

Koman summary memorandum and, if produced, to afford respondent his full "Jencks" rights. Accordingly, complaint counsel's request for permission to file an interlocutory appeal is denied. An appropriate order accompanies this opinion.

Commissioner MacIntyre dissented, and filed a dissenting statement.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY
APPEAL

Upon consideration of the Request for Permission to File an Interlocutory Appeal from the Ruling of the Hearing Examiner Striking Testimony of a Witness, filed by complaint counsel on December 22, 1970, and for the reasons stated in the accompanying opinion,

It is ordered, That the request for permission to file an interlocutory appeal be, and it hereby is, denied.

Commissioner MacIntyre dissented and filed a dissenting statement.

ASH GROVE CEMENT CO.

Docket 8785. Order, March 2, 1971

Order denying joint appeals by two cement companies and the appeal by respondent from the examiner's order which denied the so-called *Mississippi River* confidential treatment for certain specifications in subpoenas in question and granted such treatment as to certain other specifications; vacating the hearing examiner's denial of the requested protective order; and remanding the matter of a protective order for reconsideration in accordance with the Commission's views.

ORDER RULING ON APPEALS

This matter is before the Commission upon appeals from the hearing examiner's orders ruling in two different instances on requests for confidential treatment. These will be considered separately below.

I

Cross-appeals from the hearing examiner's order filed December 7, 1970, have been filed, on the one hand, jointly by Missouri Portland Cement Company (Missouri Portland) and Botsford Ready Mix Company (Botsford), and, on the other, by respondent. They were filed, respectively, on December 21, 1970, and December 14, 1970. Respondent, on December 30, 1970, filed its answer and opposition to the joint appeal of Missouri Portland and Botsford, and complaint counsel, on December 31, 1970, filed an answer, opposing such joint appeal and supporting respondent's appeal.

MISSISSIPPI RIVER FUEL CORPORATION, INC. 100.

The examiner's order in this instance, which was entered upon his reconsideration of the question in the light of the Commission's order issued November 19, 1970 [77 F.T.C. 1671], denied the so-called *Mississippi River* confidential treatment for certain specifications in the subpoenas in question and granted such treatment, although with modification, to Specification 2 of the subpoena served on Missouri Portland and Specification 6 of the subpoena served on Botsford.¹ The examiner stated that only the latter two specifications appear to include information covered by *Federal Trade Commission v. Crowther*, 430 F.2d 510 (D.C. Cir. 1970).

Missouri Portland and Botsford argue in their joint appeal that the hearing examiner failed to comply with the Commission's remand order and that he should have applied the *Mississippi River* treatment to the other specifications involved. Respondent contends in its appeal that confidential treatment should have been denied for all of the specifications.

The issue raised as to the confidentiality requested by Missouri Portland and Botsford was thoroughly briefed before the Commission upon their appeal filed October 23, 1970. Thereafter the Commission issued its order and opinion, on November 19, 1970, setting forth the Commission's views of the pertinent legal precedents applicable to the matter and, among other things, directing the examiner to proceed in accordance with these views. The examiner complied, as indicated above, by issuing his order of December 7, 1970, granting *Mississippi River* treatment as to certain specifications and denying it as to others. No new facts or circumstances other than the examiner's order have been presented by either Missouri Portland and Botsford or by respondent. We do not believe in the circumstances that reconsideration would serve any helpful purpose. Moreover, we do not find that either of the appellants have satisfied Section 3.35(b) of the Commission's rules requiring a showing that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice.

Accordingly, the joint appeal of Missouri Portland and Botsford and the appeal of respondent will both be denied.

II

The other appeal before the Commission is that filed December 22, 1970, by Mississippi River Corporation and Stewart Sand and Ma-

¹ In *Mississippi River Fuel Corporation*, Docket No. 8657 (order issued June 8, 1966) [69 F.T.C. 1186], the Commission provided for a protective order under which the alleged confidential material was to be submitted to an outside accounting firm which would compile and present the material to respondent's counsel in such a manner as to protect its confidentiality.

terial Company (referred to hereafter as appellants) from the hearing examiner's order filed December 9, 1970, denying them a requested protective order covering certain specifications in subpoenas issued to them at the instance of respondent. The terms of the order which they requested the examiner to issue are set out in pages 512-514 of the transcript. It is not a *Mississippi River*-type order that appellants want. Rather, they seek protection from the disclosure of specified information, which they deem competitively sensitive, to certain officials of the respondent. They do not object to disclosure to respondent's counsel or accountants, or to any outside professional consultant. They give as a reason for their request their belief that the information is highly sensitive business data and that its release to respondent's high officials would put them at a competitive disadvantage.

The Commission, in a recent decision herein issued on November 19, 1970, concerning the first interlocutory appeal of Missouri Portland and Botsford, held that in light of the *Crowther* decision (*supra*), unless there are distinguishing features, the *Mississippi River* formula (see footnote 1) should be used. In both the prior appeal of Missouri Portland and Botsford and in this appeal of appellants the subpoenaed third parties are seeking protective orders in comparable circumstances. The mere fact that the appellants here ask for a less restrictive order than provided by the *Mississippi River* formula should not make their request any less meritorious; in fact, the order sought by appellants may be reasonable if, as alleged, the information is sensitive business data the release of which to respondent's personnel would put appellants at a competitive disadvantage. While the instructions set out in our prior order issued November 19, 1970, do not specifically apply because the so-called *Mississippi River* treatment is not requested here, the general principles there outlined should be considered by the examiner upon remand. Accordingly,

It is ordered, That the joint appeal of Missouri Portland Cement Company and Botsford Ready Mix Company from the hearing examiner's order filed December 7, 1970, be, and it hereby is, denied.

It is further ordered, That the respondent's appeal from the hearing examiner's order filed December 7, 1970, be, and it hereby is, denied.

It is further ordered, That the hearing examiner's order filed December 9, 1970, denying the protective order requested by Mississippi River Corporation and Stewart Sand and Material Company, be, and it hereby is, vacated.

It is further ordered, That the matter be, and it hereby is, remanded to the hearing examiner for his reconsideration and disposition of the request of Mississippi River Corporation and Stewart Sand and Material Company for a protective order in accordance with the views expressed herein.