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Order

ASH GROVE CEMENT COMPANY

Docket 8785. Order and opinion, Dec. 5, 1972.

Order and opinion denying respondent's motion to dismiss the complaint for reasons expressed in prior order and opinion of Oct. 14, 1969. Case remanded to administrative law judge for further proceedings.

ORDER AND OPINION DENYING MOTION TO DISMISS THE COMPLAINT

This matter is before the Commission upon the certification of the administrative law judge, filed August 31, 1972, of respondent's motion to dismiss the complaint, filed August 16, 1972. Complaint counsel, on August 28, 1972, filed an answer in opposition to respondent's motion. The motion was certified to the Commission pursuant to Section 3.22 (a) of the Commission's Rules of Practice.

In support of its motion respondent argues: first, that this proceeding is illegal because it is an attempt to implement and enforce the Commission's January 3, 1967, Statement of Enforcement Policy with Respect to Vertical Mergers in the Cement Industry which respondent claims is a "trade regulation rule" beyond the statutory authority of the Commission to promulgate; and, second, that by issuing this alleged "trade regulation rule" the Commission has prejudged the material issues and facts in this proceeding thereby rendering a fair trial herein impossible.

Respondent's first argument rests upon its assertion that our January 3, 1967, statement of Policy is a trade regulation rule. This assertion is incorrect. In an earlier interlocutory opinion and order, issued February 6, 1967, in *Lehigh Portland Cement Company*, Docket No. 8680, *Marquette Cement Manufacturing Company*, Docket No. 8685, and *Mississippi River Fuel Corporation*, Docket No. 8657, 71 F.T.C. 1618, we clearly indicated that that Statement of Policy does not have the effect of a trade regulation rule, but is simply a guide intended to instruct the Commission's staff and industry members with respect to the enforcement intentions of the Commission. As we stated:

The Statement sets forth certain criteria which will be followed by the Commission in identifying those vertical acquisitions in the cement industry which will receive the Commission's immediate attention and, if the facts should so warrant, will result in the issuance of complaints challenging their legality. These criteria have been promulgated as part of a general *enforcement* policy for the guidance of the staff and of industry members and their counsel, who might otherwise be uncertain of the Commission's enforcement intentions in this area. The Statement pointedly emphasizes, however, that "the issues in any proceeding instituted by the Commission will be decided on the merits of that case." * * *

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