of the alleged unfairness of conducting legislative-type hearings while adjudicative proceedings are pending.

ORDER PROVIDING FOR CONSIDERATION AND DETERMINATION OF RESPONDENT'S MOTION TO VACATE THE COMPLAINT, ETC.

In this proceeding, in which complaint issued on January 22, 1965, respondent filed a motion before the hearing examiner on October 11, 1966, "to vacate complaint or postpone hearing pending further direction of the Commission." On October 12, 1966,

the examiner certified such motion to the Commission under Section 3.6(a) of the Commission's Rules of Practice. Respondent's motion presents questions similar to those raised in *Lehigh Portland Cement Company,* Docket No. 8680, and *Marquette Cement Manufacturing Company,* Docket No. 8685, relating to alleged unfairness resulting from the conduct of legislative-type hearings while adjudicative proceedings are pending. The Commission believes that the same procedure should be followed here as in those cases. Accordingly,

It is ordered, That:

(1) Respondent shall have 30 days from the date of this order in which to file a brief in support of its motion; and upon the filing of such brief by respondent, complaint counsel shall have 30 days in which to file an answering brief. The commission will thereafter determine whether, and when, it desires to hear oral arguments, and the Secretary will so notify counsel on both sides; and

(2) Pending the Commission's determination of the instant motion, all other proceedings before the hearing examiner in this matter are hereby stayed until further order of the Commission.

Commissioner MacIntyre not participating.

BEST & CO., INC.

Docket 8669. Certification, Oct. 21, 1966

Finding by hearing examiner that the record fails to establish that any complaint counsel did anything to prevent respondent from gaining access to information in the files of Majestic Specialties, Inc.; recommended that complaint counsel not be barred from the case.

CERTIFICATION TO COMMISSION, WITH FINDINGS AND RECOMMENDATIONS ON INTERLOCUTORY MATTER

This matter is before the hearing examiner pursuant to the Commission's Order of June 23, 1966 [69 F.T.C. 1193], remanding to proceeding for further action by the examiner in accordance with the opinion accompanying said order. Such remand resulted from an application by respondent for permission to file an interlocutory appeal from an order of the examiner denying a motion by respondent to suspend and bar complaint counsel from further participation in this proceeding. While the Commission denied respondent's request, it directed the examiner to make specific findings on certain of the issues raised, and to certify the matter to the Commission with his recommendation for disposition.

The ground of respondent's motion to suspend complaint coun-

sel was that their conduct in communicating with a certain witness "was calculated to prevent respondent from obtaining information material to its defense and to circumvent" the examiner's prehearing order. In his order of May 10, 1966, the examiner denied the motion to suspend for the reasons that, (a) there had been no failure by complaint counsel to comply with the examiner's prehearing order, and (b) there was no prejudice to respondent from complaint counsel's alleged communication with the witness. While accepting the examiner's finding that no harm had resulted to respondent from the action of complaint counsel, the Commission directed that the examiner make specific findings "on the issue of whether complaint counsel made misstatements to the witness in question and concealed from it material facts with the intent of preventing respondent from gaining access to information to which it is entitled."

Following the remand of this matter, the examiner concluded that it would be desirable to call before him, as witnesses, all persons having knowledge of the facts relevant to respondent's charge against complaint counsel.* In accordance with the Commission's direction that there be no interruption of the hearings for the reception of evidence in the main proceeding, scheduled to begin on June 29, 1966, the calling of witnesses in this ancillary matter was delayed until July 27 and August 1, 1966. The parties were granted until August 27, 1966, to file memoranda in support of their respective positions. No memorandum was filed by either party.

The charge of respondent concerning the alleged impropriety by complaint counsel in contacting a witness involves one of respondent's suppliers, Majestic Specialties, Inc. The contention that complaint counsel prejudiced the witness against respondent arises out of alleged conversations by complaint counsel with counsel for the witness, rather than with the witness directly. The charge of prejudicial conduct by complaint counsel is based on the following statements allegedly made by them to counsel for the witness:

1. That as a result of a motion or application by respondent, complaint counsel were being compelled to turn over to respondent certain tables (identified as Tables I and III), which otherwise would not have been turned over.

2. That the receipt of such tables would be inimical to the witness' interests.

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*Such witnesses included one of complaint counsel, one of respondent's counsel, and two of the attorneys representing the witness.

3. That complaint counsel did not intend to introduce the tables in evidence.

4. That complaint counsel did not intend to call representatives of Majestic as witnesses, but that respondent did.

Respondent further contends that complaint counsel concealed from counsel for the witness the following facts:

1. That the names of officials of Majestic appeared on a list of prospective witnesses furnished to respondent by complaint counsel pursuant to the examiner's prehearing order.

2. That complaint counsel had been willing to turn over the tables in question if respondent had agreed to stipulate to their accuracy.

3. That no motion or application had been made by respondent for the production of the tables, but same were directed to be turned over by the examiner's prehearing order, with counsel for respondent agreeing to maintain the confidentiality thereof.

The basis of respondent's contention that it was prejudiced by the conduct of complaint counsel is that as a result thereof the witness was unwilling to cooperate with respondent in verifying the correctness of another table (Table II), which had also been turned over to its attorneys by complaint counsel, and that respondent was prevented thereby from obtaining information material to its defense.

Before making specific findings on the remanded issue, brief reference should be made to the tables which form the background of the present controversy. During the investigational phase of this proceeding, complaint counsel obtained evidence from various of respondent's manufacturer-suppliers purporting to reflect sales made by these suppliers, and advertising allowances paid by them, to respondent and certain of its allegedly disfavored competitors. This evidence was compiled by complaint counsel into a series of summary tables, showing total sales and allowances on an annual basis (for the years 1962 and 1963), by each of the designated suppliers, to respondent and various of its alleged competitors. Each of these tables of sales and allowances by the various suppliers was designated as Table I. Complaint counsel also obtained from respondent Best detailed evidence purporting to show the individual payments of advertising allowances to it in 1962 and 1963. This evidence was summarized by complaint counsel in a series of tables purporting to show, for each of the named manufacturers, the date and amount of each payment, the style number of the merchandise advertised and the

publication in which the advertisement appeared. Each of these tables, summarizing the individual advertising payments to Best, was designated as Table II. In addition to this evidence, complaint counsel had also obtained from the suppliers upwards of 15,000 invoices purporting to show the sales of merchandise, bearing identical style numbers, to Best and certain of its alleged competitors. The data in these invoices were summarized, by individual suppliers, in a series of tables, each designated as Table III.

In the examiner's order scheduling the initial prehearing conference, the parties were required to exchange with one another copies of proposed documentary evidence, names of witnesses and narrative summaries of the expected testimony of witnesses. Complaint counsel indicated at the initial conference that they proposed to offer the summary tables, I, II and III, as well as the underlying documents on which the tables were based. The examiner endeavored to explore with the parties the possibility of entering into a stipulation as to the correctness of the summary tables. Counsel for respondent indicated that they were willing to enter into such a stipulation with respect to the Table II's, after verifying the information against basic records. The Table II's were, accordingly, turned over to respondent's counsel for checking. Counsel for respondent were unwilling to enter into a similar stipulation with respect to Tables I and III, unless complaint counsel would agree to limit the number of such tables to manufacturers who were to be called to testify, and agree to respondent's taking the depositions of these manufacturers. While complaint counsel were willing to agree to limit the number of Tables I and III, they would not agree to the taking of depositions by respondent.

