from *in camera* status of the exhibits referred to; and, accordingly,

It is ordered, That respondent's motion be, and it hereby is, denied.

Commissioner MacIntyre not participating.

L. G. BALFOUR COMPANY ET AL.

Docket 8435. Order and Opinion, May 10, 1963

Interlocutory order granting respondents' application to inspect documents in Commission files.

Order Directing Disclosure of Documents

In accordance with the Commission's order of October 5, 1962, the hearing examiner has again referred to the Commission his recommendation as to the disposition which should be made of respondents' request for the right to inspect documents in the Commission's confidential files. Pursuant to permission granted, respondents have filed a memorandum in opposition to the decision recommended by the hearing examiner and complaint counsel have filed in support thereof; and

The Commission having determined for the reasons stated in the accompanying opinion that the hearing examiner's recommendation should not be followed and that the respondents should be afforded substantially full disclosure of the information they seek:

It is ordered, That complaint counsel have copies made of all documents in the Commission files which fit the descriptions supplied by respondents in their motion of August 27, 1962, which were at one time in respondents' possession and are now otherwise unavailable to them; that the identity of confidential informants who may have supplied any of the documents be screened from respondents by dele-

tion of names or any effective procedure which appears reasonable; and that the copies made be turned over to counsel for respondents without further delay.

Commissioner MacIntyre not concurring.

INTERLOCUTORY OPINION OF THE COMMISSION

BY THE COMMISSION:

The complaint in this proceeding, issued June 16, 1961, charged respondents with violation of Section 5 of the Federal Trade Commission Act. Specifically alleged were unfair methods of competition and unfair acts and practices, the alleged effect of which has been or may be to restrain competition and to create a monopoly in the several lines of commerce in which respondents are engaged. On August 27, 1962, respondents filed a motion pursuant to §§ 1.163 and 1.164 of the Commission's Rules of Practice for an order directing complaint counsel to permit them to inspect and copy certain documents in the possession of the Commission. The documents requested concerned 28 enumerated matters and fell within four categories:

(a) Documents obtained by the Commission from the respondents;

(b) Four specific documents or groups of related documents;

(c) Documents obtained by the Commission from other sources which were prepared or published by respondents or which were addressed to or received by them; and

(d) All correspondence between respondents and the Commission.

By order of September 12, 1962, the examiner certified respondents' motion to the Commission, recommending that only that portion should be granted which is limited to "the request to examine certain documents submitted to the Commission by the Respondents." According to the examiner's order, "The remaining matter it appears would fall within the privileged category and should not be disclosed." The Commission, by order of October 5, 1962, remanded the matter for further consideration because of the examiner's failure to give any explanation for his recommendations. The Commission's order pointed out that: "the determination * * * of good cause for the release of documents in the Commission's files entails, primarily, consideration of issues of fact which require for their determination a detailed knowledge of the issues of the proceeding which, at this state of the case, is possessed by the examiner." For this reason, the Commission concluded that questions of good cause, privilege, and similar matters should be initially considered by the examiner in the light of the particular facts and issues of the case with which he is presumably familiar.

Pursuant to the Commission's order of remand, the examiner by order filed January 29, 1963, has again certified respondents' motion to the Commission. The examiner's new order, without considering the matters of privilege previously raised, concludes that, with the exception of the documents described under (b) above, the respondents have failed to show good cause for the requested disclosure or to identify the documents requested with sufficient specificity.

