It is ordered, That respondent's motion to withdraw or dismiss the complaint be, and it hereby is, denied.

It is further ordered, That respondent's request for permission to file an interlocutory appeal from the order of the hearing examiner denying postponement be, and it hereby is, denied.

L. G. BALFOUR COMPANY ET AL.

Docket 8435. Order, Oct. 14, 1965

Order directing the Secretary of the Commission to make available to respondent a Commission minute of March 25, 1964, and the Chairman's letter to Senator Magnuson of June 23, 1961.

ORDER DIRECTING DISCLOSURE OF DOCUMENTS

The hearing examiner has certified to the Commission for its determination two separate motions of respondents filed September 13, 1965, for the production of (1) a Commission "minute" relating to *L. G. Balfour Co.* v. *Federal Trade Commission,* Civil Action No. 3132 (E.D. Va.) [7 S.&D. 889], which was pending in March 1964, and (2) a letter from the Chairman of the Federal Trade Commission to the Honorable Warren G. Magnuson, of the United States Senate, which answered a letter from Senator Magnuson dated June 9, 1961.

The motions were filed pursuant to Section 1.133 of the Commission's Rules of General Practice[1] and Section 3.11 of its Rules of Practice for Administrative Proceedings.[2]

The examiner in his certification noted that he had examined respondents' motions and stated that the motions should be denied under "the Commission's previous rulings concerning the disclosure of confidential documents."

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[1] Sections 1.133 and 1.134 provide, in part:

§ 1.133 (a) The records and files of the Commission, and all documents, memoranda, correspondence, exhibits, and information of whatever nature, other than the documentary matters described in § 1.132, coming into the possession or within the knowledge of the Commission or any of its officers or employees in the discharge of their official duties, are confidential. Except to the extent that the disclosure of such material or information is specifically authorized by the Commission or to the extent that its use may become necessary in connection with adjudicative proceedings, they may be disclosed, divulged, or produced for inspection or copying only under the procedure set forth in § 1.134.

§ 1.134 (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.

[2] § 3.11 Upon motion of the party showing good cause therefor and upon such notice as the hearing examiner may provide, the hearing examiner may order any party to produce and permit the inspection and copying of nonprivileged 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 such party. The order shall specify the time, place, and manner of making the inspection and taking the copy and may prescribe such terms and conditions as the circumstances require.

Under the Commission's Rules, the documents which respondents seek to view are clearly confidential. In an earlier interlocutory decision in this matter,[3] we held that whenever there is a request for confidential information in the possession of the Commission, the hearing examiner must make the initial determination of the existence *vel non* of a proper showing of "good cause." It was stated that materials (or representative samples thereof) sought by request should be submitted to the examiner for study and examination to aid him in making his determination, unless they "relate to strictly internal affairs of the Commission," or "are plainly confidential, such as minutes of Commission meetings."

The examiner in this matter has viewed the so-called "minute" but there is no indication whether he studied the requested letter to Senator Magnuson. He apparently considered the moving papers of the parties but failed to make the requisite good cause finding. However, the issues raised in respondents' motions are of such a nature that "a detailed knowledge of the issues of the proceeding"[4] is not required. Thus, the Commission is able itself to reach an initial determination regarding the existence of good cause rather than remand the motions to the examiner.

On March 27, 1964, a Consent Judgment was entered in Civil Action No. 3132 [7 S.&D. 889, 890], which stated, *inter alia:*

1. That all oral and documentary evidence relating to events, transactions, and business conduct occurring prior to June 16, 1951, will be physically excised from the administrative record of the Federal Trade Commission in the proceeding entitled *In the Matter of L. G. Balfour Company, et al.*, Docket 8435, except insofar as it may be hereafter agreed by plaintiffs through counsel and defendant complaint counsel or their successors in the aforesaid administrative proceeding.

2. Both the initial decision of the defendant hearing examiner or his successor and the decision and final order of the defendant Commission in the aforesaid administrative proceeding will be based solely upon the excised administrative record as provided in Paragraph 1 above, and such further evidence, oral and documentary, as may be hereafter received in the aforesaid administrative proceeding.

* * * * * * *

6. The allegations of the administrative complaint in the aforesaid administrative proceeding shall be limited to ten years prior to June 16, 1961.