At a prehearing conference held April 7, 1966, counsel for respondent, while not agreeing that Tables I and III could be received as evidence, agreed that in view of the voluminous nature of the underlying records, they would accept copies of Tables I and III as compliance with the examiner's earlier prehearing order for supplying opposing counsel with copies of proposed documentary evidence. Since complaint counsel indicated that they preferred to supply copies of the tables rather than the voluminous underlying records, they were directed to turn over copies of Tables I and III by April 20, 1966. Based on the representation of complaint counsel that such records contained confidential information, counsel for respondent agreed not to disclose them to anyone except to the extent that they might have to consult their client as to the correctness of certain of the information. At the same prehearing conference counsel for re-

spondent indicated that they had been unable to verify, from respondent's own records, the accuracy of certain of the style numbers appearing in the Table II's, and that they were endeavoring to do so from the records of some of their suppliers. The examiner directed that this effort be completed by April 15, 1966. Counsel for respondent further indicated that they intended to move for the taking of the depositions of the Commission's supplier witnesses. The examiner directed that such motion be filed not later than April 20, 1966.

Following the prehearing conference of April 7, Ronald D. Schwartz, the member of complaint counsel's staff who was in charge of the portion of the case pertaining to Majestic Specialties and its records, concluded that he was obliged to notify Majectic's counsel of the fact that he had been directed to turn over copies of Tables I and III to counsel for respondent. The tables had been prepared from documents supplied by Majestic and, at a meeting held in the office of Majestic's attorneys in December 1965, Schwartz had supplied copies of the tables to the attorneys and had promised them that he would notify them if it became necessary to reveal the contents thereof to third persons. On April 8, 1966, Schwartz telephoned Andrew J. Kilcarr of the Washington, D.C. office of the law firm representing Majestic, and notified him that he was being obliged to turn over Tables I and III to respondent's counsel by April 20, 1966, pursuant to the examiner's prehearing order. Kilcarr expressed concern about the revealing of what he regarded as confidential information, and asked Schwartz to hold up the turnover until the last date possible so that he could discuss with his firm's New York office what action should be taken.

By coincidence, at the time Schwartz called Kilcarr, the latter was talking on the telephone with Erwin Klineman, a Majestic official. Klineman advised Kilcarr that he had been contacted by respondent for the purpose of checking the style numbers listed in the Table II pertaining to Majestic. Since Majestic had been previously instructed by its attorneys not to talk to anyone about the case without consulting them, Klineman declined to permit an inspection of Majectic's records by respondent at that time, but advised the latter that he would have his attorneys communicate with respondent's attorneys regarding the matter. Kilcarr informed Klineman that he would have Sanford Litvack of his law firm's New York offce communicate with respondent's attorneys regarding the verification of style numbers.

On April 11, 1966, Kilcarr telephoned Litvack and informed him of his conversations with both Schwartz and Klineman. The at-

torneys were concerned about the turning over of the tables, particularly Table I, because they were fearful that if other customers learned of the information, Majestic might be subject to a treble damage suit. It was decided that since Litvack was in New York, he would telephone respondent's attorneys regarding the checking of style numbers, and discuss ways and means for protecting their client from the turnover order.

In the meantime, respondent had informed its attorneys of the conversation with Majestic and of the latter's advice that its attorneys would contact respondent's attorneys. After waiting several days for a call from Majestic's attorney, one of respondent's attorneys, Ronald J. Offenkrantz, placed a call to the Washington office of Majestic's attorneys and spoke to Andrew Kilcarr. The latter informed Offenkrantz that Litvack of the law firm's New York office was handling the matter and that the latter would be in touch with him.

Not having heard from Litvack, Offenkrantz telephoned the former on April 13. He asked Litvack if he could arrange to have certain style numbers checked against Majestic's records. Litvack informed Offenkrantz he had learned that complaint counsel were being directed to turn over to respondent confidential records pertaining to Majestic, and that he was disturbed about the matter. Offenkrantz informed him that respondent's attorneys had agreed to maintain the confidentiality of the records and not reveal their contents to anyone, except to the extent it might be necessary for counsel to reveal the contents to his client for the purpose of checking the accuracy of the information. During the course of the conversation Offenkrantz informed Litvack that Majestic records would eventually be introduced as evidence through officials of Majestic, who were on the witness list supplied to respondent by complaint counsel. Litvack expressed surprise at learning officials of Majestic would be called to testify, having gotten the impression from a meeting with Schwartz some months earlier that it might not be necessary to call Majestic officials if certain stipulations could be worked out. Offenkrantz offered to send Litvack the portion of the prehearing transcript related to preserving the confidentiality of Tables I and III, and copies of the narrative statements of the proposed Majestic witnesses which had been supplied by complaint counsel. Litvack informed Offenkrantz that he could not give him any definite word on when the style numbers could be checked since the official in charge, Erwin Klineman, had left for Europe the previous day. However, he undertook to see what other arrangements could be made.

The following day, April 14, Litvack was in Washington, D.C., attending a meeting of the Antitrust Section of the American Bar Association. He took advantage of the occasion to discuss with Kilcarr the matter of the turning over of the tables to respondent's attorneys. A meeting was arranged later in the day with Schwartz of Commission's trial staff. Majestic's attorneys sought to find out whether it was true that representatives of Majestic would be called to testify, and were informed that they would be. Upon inquiring when it was likely that the Majestic witnesses would be called to testify, Schwartz stated that respondent was filing a motion to take the depositions of supplier witnesses, including Majestic, and that this might delay the start of hearings. Discussion was also had about the request from Best's attorneys that Majestic permit them to verify the correctness of the style numbers of merchandise sold to Best, on which advertising allowances had been paid by Majestic. Schwartz explained that this information appeared in the Table II's, copies of which had been turned over to respondent's counsel several months earlier, and he urged that Majestic cooperate in this effort. He stated that the failure to complete verification of the tables might result in a delay of the hearings.

Later in the day on April 14, Litvack called Offenkrantz in New York. He told him he had verified, through complaint counsel, the fact that Majestic officials were to be called as witnesses. However, he stated he was still concerned about protecting the confidentiality of the tables which were to be turned over to respondent's counsel. He expressed doubt about the sufficiency of the commitment by respondent's counsel to maintain the confidentiality of the tables, and stated he was considering filing a motion for a protective order. With regard to verification of the style numbers in the Table II's, he stated he had not yet been able to discuss this matter with his client, and told Offendrantz he would call him about it in a few days.

On April 14, respondent's counsel sent Litvack a letter, purporting to summarize their conversations of the previous day and that day. In this letter (which is attached to respondent's motion to suspend complaint counsel), respondent's counsel stated that "our efforts to verify information furnished by the Commission [viz, Table II] have been thwarted and delayed by your apprehension as a result of communication with you from Complaint Counsel." To this letter Litvack replied the following day, taking issue with the statement that the reason for the delay in the verification of style numbers was a communication from complaint counsel. Litvack's letter (which is also attached to

the motion to suspend) states that the reason for the delay was that "although you have had the data since January 7, 1966, you did not make any request to Majestic to aid in verifying the style numbers until April 8, 1966. Further, you did not actually communicate with us as counsel for Majestic until April 13. At that time, Mr. Klineman had already left for Europe."