This matter brings into focus a series of problems and questions which have arisen concerning the latitude or scope of discovery permitted respondents under the Commission's Rules of Practice.[1] Prior to amendment of the Rules, hearings in adjudicative proceedings were held at uncertain intervals and in different locales. Under this type of practice there was little need to afford respondents the right to pre-trial discovery for they were customarily afforded an ample interval to prepare their defenses subsequent to the close of the case in chief.[2] But the revised rules now require that, insofar as it is possible and practical, the hearings must be held in one place and continue without interval until all evidence, in support of and in opposition to the complaint, has been received.[3] Thus, respondents must now be prepared to offer their evidence immediately after the close of the case in chief and, accordingly, must be afforded all of the rights necessary for them to prepare before trial. To provide for this changed circumstance and to assure that the Federal Trade Commission's hearings were not conducted under the "sporting theory" of litigation where the goal is to surprise and confound your opponent, the Commission promulgated Rule 4.8, which provides for the convening of prehearing conferences to discuss and determine the most expeditious procedure to be followed in adjudicative hear-

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[1] The current Rules were published June 29, 1961. Practice under these Rules showed the need for several comparatively minor revisions which were made and the current Rules, published June 1962, reflect these changes.

[2] E.g., *Joseph A. Kaplan & Sons, Inc.* (57 F.T.C. 1537, 1539). "Under the Commission's method of procedure the respondent will not be prejudiced by the denial of its request [for discovery subpoenas]. At the close of the case in chief, it may make application to the hearing examiner for such subpoenas as it deems necessary to its defense. At that time the hearing examiner having heard the evidence supporting the complaint will be better able to determine the permissible scope of the requested subpoenas and will, of course, cause those to issue which in his judgment are reasonable and proper."

In *Standard Distributors, Inc., et al.* v. *Federal Trade Commission,* the Second Circuit upheld the Commission's refusal to permit respondent to copy or photograph the documentary evidence to be introduced, holding that denial of such a request was not erroneous, for, as was said "* * * in N.L.R.B. v. Remington Rand, Inc., 2 Cir., 94 F. 2d 862, 'it is of slight value in a trial by hearings at intervals.'" (211 F. 2d 7, 11 (1954).) [5 S.&D. 619, 623.]

[3] Rule 4.14(d): *"Expedition.* Hearings shall proceed with all reasonable expedition. Unless the Commission otherwise orders upon a certificate of necessity therefor by the hearing examiner, all hearings will be held at one place and will continue without suspension until concluded. (This shall not bar overnight, week end, or holiday recesses, or other brief intervals of the sort normally involved in judicial proceedings.)"

ings. Among the specific matters which may be considered at the conference are:

> Such other matters as may aid in the orderly disposition of the proceeding, including disclosure of the names of witnesses or furnishing for inspection or copying of non-privileged documents, papers, books or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody or control of any party to the proceeding. (§ 4.8(a)(6))

While this was the first appearance of this procedural step in the Rules, it is not an entirely new concept in Commission practice, for the authority of a hearing examiner to order discovery of the type described in the Rule has been recognized for a number of years.[4] And, although the complaint in this proceeding was issued prior to the effective date of the Rule, the respondents were afforded discovery before trial coextensive with the Rule's provisions. Just as the Rule provides, they were given the names of all witnesses complaint counsel intended to call and copies of all documents he intended to introduce in evidence.[5]

The questions presented by prehearing discovery requests must be considered in a broad context. To enable it to carry out its functions, the Commission has been given unique, extensive powers of visitation which authorize it to search into and examine in detail the business secrets and other confidential data concerning persons or corporations being investigated or who possess information relevant to an investigation or proceeding.[6] The material adduced through exercise of these broad powers is placed in the Commission's confi-

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[4] *American Metal Products Company, et al.,* Docket No. 7365, interlocutory order of July 2, 1959, affirming the hearing examiner's right to require complaint counsel to furnish respondents' counsel with copies of all documents which he intended to offer in evidence. *Gulf Oil Corp.* (54 F.T.C. 1891 (1958)), interlocutory order affirming the hearing examiner's power to order complaint counsel to disclose names and addresses of witnesses two weeks in advance of hearing.