During the course of a discussion on the record relating to the authority under paragraph 6 of the Judgment for physically altering certain provisions in the complaint and answer, the following exchange occurred between the examiner and complaint counsel:

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[3] Opinion and Order Remanding Respondents' Motion to Inspect and Copy Documents, issued October 5, 1962 [61 F.T.C. 1491].

[4] *Id.* at 2 [at 1492].

MR. BARNES: And I have never thought that I had the authority or that Your Honor had the authority to rewrite the Commission's complaint. I do not think it is necessary.

HEARING EXAMINER LYNCH: Well, I do not know about what Your Honor's authority is so far as the Commission's complaint is concerned, but that is the way you interpret my remarks and I have no intention of rewriting the Commission's complaint. I do not, however, think that there is much area with respect to what you and the respondents have entered into by way of a stipulation, nor do I think that there is much area for conversations concerning the court's order. Furthermore, I have before me the minutes of the Commission concerning this matter, and I am well aware of what the authority of counsel representing the Commission was given by the Commission in order to dispose of this proceeding and it seems to me that in order to dispose of Civil Action No. 3132 you made the decision as to what position you are going to take as a representative of the Commission — you or someone else made the judgment, and now you are bound by it. Whether in your opinion the Commission gave you authority to amend your complaint, the Commission's complaint, I do not know. All I know is what you stipulated and what the court order says. [Tr. 4998-4999.]

The examiner's statement that he had viewed the Commission's "minutes" inspired respondents' first motion.

Since it is not the Commission's practice to make available to its staff the official minutes of meetings, obivously the document to which the examiner referred was not an actual Commission minute. However, often, certain staff members are supplied with resumes of the minutes and apparently the hearing examiner in this matter was given access to such a document. Minute resumes are confidential memoranda for the staff's use and are unavailable to the general public.

However, it does appear that the examiner to some extent considered the minute resume to reach a judgment on the question before him. Accordingly, we believe respondents have shown good cause to have made available to them that underlying document used by the examiner in his decisional process.[5]

Respondents were made aware of the document which is the subject of their second motion when complaint counsel listed, among the exhibits which they proposed to offer in their rebuttal case, a letter from Senator Magnuson to Chairman Dixon, dated June 9, 1961 (marked for identification by complaint counsel as CX 782-A), and a copy of a letter from one Frank H. Myers to the Senator, dated June 7, 1961 (marked for identification by complaint counsel as CX 782-B).[6]

[5] An examination of the document by respondents will reveal to them that it was not a Commission directive to a hearing examiner, as they contended. (Reply to Complaint Counsel's Opposition to Respondents' Motion for the Production of Commission Minute Relating to Consent Judgment, p. 4.) Thus, Rule 3.17(f) was inapplicable.

[6] On September 9, 1965, complaint counsel notified counsel for respondents that they were considering not offering into evidence the exhibits they had marked as CX 782-A and 782-B.

Senator Magnuson's letter to the Chairman bore a date showing that it was routed to the Commission's Bureau of litigation on June 14, 1961. The complaint in this matter issued two days later.

Respondents state three reasons why Senator Magnuson's letter should be produced for their inspection: (1) that the letter is relevant to the testimony of a witness called by complaint counsel relating to the matter referenced in the Myers' letter; (2) that it is important for respondents "to ascertain the contemporaneous views of the Commission with respect to the considerations of public interest which led the Commission to issue the instant complaint;" and (3) that "Chairman Dixon's reply to Senator Magnuson is also directly relevant to Chairman Dixon's qualifications to render a decision in this matter 'in an impartial manner,' as required by Section 7(a) of the Administrative Procedure Act, 5 U.S.C. § 1006(a)."

The Commission's disposition of respondents' second motion makes comment upon their arguments unnecessary.

Complaint counsel whetted respondents' curiosity by voluntarily supplying them with two of three related confidential documents. We believe that fairness dictates the third should be supplied them. Accordingly,

It is ordered, That the Secretary prepare a certified copy of the Commission's minute resume of March 25, 1964; that complaint counsel have a copy made of the letter from Chairman Dixon to Senator Warren G. Magnuson, dated June 23, 1961; and that both documents be transmitted to respondents' counsel without delay.

MISSISSIPPI RIVER FUEL CORPORATION

Docket 8657. Order, Oct. 14, 1965

Order denying respondent's motion to reconsider a previous order of the Commission denying suspension of the complaint.