Several days later Litvack called Offenkrantz and told him that in view of the fact that respondent was about to file a motion to take Majestic's deposition, he could see no reason for verifying the style numbers at that time since it would, in effect, require the appearance of Majestic officials on two separate occasions. He suggested to Offenkrantz that the matter of verification of style numbers should be held in abeyance until a ruling had been made on the application for depositions. Thereafter, on April 21, 1966, counsel for Majestic moved for a protective order with respect to Tables I and III, the examiner having in the meantime, at their request, directed that the turnover of the tables be delayed pending the filing of such motion. By order dated April 26, 1966, the examiner modified his Prehearing Order No. 2, by directing that counsel for respondent not reveal, to anyone, the contents of Table I pertaining to Majestic, without prior approval of the examiner. Thereafter, copies of Tables I and III were turned over to counsel for respondent by complaint counsel.

CONCLUSIONS

There is no dispute as to the fact that Ronald D. Schwartz, of complaint counsel's staff, communicated with a representative of the law firm representing Majestic Specialties, Inc., a prospective witness, and informed him that he was turning over copies of Tables I and III to counsel for respondent pursuant to the examiner's prehearing order. However, as the Commission held in the opinion remanding this matter:

> Merely contacting a witness to inform him that data he furnished to the Commission will be turned over to a respondent * * * without more is, of course, a neutral act not warranting charges of impropriety.

The issue presented on this remand is whether Schwartz went beyond this mere "neutral act," and "made misstatements to the witness in question and concealed from it material facts with the intent of preventing respondent from gaining access to information to which it is entitled." This, in effect, involves a resolution of two questions, viz, (a) whether Schwartz made any of the statements or concealed any of the facts set forth in respondent's motion and (b), if so, whether any of these involved

"material facts" and were made or concealed "with the intent of preventing respondent from gaining access to information to which it is entitled."

The statements attributed to Schwartz which, in the opinion of the examiner, were most clearly calculated to discourage the witness from cooperating with respondent are those that (a) the turning over of the tables (I and III) to respondent's counsel "would be inimical to Majestic's interests," and (b) this would not have been necessary "except for a motion or application by respondent which was granted by the Hearing Examiner" (Respondent's Motion, p. 10). Such statements by Schwartz were allegedly revealed by the witness' counsel, Litvack, in a telephone conversation with respondent's counsel, Offenkrantz, on April 13 or 14, 1966. However, according to Schwartz' testimony and that of the two attorneys for the witness to whom he talked, Kilcarr and Litvack, Schwartz never made any such statements. The first conversation which Schwartz had regarding the turning over of the tables was on April 8 and was with Kilcarr only. Schwartz, in essence, stated that he was being required to turn over the tables pursuant to the examiner's prehearing order, and said nothing as to how said order had come about or what effect it would have on the witness (Tr. 3059–3064, 3082, 3088–3091, 3098–3100). When Schwartz met with Kilcarr and Litvack in Washington on April 14, the discussion related primarily to whether and when Majestic officials would be called to testify, and as to the desirability of cooperating in the verification of the other table (Table II) which respondent was seeking to check from Majestic's records (Tr. 2612, 2618, 2621, 2628–2629, 3065–3069, 3071, 3080–3082, 3096, 3098–3099).

Respondent's contention regarding the making of the prejudicial statements by Schwartz rests on the vicarious admission allegedly made by Litvack in a telephone conversation with Offenkrantz. Respondent made no claim, in its motion, that Litvack had identified Schwartz specifically, as the author of the statements, but rather that Litvack referred to such statements as having emanated from a "source in Washington." Respondent apparently assumed that Schwartz was Litvack's Washington "source" because in the second telephone conversation between Offenkrantz and Litvack on April 14, the latter mentioned that he had met with Commission counsel that day. However, it is clear from Offenkrantz' own testimony concerning the matters which he discussed with Litvack in their two conversations that the prejudicial statements which Litvack allegedly identified as having emanated from a Washington source, if made at all, were made

in the first conversation between Offenkrantz and Litvack on April 13 (Tr. 3111–3118). Since Litvack had not yet talked to Schwartz about the matter, it is clear that Litvack's Washington source when he talked to Offenkrantz on April 13 would have had to be Kilcarr, rather than Schwartz. In view of the fact that Litvack had no apparent hesitancy, on the occasion of his second conversation with Offenkrantz on April 14, in revealing that he had spoken to complaint counsel, it is difficult to believe that he would have been unwilling to identify Commission counsel as his source when he first spoke to Offenkrantz, if such were the fact.

In any event, irrespective of who was Litvack's Washington source, or whether the subject was discussed between Litvack and Offenkrantz in their first or second telephone conversation, the examiner is satisfied that neither Schwartz, nor any other Commission attorney, told Kilcarr or Litvack that the turning over of the tables would be inimical or prejudicial to Majestic's interests. The credible testimony of both Litvack and Kilcarr corroborates that of Schwartz, that he never made any such statement to them (Tr. 2610, 3098–3099, 3082). According to Litvack's testimony, to the extent that he referred to the prejudicial consequences of the turnover of records in his conversation with Offenkrantz, he was expressing his own opinion, and was not reporting any statement made by his informant (Tr. 2610). Offenkrantz conceded in his own testimony that, after hearing Litvack testify, he was "not sure" whether, what Litvack told him concerning the prejudicial consequences of the turnover, was expressed as his (Litvack's) own opinion or that of his informant (Tr. 3114). It is significant that in the letter written by respondent's counsel to Litvack on April 14, 1966, purporting to summarize their discussions, there is no reference to the fact that the statement concerning the prejudicial effect of the turnover had emanated from Litvack's informant, but rather that, "*you* [Litvack] were apprehensive as to the prejudice that might result to your client" from the turnover of the tables (emphasis supplied). The reason for this apprehension was, as Offenkrantz' own testimony indicates he was informed by Litvack, the possibility that if the information became known to disfavored retailers Majestic might become the subject of treble damage actions (Tr. 3112). Considering the fact that Schwartz was not dealing with a layman, but with counsel experienced in antitrust matters, it is contrary to the probabilities inherent in the situation, to say nothing of the credible testimony now in the record, to believe that Schwartz would have had the poor taste to advise

such counsel what would be the consequences, to their client, of the turnover of the tables.

With respect to the second of the prejudicial statements allegedly made by Schwartz, viz, that the tables would not have been turned over except for a motion or application by respondent, the record likewise fails to establish that he made any such statement. According to Schwartz' testimony, he had no occasion to discuss with Kilcarr the circumstances which led to the examiner's prehearing order for the turnover of the records (Tr. 3063). Kilcarr had no recollection of Schwartz saying anything to him as to why the examiner had ordered the records turned over (Tr. 3100). Respondent's charge, in this respect, is apparently based on a statement inadvertently made by Litvack in his initial discussion with Offenkrantz on April 13 (prior to Litvack's talking with Schwartz). Since Litvack had been informed by Kilcarr that the tables were to be turned over pursuant to a prehearing order of the examiner, he assumed that a motion therefor had been made by respondent and, in his conversation with Offenkrantz, he used the expression: "I understand a motion was made." When Offenkrantz informed him there had been no motion, Litvack replied: "That is my word. I must have used the wrong word" (Tr. 2607). While stating that he had gotten the impression that Litvack's reference to a motion having been made was based on information received from his source, Offenkrantz conceded in his testimony that "I guess I am really reading his mind" (Tr. 3112). In the opinion of the examiner, Litvack's statement cannot be attributed to anything which Schwartz said to Kilcarr or to him and cannot be considered the basis for any finding that Schwartz made any misstatement of fact regarding the reason for the examiner's turnover order.