[5] Related questions arising during the trial are handled similarly. We have held, for example, that a signed prior statement of a witness may be released by order of the hearing examiner when necessary. Our pronouncement to this effect was made in *Sun Oil Company,* Docket No. 6934, interlocutory opinion of September 15, 1958. The authority is not unqualified and must be circumspectly used. A pertinent part of the opinion reads:

"In regard to the latter situation, we believe that the afforesaid rule should not be so interpreted as to deprive the examiner of authority to order in his sound discretion production of a record in the Commission's files for cross-examination where such is a prior statement of a witness, which statement is identified and known to exist, and where it is shown to relate to the subject matter of the testimony of the witness. In this connection, the examiner should prudently exercise his discretion and should not release any document (or any part thereof) which is privileged or irrelevant. In particular, the identity of an applicant or complaining party should be strictly protected from disclosure. Consequently, a document so produced must first be inspected by the examiner before it may be turned over to the respondent, a procedure which the examiner proposed to follow in this instance."

[6] For a recent discussion of the Commission's investigative powers, see *Hunt Foods and Industries, Inc.* v. *Federal Trade Commission,* 286 F. 2d 803 (9th Cir. 1960) [6 S.&D. 850].

dential files and its unauthorized disclosure subjects the offender to serious criminal penalties.[7] This restriction on unauthorized disclosure applies as well to hearing examiners as to other employees, and the Commission has held that as a general proposition hearing examiners have "no authority to require the production of information or material from the Commission's files by subpoena duces tecum or otherwise." [8] The guarding of the products of Commission investigations is founded in the realization that much of it was considered as highly confidential by the persons from whom it was secured.

The only manner in which confidential information may be released from the Commission's files other than that referred to in Rule 4.8 is by order of the Commission pursuant to § 1.164 of the Rules of Practice. The Commission will release such material to applicants only if they are able to show "good cause" therefor and if the release will not do violence to any statute, rule or the public interest.[9]

In cases in which the release of such materials is requested, the threshold question to be decided is whether the applicant has shown good cause.[10] In adjudicative proceedings the application is made to the hearing examiner who intially considers the matter and then certifies the question to the Commission with his recommendations and reasons therefor.[11] This is the procedure which has been followed here.

In considering whether or not good cause has been shown in support of a particular request, the Commission, of course, is cognizant of the fact that a marked distinction must be drawn between discovery of a party's own documents—for example, business records

[7] Section 10 of the Federal Trade Commission Act provides in part: "Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court."

[8] *Postal Life and Casualty Insurance Company,* 52 F.T.C. 651, 653 (1956); *Thomasville Chair Company,* 56 F.T.C. 1651 (1959).

[9] The pertinent parts of § 1.164 provide:

"(a) Upon good cause shown, the Commission may by order direct that certain records, files, papers, or information be made public or disclosed to a particular applicant.

"(b) Application by a member of the public for such disclosure shall be in writing, under oath, setting forth the interest of the applicant in the subject matter; a description of the specific information, files, documents, or other material inspection of which is requested; whether copies are desired; and the purpose for which the information or material, or copies, will be used if the application is granted. Upon receipt of such an application the Commission will take action thereon, having due regard to statutory restrictions, its rules, and the public interest."

[10] E.g., *Shell Oil Company,* Docket No. 8537, Interlocutory Opinion of February 1, 1963 [p. 1488 herein].

[11] *Union Bag-Camp Paper Corporation,* Docket No. 7946, Order Denying Applications For Disclosure and Special Reports, July 30, 1962.

peculiarly within its possession and not otherwise available to the adversary, and documents that reflect the result of investigation by lawyers in preparation for possible litigation.[12] That distinction takes on added significance when the investigation as to which discovery is sought is by government lawyers acting in the public interest.[13]

It is neither necessary nor desirable to frame a firm rule of general application defining with particularity the elements of a showing of good cause for the release of material from the Commission's files. It is impossible to anticipate the wide variety of situations which may arise and which should be met with flexibility and discretion; not rigid formula. In general, however, it may be said that an applicant must satisfy the Commission not only that the material sought is relevant and useful for defensive purposes, but also that its release would not impair any overriding public interest in preserving its confidentiality.[14] In making its judgment the Commission will also necessarily take into account such considerations as basic fairness to the parties and the need for avoiding delay.[15] But it must be emphasized that an effort to obtain discovery of Commission files merely for "fishing" purposes to determine whether material might be extracted therefrom which could be exploited by the defense will not be allowed.

