner in his order states that respondent has shown no actual need for the subpoenas sought in this instance and that if during the course of the presentation of complaint counsel's case-in-chief respondent's need for any such subpoenas to prepare for its defense becomes apparent, it will be given the opportunity to renew its request. In discovery matters, the hearing examiner has broad discretion and no showing has been made here to justify a review of his decision by the Commission at this stage of the proceeding. Moreover, no sufficient showing required by Section 3.35(b) of the Commission's Rules of Practice has been made. Thus, this appeal will be denied.

III

Finally, we have before us cross appeals by respondent and jointly by two third parties named in subpoenas from the orders of the hearing examiner filed October 21, 1970, and November 10, 1970.

Respondent filed an appeal pursuant to Section 3.35(b) on October 27, 1970, from the examiner's order of October 21, 1970, which order granted the motions of third parties Monarch Cement Company (Monarch) and Concrete Materials, Inc., (Concrete Materials) to quash subpoenas issued to them at the instance of respondent.[2] The examiner upon an application by Monarch and Concrete Materials to reconsider their motions, filed his second order on these subpoenas on November 10, 1970. Therein he referred among other things to the Commission's order and opinion filed October 22, 1970 and he denied the motion for reconsideration and the motions to quash in their entirety.

Respondent, in this instance, argues that the hearing examiner erred in applying Rule 45 (b)(2) and (c) of the Federal Rules of Civil Procedure and in requiring the advance payment of witness fees and costs. The question on the use of Rule 45 was dealt with by the Commission in its order and opinion issued herein October 22, 1970 and the principles there mentioned apply equally here. However, respondent's appeal is moot in this instance because of the examiner's subsequent order filed November 10, 1970, denying the motions to quash in their entirety. The appeal will be denied to dispose of the matter for the record.

Monarch Cement Co. and Concrete Materials, Inc., on November 24, 1970, jointly appealed from that part of the hearing examiner's order

[2] The subpoenas were issued to Vernon Barlow, vice president, the Monarch Cement Company and to Robert C. Brown, vice president, Concrete Materials, Inc.

filed October 21, 1970 which denies confidentiality "Mississippi River treatment" to the information sought and from the portions of the orders filed October 21, 1970, and November 10, 1970, denying motions to limit certain specifications of the subpoenas to the "Kansas City area." Their arguments are (a) that the denial of confidential treatment will result in the disclosure of trade secrets giving respondent a competitive advantage and (b) that certain specifications of the subpoenas extend beyond the relevant geographic market.[3]

So far as the appeal of Monarch and Concrete Materials takes issue with the examiner's rejection of their request for confidential treatment (*i.e.*, treatment like that granted in the matter of *Mississippi River Fuel Corporation*, Docket No. 8657, sometimes referred to as the Mississippi River treatment) our views are set forth in our order and opinion issued November 19, 1970 [p. 1671 herein] in this matter, concerning a similar appeal. For the reasons therein stated, we will grant the appeal to the extent that it involves the examiner's denial of petitioners' request for confidential treatment, vacate the examiner's orders and direct him to take appropriate action consistent with our views expressed in such prior order.

The appeal of Monarch and Concrete Materials is denied in all other respects for the reason that no sufficient showing is made required by Section 3.35(b) of the Commission's Rules of Practice. Accordingly,

It is ordered, That respondent's appeal from the hearing examiner's order filed October 9, 1970, be, and it hereby is, granted to the extent set forth in this order and opinion and otherwise denied.

It is further ordered, That respondent's appeal from the hearing examiner's order of October 30, 1970, be, and it hereby is, denied.

It is further ordered, That respondent's appeal from the hearing examiner's order filed October 21, 1970, be, and it hereby is, denied.

It is further ordered, That the joint appeal of Monarch Cement Co. and Concrete Materials, Inc., from the hearing examiner's orders filed respectively on October 21, 1970, and November 10, 1970, be, and it hereby is, granted to the extent indicated in this order and opinion and it is otherwise denied.

It is further ordered, That the hearing examiner's orders filed respectively on October 21, 1970, and November 10, 1970, be, and they hereby are, vacated.

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[3] These appellants on October 28, 1970, and again on November 19, 1970, asked for an extension of time for filing their cross appeal and answer. Since they have filed their appeal which is here being considered and since respondent's appeal is mooted by the examiner's subsequent order, thus eliminating the need for an answer, no further action is required on the time extension requests.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for appropriate action consistent with the Commission's views expressed in this order and opinion and to the extent applicable in its prior orders and opinions issued herein respectively, on October 22, 1970, and November 19, 1970.

No. 399. Plan for Merchandising by Lottery.

The Commission issued an advisory opinion relative to proposed weekly drawings for wigs.

The wigs are purchased at $5 each wholesale and retailed to consumers at $50. None have ever been sold at retail below this price. It is proposed to establish a method by which each buyer of a wig would be assured of a wig at a price of $50 or less. The method of operation would be as follows: Customers would be divided into groups of 10. Each week, each such customer in each such group would pay $5, and a drawing would be had, the winner to receive a wig. The next week, the nine remaining persons in the group of 10 would each pay $5, and one of them would receive a wig. This process would continue, until finally the last person in the group would pay the full price of $50 for the wig.

The Commission expressed the view that the proposed course of action would constitute a scheme to sell merchandise by means of a lottery or game of chance, a sales device long held to be illegal under the Federal Trade Commission Act, Section 5. The mere fact that each participant receives a thing of value for his contribution does not negate the existence of a lottery nor change the plan's essential nature as an appeal to the public's gambling instincts. Clearly, the participants in this drawing would be motivated by the chance of receiving something of more value than the amount they contributed. Hence, the nature of the appeal is unmistakable. (File No. 703 7051, released Jan. 19, 1970.)

No. 400. Labeling of Imported Magnetic Recording Tape.

Modifying the position announced in Advisory Opinion Digest No. 366 [76 F.T.C. 1103] (16 C.F.R. § 15.366), the Commission advised that:

Tape accompanying an imported tape recorder, if packaged to show country of origin, is not required to express quantity of contents as

*Prior to October 29, 1969, in conformity with the policy of the Commission, advisory opinions were confidential and available to the public only in digest form. Digests of advisory opinions were published in the Federal Register. The policy was changed on October 29, 1969, to provide for publication of advisory opinions and requests therefor, including names and details, when rendered, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's rules, and the public interest. The policy was again changed on December 22, 1971, to provide for the placement in the Commission's public record of advisory opinions and requests therefor, including names and details, immediately after the requesting party has received the Commission's advice, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's rules, and the public interest.