Unlike the two statements discussed above, the third and fourth misstatements attributed to Schwartz by respondent were not, in themselves, calculated to prejudice the witness against cooperating with respondent. These are the statements allegedly made by Schwartz that (a) complaint counsel did not intend to offer the tables (I and III) in evidence, and (b) they did not intend to call officials of Majestic to testify, but that respondent did intend to do so. The only basis on which such statements could be considered to have prejudicial overtones is that they were made in the context of the other two statements, *i.e.*, that at the time such statements were made Schwartz informed counsel for the witness that he was being compelled to turn over the tables because of a motion by respondent, and that the turnover of the tables would be prejudicial to the witness' interests. How-

ever, as has been found above, the record fails to establish that Schwartz made the latter statements.

Aside from whether the third and fourth statements attributed to Schwartz are prejudicial or not, the record fails to support respondent's position concerning the making of these statements. According to Offenkrantz' testimony, the statement by Litvack (attributed to his Washington "source"), that complaint counsel did not intend to call Majestic officials was witnesses, was made on the occasion of their first telephone conversation on April 13 (Tr. 3111, 3113). However, as previously found, Litvack had not yet talked to Schwartz about the turning over of the tables and other matters incident thereto. Litvack's testimony indicates that he did state, in his initial conversation with Offenrantz, that he understood complaint counsel did not intend to call any witnesses from Majestic. However, this statement was based on talks which he had had with Schwartz some months earlier, and not any discussion of the matter following the examiner's turnover order. As previously found, Schwartz had conferred with Majestic's attorneys some months earlier regarding the material which Majestic had turned over to him. At that time he had expressed the hope that, if some stipulation could be worked out with respondent for offering the material in evidence, it might not be necessary to call any witnesses from Majestic (Tr. 2610–2614, 3055–3059, 3084–3088). However, when he talked to Kilcarr on April 8 to advise him of the order to turn over the tables, Schwartz made no reference to the subject of whether Majestic officials would or would not be called to testify (Tr. 3062–3063, 3093). At his meeting with both Kilcarr and Litvack on April 14, when the latter sought to verify the information received from Offenkrantz, that Majestic officials would be called, Schwartz did truthfully inform the witness' attorneys that this was the fact (Tr. 2618, 3066, 3096). It is clear, therefore, that Schwartz did not advise counsel for the witness in any conversation following the examiner's turnover order that Majestic officials would not be called to testify.

As part of the same charge, respondent contends that Schwartz not merely informed Majestic's counsel that he did not intend to call any witnesses from the company, but that respondent intended to do so. Litvack acknowledged that, in the same conversation in which he told Offenkrantz he understood the Commission did not intend to call any witnesses from Majestic, he also stated he understood respondent might do so. This statement was based on the discussions with Schwartz previously alluded to, which had taken place some months prior

to the examiner's turnover order. While Schwartz had stated at that time that if agreement could be reached on Majestic's records being received in evidence, it would be unnecessary to call any witnesses from the company, he also indicated that respondent might object to this procedure and that this would necessitate the calling of Majestic witnesses (Tr. 2611). The only reference made by Schwartz to the possibility of respondent's calling Majestic witnesses, after the examiner's turnover order, was in the meeting with Litvack and Kilcarr on April 14. In connection with a discussion of when the case would be reached for trial, Schwartz mentioned that there might be some delay due to respondent's impending motion to take the depositions of a number of suppliers, including that of Majestic. The statement by Schwartz that respondent intended to take Majestic's deposition was truthful. A date for the filing of such a motion had been fixed at the prehearing conference of April 7, and such motion was filed soon after Schwartz' conversation with Litvack and Kilcarr.

The record likewise fails to support respondent's position concerning the last of the alleged misstatements attributed to Schwartz, viz, that he did not intend to offer Tables I and III in evidence. Aside from the fact that there is some question as to whether Schwartz made any such statement to Litvack, which the latter relayed to Offenkrantz (Tr. 2611–2612), the statement, if made, was a truthful one. At the time he talked to Kilcarr, and later to both Kilcarr and Litvack, it was not Schwartz' intent to offer the tables in evidence. He had earlier, during the prehearing conferences, indicated a desire to offer the tables as a summary of the voluminous underlying data. However, since he and counsel for respondent could not agree on a stipulation for the offering of the tables, complaint counsel concluded that he had no alternative except to offer the underlying documents without the tables. Kilcarr's testimony indicates that in the meeting on April 14, Schwartz did inform him and Litvack that the tables themselves would not be offered in evidence, in view of the breakdown of negotiations with counsel for respondent (Tr. 3099–3100). To the extent that Schwartz made the statement attributed to him by respondent, it was truthful and nonprejudicial at the time, and in the context in which, he made it.

The remaining charges of respondent involve the alleged concealment of facts, rather than the affirmative misstatement of facts, by Schwartz. The first of the facts allegedly concealed by Schwartz in his conversations with Majestic's attorneys is the

fact that two of Majestic's officials appeared on complaint counsel's list of witnesses, and that narrative statements of the testimony of such witnesses had been supplied to respondent pursuant to the examiner's prehearing order. Such fact was, admittedly, not revealed to Kilcarr on the first occasion when Schwartz spoke to him about the turning over of the tables. However, the failure to reveal this fact was not, in the opinion of the examiner, the product of any intent on Schwartz' part to prejudice the witness against respondent or to prevent respondent from gaining access to information to which it was entitled. Schwartz telephoned Kilcarr on April 8 for the sole purpose of informing him, in accordance with what he regarded as an earlier commitment to do so, that the examiner had ordered him to turn over to counsel for respondent certain information obtained from Majestic. There was no obligation on Schwartz' part to give Kilcarr an extended account of other developments in the case. The only basis on which the claimed concealment could be deemed to have been perpetrated with an untoward motive would be if it occurred in connection with respondent's concomitant charge, that Schwartz falsely stated to Majestic's attorneys that he did not intend to call any of the company's officials to testify. However, as above found, no such statement was made by Schwartz at or after the time he advised the attorneys about the examiner's turnover order.

The second of the facts allegedly concealed from the witness' counsel is the fact that complaint counsel would have been willing to turn over the tables (I and III) if counsel for respondent had agreed to stipulate to their accuracy. This fact was, admittedly, not disclosed to counsel for the witness. However, it is the opinion of the examiner that the failure to reveal this fact could not possibly have been prejudicial, unless it occurred in the context of the basic misstatements charged by respondent, viz, that Schwartz stated he was being compelled to turn over the tables as a result of respondent's motion, and that this would be harmful to Majestic's interests. As previously found, the record fails to establish that these misstatements were made. The only other basis on which the failure to reveal the fact under discussion could be deemed prejudicial is that it tends to prove Schwartz was not in good faith in informing respondent of the turnover order, since he had been willing earlier to turn over the tables voluntarily. However, the examiner does not consider the two actions inconsistent. It does not follow that if it had been possible to stipulate to the accuracy of the tables, Schwartz would not have sought to protect

the confidentiality of the information before turning it over, or would not have felt obliged to inform Majestic prior to the turnover. It may be noted, in this connection, that counsel for Majestic were aware that ultimately the data turned over to the Commission would be offered in evidence, but they felt that arrangements could be made, at an appropriate time, to protect its confidentiality (Tr. 2614–2615). It is the conclusion of the examiner that Schwartz' failure to reveal his earlier willingness to turn over the tables was not the result of any intent to prevent respondent from obtaining needed information or of prejudicing the witness against it.