It is obviously not possible to show "good cause" without a fairly well drawn designation of the material sought. But, the question of the sufficiency of designation, like that of good cause, should not be solved by resort to rules, whether strict or liberal, for in order for justice to be done each problem which arises should be approached without the handicap of an arbitrary formula.[16] Moreover, the problem of designation is subservient to that of good cause. It is impossible to make the latter showing without first identifying the material needed.

Applying the foregoing reasoning to these respondents' application, there appears to be a serious question whether they have made

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[12] *Hickman* v. *Taylor*, 329 U.S. 495 (1947).

[13] *United States* v. *Deere & Company, et al.*, 9 FRD 523 (D. Minn. 1949).

[14] In this connection, we note that while the Federal Rules of Civil Procedure do not apply to Commission proceedings, the standards which have been used by the district courts in their interpretations of Rule 34 are informative. See § 34.08, Moore's Federal Practice, and cases there cited.

[15] E.g., *The Texas Company*, Docket No. 6898, Interlocutory Opinion of March 9, 1962 [60 F.T.C. 1887]; *Giant Food, Inc.*, Docket No. 7773, Interlocutory Opinion of April 20, 1961 [58 F.T.C. 1193]; *Thomasville Chair Co.*, 56 F.T.C. 1651, 1653 (1959); *Postal Life & Casualty Ins. Co.*, 52 F.T.C. 651, 654 (1956).

[16] Even under Rule 34, Federal Rules of Civil Procedure, there appears to be no uniformity among the court rulings as to the degree of specificity required. Under one view, represented by *United States* v. *American Optical Co., et al.*, 2 FRD 534, 536 (S.D.N.Y. 1942), a fairly exact description of each item is required, while under another, set forth in *United States* v. *United States Alkali Export Assn., Inc.*, 7 FRD 256, 258 (S.D.N.Y. 1946), designations by general category are permitted.

the necessary showing. The hearing examiner's order certifying the question to us suggests that the respondents may be actually engaged only in a fishing expedition to determine whether something of value may be found. Their motion calls for disclosure in such general terms as to indicate that they possess no real knowledge that much of the material requested even exists. And yet, in this instance, the Commission feels that disclosure should be made.

Here respondents are trying to recover only their own documents and, in this factual situation, denial of their request probably would cause them some hardship. The factual complex framing respondents' request is somewhat unique. Over a period of more than 30 years, the Commission has conducted a series of more or less interrelated investigations of respondents' business activities. These investigations produced a sizable file of documents which, except for those which have been heretofore placed in evidence in this proceeding,[17] are still in the Commission's possession. Respondents claim that a diligent search of their files has revealed that they failed to retain copies of all documents turned over to the Commission during the various investigations. Respondents state that some of the missing documents contain exculpatory material, but are unable to supply specific details to support this claim.

The complaint in this proceeding is necessarily broad, covering a long period of respondents' business life. Moreover, the charge of monopolizing is capable of proof and defense by an almost infinite variety of evidence. Thus, there is little doubt that the documents which respondents seek bear some relevance to the issues here involved. In this instance and on these peculiar facts, we are not inclined even to insist upon a definitive showing of relevance because we feel that basic fairness dictates our decision and overrides all deficiencies in respondents' showing.