The final charge of omission is that Schwartz failed to reveal that no motion had been made by respondent for the turnover of the tables, and that respondent's counsel had agreed to treat the tables in confidence. This charge is, in part, a duplication of the charge that Schwartz falsely stated that the tables would not have been turned over "except for a motion or application by respondent." As heretofore found, the record fails to establish that Schwartz made any such statement. Not having suggested in any way that respondent was responsible for the examiner's order, Schwartz was not, in the opinion of the examiner, under any obligation to affirmatively reveal that respondent had not moved or applied for the turnover order. His failure to do so cannot, under the circumstances, be deemed to have been done with the intent of prejudicing the witness against respondent or of preventing it from obtaining necessary information.

With regard to the claim that Schwartz should have revealed that respondent had agreed to treat the tables in confidence, it is the opinion of the examiner that he was under no obligation, when he initially contacted Kilcarr, to discuss with him the terms of the examiner's prehearing order, including the provision for the confidential treatment of the records. However, it was Schwartz' testimony that he did, in fact, advise counsel for the witness of this provision (Tr. 3073). Whether Schwartz did or did not do this at the time of his initial contact with the witness' attorneys, it is clear that when he met with both attorneys on the second occasion, they were well aware of the fact that there was a restrictive provision in the order. However, it was their view that this provision did not sufficiently protect their client, since it permitted disclosure of the information to respondent by its counsel, under stated circumstances (Tr. 3117). Accordingly, they moved soon thereafter for a more restrictive protective order. It is the opinion of the examiner that, to the

extent Schwartz may have failed to promptly disclose respondent's counsel's undertaking to maintain the confidentiality of the tables, it was not with any intent to prejudice the witness against respondent, or to prevent it from cooperating with respondent.

In the foregoing discussion the examiner has not considered, directly, the question of what prejudice could have resulted to respondent from Schwartz' communication with Majestic's counsel. It is basic to respondent's motion that the statements and acts of concealment by Schwartz were prejudicial to it. The only prejudice which is specifically referred to by it is that, as a result of Schwartz' conduct, "our efforts to verify information furnished by the Commission have been thwarted," *i.e.*, the checking of the correctness of the style numbers in the Table II pertaining to Majestic (letter of April 14 to counsel for Majestic). While there is some suggestion in the motion that respondent may have been prevented from obtaining other information necessary to its defense, there is no indication of what other information respondent sought and was unable to obtain as a result of the communication from Schwartz.

Insofar as the verification of the style numbers in the Table II's is concerned, the prejudice, if there was any, was experienced principally by complaint counsel since, as a result of respondent's inability to verify the style numbers, complaint counsel was precluded from offering the Majestic tables in evidence with style numbers. Since complaint counsel was a major beneficiary of respondent's effort to verify the style numbers, it is difficult for the examiner to believe that Schwartz would have undertaken to state or conceal facts from Majestic's counsel for the purpose of prejudicing the latter against cooperating with respondent's counsel. The credible testimony establishes that he not merely did nothing to prevent cooperation, but that he actively urged that the witness cooperate in the verification of style numbers (Tr. 2621, 3082, 3099).

The examiner is satisfied that the delay in the verification of the tables was not the result of anything which Schwartz said or failed to say in communicating with the witness' attorneys. The initial delay occurred because, as indicated in the letter of the witness' attorney dated April 15, counsel for respondent had waited to communicate with the witness until the eve of the departure for Europe of the official familiar with the matter. The later decision by counsel for Majestic to hold up the verification was due to the immenent filing of respondent's

motion for depositions and the desire of counsel to avoid a duplication of appearances by his client.

According to the testimony of Majestic's attorney, there was no connection between anything that Schwartz said, and the decision to hold up verification of the tables. The two were completely unrelated (Tr. 2626). Respondent's counsel was principally concerned with verifying the tables, so that he could comply with the examiner's order that this effort be completed by April 15, 1966. However, counsel for the witness were primarily concerned with protecting their client from a possible treble damage suit, and so advised respondent's counsel at the time (Tr. 3112). The verification of the tables was a matter of small moment to them. The examiner is satisfied that there was no causal connection between the delay in the verification of the tables, and anything which Schwartz said or failed to say to counsel for the witness.

It is the conclusion and finding of the examiner that the record fails to establish that Ronald D. Schwartz, or any other member of complaint counsel's staff, made any misstatements or concealed any facts of the nature set forth in respondent's motion, or any similar statements or material facts, with the intent of preventing respondent from gaining access to information to which it was entitled in the files of Majestic Specialties, Inc.; and further, that the record fails to establish that the communication by complaint counsel with counsel for Majestic prevented respondent from obtaining information which it sought and to which it was entitled.

RECOMMENDATION

It is recommended that the Commission take no further action in this matter and consider it closed, insofar as the issues raised by respondent's motion to suspend or bar complaint counsel from further participation in this proceeding.

The hearing examiner's consideration of this matter having been completed, it is hereby certified back to the Commission for consideration and appropriate action by it.

THE SEEBURG CORPORATION

Docket 8682. Order and Opinion, Oct. 25, 1966

Order denying respondent's request for the production of certain Commission documents and for the opportunity to present briefs and oral argument thereon.

OPINION OF THE COMMISSION

This matter is before the Commission on the hearing examiner's certification of respondent's motion for production of Commission documents pursuant to § 3.11 of the Commission's Rules, with a recommendation that it be denied. The motion was certified to the Commission on the ground that the request should be treated as an application for confidential information from the Commmission's files under § 1.134 of the Rules. It should be noted at the outset that respondent has apparently had full disclosure of complaint counsel's case, both with respect to the witnesses to be utilized, the documents to be introduced, the underlying data supporting such exhibits, and the theory of the case. There is evidently no suggestion that complaint counsel will, in his presentation of the case, rely on the data included in the specifications of respondent's motion for production now under consideration.

In issue before the Commission, according to the examiner's certification, are the following documents specified in respondent's motion for production:

3. Any documents showing the amount and manner of sales of bottle and can vending machines to the following listed classes of bottlers, including, but not limited to, any special policies, problems, and selling or other techniques applicable to such classes of bottlers:

(a) Bottlers of Coca-Cola, whether independent or owned by The Coca-Cola Company;

(b) Bottlers of Pepsi-Cola, whether independent or owned by Pepsi-Cola Co., Inc.;

(c) Bottlers of Royal Crown Cola, whether independent or owned by the Royal Crown Cola Company;

(d) Bottlers of Seven-Up, whether independent or owned by Seven-Up syrup manufacturers;

(e) Bottlers of Dr. Pepper, whether independent or owned by the Dr. Pepper Company;

(f) Bottlers of Canada Dry, whether independent or owned by the Canada Dry Corporation;

(g) Bottlers of other soft drinks, whether independent or owned by soft drink syrup manufacturers.

4. Any documents which are, or which mention, refer, relate to, or show correspondence, reports of meetings, meetings, negotiations, engineering tests, or other contacts between any manufacturer of vending machines and any manufacturer of soft drink syrup in connection with the approval or acceptance of the vending machine manufacturer's products for sale to bottlers of soft drinks.