In the trial of a lawsuit a lawyer deprived of the information his client has given to the opposing party must of necessity cause the lawyer much discomfort. It could even result in misjudgment fatal to his case. A lawyer working under such a handicap could never be sure that a defensive gambit would not be met with the crushing rebuttal of his client's prior inconsistent statements or actions. To subject respondents and their counsel to this hardship simply because of a failure to retain copies of all documents which may have relevance to this action would, we feel, be unfair.

Complaint counsel protests that some of the documents sought, while originally in respondents' possession, were not secured from it but from third parties whose identity is disclosed thereon. Re-

[17] More than 700 have been offered and received to date.

spondents aver they have no interest in the identity of such third parties and have no objection to an order which would protect this information. Accordingly, our order providing for disclosure will authorize complaint counsel to delete names of confidential informants from any documents made available to respondents.

Commissioner MacIntyre does not concur.

THE PURE OIL COMPANY

Docket 6640. Memorandum and Order, May 13 and 15, 1963

Memorandum of Chairman in response to motion of respondent that he withdraw from this proceeding, and order of Commission denying respondent's motion for disqualification of the Chairman.

MEMORANDUM OF CHAIRMAN DIXON IN RESPONSE TO THE MOTION OF RESPONDENT, THE PURE OIL COMPANY, THAT HE WITHDRAW FROM THIS PROCEEDING

By motion filed May 3, 1963, respondent requests that I withdraw from participation in the appeals now pending before the Commission from the initial decision of the hearing examiner herein.

As the reason for its request, respondent quotes, in part, from my address of July 25, 1961, before the National Congress of Petroleum Retailers, Inc., in Denver, Colorado. Respondent states that it is one of the companies referred to in the speech and that one of the plans referred to therein is that designated in this complaint. On the basis of similar contentions with respect to this same speech, I was requested to withdraw from participation in the *Goodrich* matter.[1] Although not specifically stated in this present motion, I assume that respondent's contention here is the same as that in the *Goodrich* case, that is, that this speech reflects on my part, personal bias and a prejudgment in favor of the allegations of the complaint.

After careful reflection, I declined to withdraw from participation in the *Goodrich* proceeding. In answer to respondent and for the record herein, I repeat the grounds for that decision which are equally applicable to this request.

I stated in my speech that the Commission had challenged the legality of plans of various oil companies including that of this respondent. This is evidenced by the complaint itself which, by statute, can issue only after the Commission has determined that it has reason to believe that such plans are in violation of the law. My rephrasing of this determination does not represent a prejudgment of the final decision.

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[1] *In the Matter of B. F. Goodrich Company and The Texas Company,* Docket No. 6485.

As in the *Goodrich* case, the complaint in this matter was issued long before I assumed my position as a member of the Commission. Also, I have no direct knowledge of this proceeding other than that obtained from an examination of the initial pleadings. In direct response to the charges which I must assume are the grounds for respondent's request, I have not prejudged the issues in this matter, nor do I harbor any personal bias. Accordingly, it is my decision not to withdraw from participation in the appeals from the initial decision in this proceeding.

I shall not participate in any deliberations by the Commission on respondent's alternate request. (Dated May 13, 1963.)

ORDER DENYING MOTION TO DISQUALIFY

The respondent, by motion filed May 3, 1963, having requested that Chairman Paul Rand Dixon withdraw from participation in this proceeding, and that he be disqualified from such participation; and

The Commission having determined that respondent has failed to show justification for departure from the Commission's practice of treating disqualification as a matter primarily for determination by the individual concerned; and

Chairman Dixon having filed with the Commission a memorandum denying the existence of any grounds for his disqualification from participation in this proceeding:

It is ordered, That the motion for disqualification of Chairman Dixon from participation in this proceeding be, and it hereby is, denied.

Commissioner Dixon not participating. (Dated May 15, 1963.)

STERLING DRUG, INC., ET AL.

Docket 8554. Order and Opinion, May 16, 1963

Order denying respondent's motions that Commission disqualify itself from adjudicating issues in Paragraph Seven (1) of the amended complaint.