5. Any documents obtained from any manufacturer of soft drink syrup, including, but not limited to, the firms listed in specifications 3(a)–(f), which are, or which mention, refer, relate to, or show:

(a) Laboratory or engineering procedures used by any such manufacturer in the testing or acceptance of bottle or can vending machines;

(b) Laboratory, engineering or other reports (including summaries thereof) on the testing or acceptance of bottle or can vending machines by such manufacturers;

(c) Negotiations, meetings, correspondence, or any other contacts between such soft drink syrup manufacturer and any manufacturer of bottle or can vending machines with respect to the testing or acceptance of said vending machine manufacturer's machines by said soft drink syrup manufacturer;

(d) Modification and/or resubmission of vending machines by bottle or can vending machines manufacturers to overcome engineering or technical problems or objections raised by soft drink syrup manufacturers;

(e) Technical problems encountered in actual operation of bottle or can vending machines;

(f) Lists of bottle or can vending machines approved or accepted by any manufacturer of soft drink syrup for sale or recommendation for sale to its owned, controlled, or contract bottlers;

(g) Purchase volume of bottle or can vending machines, including particular types and models thereof, by soft drink syrup manufacturers and/or soft drink bottlers, from particular suppliers;

(h) Any special promotional incentives, offered by soft drink syrup manufacturers in connection with the purchase of bottle or can vending machine equipment by soft drink bottlers.

6. Any documents obtained from any bottler of soft drinks, whether independent or company owned, or from any association of soft drink bottlers, which are, or which mention, refer, relate to, or show:

(a) Purchase volume of bottle or can vending machines, including particular types and models thereof, from particular suppliers;

(b) Identity of suppliers of bottle or can vending machines;

(c) Technical problems encountered in the actual operation of bottle or can vending machines;

(d) Incentive programs, whether in cooperation with a manufacturer of bottle or can vending machines or a manufacturer of soft drink syrup, in connection with the purchase of bottle or can vending machines;

(e) Any meetings, correspondence, conversations, or other contacts between a bottler and any manufacturer of soft drink syrup pertaining to or concerning purchase by the bottler of bottle or can vending machines not approved or accepted by said soft drink syrup manufacturer.

8. Any memoranda or documents in the Commission's files relating to the Commission proceeding denominated *In the Matter of The Vendo Co.*, FTC Dkt. 6646 (Sept. 5, 1957) [54 F.T.C. 253], which will show the reasons or basis for the Commission's approval of the settlement which permitted Vendo, alleged to have been the nation's largest manufacturer of soft drink vending machines, to retain ownership of Vendorlator Mfg. Co., one of Vendo's major competitors in this market, where the combined sales of the merged company were alleged to have accounted for over 50 percent of the domestic bottle vending machine market.

Respondent asserts, with respect to specifications 3–6 and 8, that it requires this information in order to elicit evidence

in support of its theory of the case as to the relevant market in this Section 7 proceeding and to prepare for the cross-examination of complaint counsel's witnesses. To make its defensive showing respondent asserts that it desires to demonstrate "the separate nature of the Coca-Cola and other bottler markets." According to the examiner, respondent intends to establish that there was no substantial actual or potential competition between Seeburg and Cavalier, the acquired concern, at the time of the acquisition.

The examiner states that apart from the contention that the acquired concern was not competing in the alleged relevant market in which Seeburg did business, the purpose of the discovery in question under these specifications is obscure since the nature of the relevant market, functionally, which respondent proposes to establish, is not disclosed. The examiner finds that respondent has not made the prerequisite showing of good cause necessary under § 1.134. The examiner further holds that an application for such disclosure should be supported by a specific indication of relevancy and materiality as to each and every class of document, supplemented by an explanation of how such documents would fit into respondent's pattern of defense, including "the functional" market structure which respondent believes the evidence may establish.

The examiner, in view of his proximity to the proceeding, is in a more favorable position than the Commission to judge in the particular instance the proper scope of discovery proceedings.[1] As a result, the Commission will, of necessity, give considerable weight to his analysis of applications for production of confidential documents from the Commission's files under Rule 1.134. A showing of generalized relevance or possible helpfulness is not enough. A showing of good cause under § 1.134 requires a demonstration of "real or actual need." *Viviano Macaroni Company*, Docket No. 8666, Order Ruling on Question Certified (March 9, 1966) [69 F.T.C. 1104, 1106]. We agree with the examiner that on the facts presented the showing of need requisite to the production under the rule has not been made. In this connection, we note further the examiner's statement that the respondent has made no attempt, through the deposition procedures available to it, to document the necessity of securing the data demanded from the Commission's files.

Much of the data which respondent desires to secure from the Commission's files is obviously confidential, both in the case

[1] *Cf. Topps Chewing Gum, Inc.*, Docket No. 8463, opinion and order disposing of motions, July 2, 1963 [63 F.T.C. 2196].

of customers of the vending machine manufacturing industry and competitors of Seeburg, since it relates to sensitive topics such as the marketing strategies, as well as the technical, marketing and purchasing experiences and plans of such customers and competitors. Sensitive information of this nature should not be released by the Commission from its confidential files without compelling need. Disclosing information from the Commission's confidential files under a lesser standard would necessarily engender resistance on the part of companies and individuals cooperating in Commission industry investigations. It would be likely to seriously retard voluntary compliance with the Commission's efforts to obtain the data which it needs in industry inquiries. Obviously, the cooperation which the Commission has received in the past from business depends in large part on the confidence of industry that confidential data submitted to this Agency will not be released in an adjudicative proceeding unless specific and concrete need therefor has been shown.

The Commission, at this time, is not fully informed as to the measures respondent has taken or intends to take to secure the information requested in specifications 3–6 directly from the third parties involved under the procedures set forth in §§ 3.10 and 3.17 of the Rules. At this time no determination can be made that such data is unavailable to respondent under these procedures. Wherever sensitive data relating to customers or competitors of the nature involved in this request is concerned, respondent should utilize the procedures made available by the Commission's Rules to secure the data directly from the source rather than from the Commission's confidential files. Under these procedures, the third parties from whom information is sought are, of course, entitled to state their views on the competitive implications of disclosing the information requested and on the proper measures for preserving the confidentiality of the data produced pursuant to subpoena where such measures are appropriate.[2] In this connnection, it appears from the hearing examiner's certification that certain of the data sought in specifications 3–6 has already been obtained by respondent. Certainly due process requires no more than that respondent be able to secure evidence to present its defense. Respondent, of course, does not have an unqualified right to demand confidential

[2] If a party responding to respondent's subpoena states that it would prefer to have the Commission release documents already in this Agency's files which it previously furnished in order to save itself the trouble of responding to Seeburg's subpoena, then such data may be released to respondent.

data from the Commission's files at any particular time or stage in a proceeding. See *The Sperry and Hutchinson Company* v. *Federal Trade Commission,* CCH Trade Reg. Rep ¶ 71,800 (S.D.N.Y. 1966).[3]

We turn now, specifically, to specification 8 of Seeburg's motion for production, which seeks any memoranda or documents in the Commission's files showing the reasons or basis for the Commission's approval of the settlement in *The Vendo Co.,* Docket No. 6646, which permitted Vendo to retain ownership of the Vendorlator Mfg. Co. Respondent requests these files on the ground that the documentation sought may contain material necessary to adequately cross-examine complaint counsel's witnesses from the Vendo Company "as to the realities of competition in the industry, illustrated by Vendo's attempt to diversify by acquiring Vendorlator." In addition, Seeburg asserts "the requested documents may also support respondent's defensive showing as to the separate nature of the Coca-Cola and trade bottler markets." On both counts respondent's showing of need is so conjectural that it necessarily fails to meet the prerequisites for release of confidential information under § 1.134 of the Rules.[4]

Insofar as the demand encompasses internal memoranda of the Commission in an attempt to probe its mental processes in deciding to accept the consent settlement in *Vendo,* these are clearly not a proper subject of discovery.[5] The fact that intra-agency memoranda of this kind come within the exemption of § 3(e)(5) of the Freedom of Information Act has already been considered in connection with respondent's motion to vacate. That discussion also applies to this issue as well.

Respondent contends that the procedures for application to the Commission under § 1.134 of the Rules for the release of confidential information from the Commission's files are inapplicable here, on the ground that the examiner has the power to order the production of the documents in question under § 3.11 without reference to the Commission. Seeburg relies on the clause in § 1.133(a) exempting from the procedures for the

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[3] *Cf. American Brake Shoe Company* v. *Schrup,* 1965 Trade Cases ¶71,575 (D. Del. 1965).

[4] The consent order in question was issued more than nine years ago, on September 5, 1957. See *The Vendo Company,* 54 F.T.C. 253 (1957).

[5] *Graber Manufacturing Company, Inc.,* Docket No. 8038, Order Ruling on Questions Certified by the Examiner and Respondents' Appeal From Hearing Examiner's Ruling, December 13, 1965 [68 F.T.C. 1235]; *R. H. Macy & Co., Inc.,* Docket No. 8650, Order Ruling on Questions Certified and Denying Motion To Strike Certification, September 30, 1965 [68 F.T.C. 1179]. *Cf. Modern Marketing Service, Inc.,* Docket No. 3783, Order Ruling on Question Certified, January 7, 1966 [69 F.T.C. 1077]. See also *Coro, Inc.* v. *Federal Trade Commission,* 338 F. 2d 149 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965).

release of confidential information under § 1.134 those documents whose "use may become necessary in connection with adjudicative proceedings." The fact is that the Commission has already ruled on the scope of the exception in § 1.133 on which respondent relies. In *Viviano Macaroni Company,* Docket No. 8666, Order Ruling on Question Certified (March 9, 1966) [69 F.T.C. 1104, 1105], the Commission stated:

> * * * The exception in pertinent part relates to material and information which may be necessary for use in connection with an adjudicative proceeding and this, in general, includes that which complaint counsel must use in the presentation of his case and other vital documents such as Jencks type statements. * * * It is not a general authorization for pretrial discovery bypassing the Commission's requirements in § 1.134 governing the release of confidential data. * * *[6]

There is no question here, as respondent states, of § 3.11 not meaning what it says if this construction of the Rules is followed. Obviously, on their face §§ 1.133, 1.134 and 3.11 are expressly related by the terms of § 1.133. The rules must be read together and the construction given § 1.133 is a reasonable one, doing no violence to the provisions of § 3.11. Respondent's argument that this construction of the Rules requires it to resort to procedures not published in the Federal Register and therefore violates Section 3(a) of the Administrative Procedure Act is without merit.

Seeburg further asserts that Sections 6(a), 7(a), and 12 compel the production of the documents which it seeks pursuant to § 3.11 of the Commission's Rules. Otherwise, respondent argues, its right under Section 6(a) to be represented and advised by counsel would be reduced to an empty formality if complaint counsel, in an adjudicative proceeding, were accorded a preferred position in their discovery and pretrail preparation by the Commission's interpretation of § 3.11. With respect to Section 7(a)'s direction that adjudicative proceedings be conducted in an impartial manner, respondent similarly argues that this provision would be frustrated if it is not granted the pretrial discovery which it seeks. Respondent, in addition, relies on Section 12's guarantee that all requirements or privileges relating to evidence and procedures shall apply equally to agencies and persons.

Contentions similar to those advanced by Seeburg were passed on by the District Court for the Southern District of New York, in *The Sperry and Hutchinson Co.* v. *Federal Trade Commission,*

[6] See also *Inter-State Builders, Inc.*, Docket No. 8624, Order and Opinion Directing Remand, April 22, 1966 [69 F.T.C. 1152].

supra, when the court considered claims that the Commission's denial of motions under § 3.11 of the Rules for discovery contravened statutory rights guaranteeing access to material evidence under Sections 7(c) and 12 of the Administrative Procedure Act.[7] The court ruled:

> I cannot agree. Section 7(c) provides simply that "every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." These rights certainly do not extend to an unlimited privilege to examine all the Commission's files, which in essence is what Sperry seeks. As previously pointed out, there has been no showing here that Sperry will be denied any rights to present its defense and this court is in no position to find that Sperry is likely to be deprived of essential material at what will undoubtedly be a lengthy hearing yet to be commenced.
>
> Section 12 adds little to Sperry's argument. This provision states that "*except as otherwise required by law,* all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons." (Emphasis added.) By no means can it be said that the Commission has plainly flouted this open-ended legislative direction. CCH Trade Reg. Rep. ¶ 71,800, *supra,* at 82,703.

That holding is applicable here. Seeburg, as we have noted already, is not foreclosed from seeking the evidence which it seeks pursuant either to § 3.10 or § 3.17 or even to again seek this data from the Commission's files if it can meet the standard of necessity outlined in this and previous decisions. The court, in *Sperry and Hutchinson,* clearly held that a respondent does not have the right, as we noted above, to confidential data from the Commission's files at any particular time or stage in the Commission's proceeding as long as there is a reasonable opportunity at future stages of the proceeding to adduce the evidence it needs.

Significantly, the district court characterized the requirement of Section 12 that all requirements or privileges relating to evidence or procedures shall apply equally to agencies and persons as an "open-ended legislative direction." In short, while it has the duty of insuring that Seeburg has the opportunity to secure and present its evidence, the Commission can make provision that this is done in a manner consistent to the greatest extent possible with the protection of confidential sensitive business data in the Commission's files. As the court stated:

> Such "equal" rights of access to evidence as Sperry may have under this provision are by no means unqualified. As the statute indicates these

[7] Although respondent here relies on Sections 6(a) and 7(a), as well as 12, of the Administrative Procedure Act, its contentions are not materially different from those ruled upon by the court.

rights are plainly subject to the protections against disclosure of confidential information required by the Commission's rules. . . .

Moreoever, even assuming there is a statutory right of "equal" access to evidence, it could scarcely be said to require such access at any particular time or at any particular stage in the proceeding. Nor would it include access to any evidence which is not shown to be necessary to the defense. There is no showing here that access to any such material will necessarily be denied in this adjudicative proceeding. CCH Trade Reg. Rep. ¶ 71,800, *supra*, at 82,703.

Finally, the Commission does not construe § 1.133 "as a blanket of secrecy for all documents in [complaint] counsel's possession." The fact of the matter is that § 1.133 and § 1.134 do not constitute an impenetrable barrier to the Commission's confidential files, but merely require, as we have stated here and in other cases, that documents in the confidential category should not be released without a showing of necessity on the part of a respondent engaged in putting on his defense. This is by no means an insuperable barrier. The Freedom of Information Act of 1966 does not indicate that the Commission should abandon the standard of necessity in the case of discovery proceedings involving application for confidential documents from the Commission's files. In fact, the provisions of the Act indicate to the contrary. The Act does not concern itself with discovery procedures applicable to adjudicative proceedings. It does concern itself with enlarging the access of the public and in clarifying the right of the public to documents in administrative files. However, Section 3(e) of the Act provides expressly that documents in the categories enumerated therein shall be exempt from the provisions of the Act. In this connection, Section 3(e)(4) exempts from the provisions of the Act trade secrets and commercial or financial information obtained from any persons and privileged or confidential,[8] while Section 3(e)(7) exempts investigatory files compiled for law enforcement purposes except to the extent available by law to a private party.[9] Certainly, while these exemptions do not exclude documents in this cate-

[8] "Exemption No. 4 is for 'trade secrets and commercial or financial information obtained from any person and privileged or confidential.' This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. * * *" S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

[9] "7. Investigatory files compiled for law enforcement purposes except to the extent available by law to a private party: This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. S. 1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966).

gory from discovery proceedings when a proper request is made, they clearly indicate that it was not the intent of Congress to change with this legislation the standards whereunder discovery would be required with respect to such documents. In short, in the case of discovery proceedings relating to confidential information from the Commission's files coming within the exemptions of Section 3(e) of the Act, the test is still one of a showing of necessity, which has not been met in this instance.

Since the Commission is adequately informed of the issues raised by respondent's motion for production, the request for the opportunity to present briefs and oral argument will be denied. The motion for production is denied for the reasons set forth above.

Commissioner Elman concurred in the result.

ORDER RULING ON HEARING EXAMINER'S CERTIFICATION

Upon consideration of respondent's motion for production of documents certified by the examiner and its request that briefs and oral argument be scheduled on this motion, the Commission, for the reasons stated in the accompanying opinion, has determined that the motion for production of documents and the request for the scheduling of briefs and oral argument should be denied. Accordingly,

It is ordered, That respondent's motion for the production of documents be, and it hereby is, denied.

It is further ordered, That the request for the scheduling of briefs and oral argument on respondent's motion for the production of documents be, and it hereby is, denied.

Commissioner Elman concurring in the result.

THE SEEBURG CORPORATION

Docket 8682. Order and Opinion, Oct. 25, 1966

Order denying respondent's motion to vacate complaint and to file briefs and present oral argument on the issue of whether the Commission's consent order procedure violates the Administrative Procedure Act.

OPINION OF THE COMMISSION

This matter is before the Commission on respondent's motion to vacate the complaint, certified by the hearing examiner with a recommendation that it be denied.[1] In essence, respondent's

[1] Respondent, in a separate motion to the Commission, opposed by complaint counsel, requests leave to file a brief and present oral argument in support of its motion to vacate the complaint. Seeburg subsequently requested the Commission to consolidate the motion to vacate the complaint with the examiner's certification of respondent's motion for the production of certain documents from the Commission's files for briefing and oral argument.

motion to vacate alleges, in support of its request, that the Commission's consent order procedure preceding issuance of complaint violates the Administrative Procedure Act, the Freedom of Information Act of 1966, and administrative due process. Specifically, Seeburg attacks the Commission's consent order procedures as deficient on three grounds. It first alleges that the Commission's Rules of Practice delineating the consent order procedure, by omitting vital elements of the Commission's actual operations which are either unauthorized or unlawful, violate the notice requirement of Section 3(a) of the Administrative Procedure Act, as well as the Freedom of Information Act. Secondly, respondent alleges that it has been denied administrative due process on the ground that it was not apprised of, and had no opportunity to meet, the *ex parte* representations of the staff to the Commission in the course of the consent order procedure prior to the issuance of complaint. As a result, respondent argues, it was denied a fair hearing and effective representation by counsel. Thirdly, respondent argues the invalidity of the Commission's consent order procedure is confirmed by the Freedom of Information Act of 1966.

Respondent's motion to vacate the complaint presents two threshhold questions: First, do the Commission's Rules comply with the notice requirement of Section 3(a) of the Administrative Procedure Act and, secondly, are the Commission's consent order procedures, prior to the issuance of complaint, "adjudication," as that term is defined by that statute? Or, are consent settlement procedures, at this stage of the proceeding, as the Rules contemplate, simply an exercise of this Agency's administrative function where *ex parte* contact with the staff is appropriate and even desirable?

We first turn to the question of whether the Commission's Rules of Practice comply with the notice requirements of Section 3(a) of the Administrative Procedure Act. Respondent's contentions on the question of whether it had an adequate hearing and whether the consent order procedures permit improper commingling of the prosecutorial and adjudicative functions will be considered in connection with the issue of whether precomplaint consent settlement procedures are properly administrative or adjudicative functions.

Respondent contends that Section 3 of the Administrative Procedure Act has been violated by the failure of the Commission's Rules to authorize the participation or to define the role of the Bureau of Restraint of Trade in the consent order procedure. In this connection, Seeburg contends:

. . . the Commission's present Rules specifically pinpoint exclusive responsibility for consent negotiations with the Division of Consent Orders, which has no connection with investigation or litigation, as contrasted with staff counsel assigned to the Bureau of Restraint of Trade, who are inherently adversary advocates predisposed against a proposed respondent whose conduct they have investigated with an eye toward litigation.

Respondent's reliance on Section 3(a) of the Administrative Procedure Act, whose text is set forth in the margin,[2] is misplaced. A reading of §§ 2.1–2.4 of the Commission's Rules and its Statement of Organization makes it clear that they adequately delineate the consent order procedure actually followed and authorized the participation of the Bureau of Restraint of Trade in that process.

In this connection, the Statement of Organization sets forth the functions of the Division of Consent Orders as follows:

Division of Consent Orders.—This office *supervises* the preparation and execution of agreements submitted to the Commission for the settlement of cases by the entry of consent orders. (Emphasis supplied.)

The term "supervise" to describe the duties of the Division of Consent Orders is utilized for a purpose, namely, to inform respondent and all others to whom the consent order procedure applies that it is the duty of the staff members of this Division to oversee the preparation of agreements looking toward consent settlement by respondent and employees on the Commission's staff outside the Consent Order Division. The fact that the Statement of Organization does not specifically name the Bureau of Restraint of Trade, as such, is immaterial. Obviously, the Rules contemplate, in any case, that a proposed respondent desiring to settle a proceeding shall negotiate under the consent settlement procedure with those staff members primarily responsible for the case (in this case, attorneys belonging to the Bureau of Restraint of Trade), under the supervision of the Division of Consent Orders. Read together, §§ 2.1–2.4 of the Rules and the Statement of Organization clearly authorize, in the consent settlement process, participation by the Bureau of Re-

[2] "(a) *Rules.*—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

straint of Trade or other staff personnel engaged in the investigation or prosecution of the case.

In short, it is clear that the Rules and the Statement of Organization put respondents on notice that personnel from the Division of Consent Orders are not alone involved in the precomplaint consent order procedure. The Rules also make it clear that the final authority for deciding on whether proffered consent agreements should be accepted rests with the Commission itself. Accordingly, the Rules comply with the requirements of Section 3(a) that procedural rules shall describe the organization of the agency as well as the general course and methods by which functions are channeled and where final authority rests with respect to particular functions—in this case, the consent order procedure. Section 3(a) does not require that an agency's procedures be set forth in every detail but merely that they be "realistically informative to the public" [3] so that it can intelligently take advantage of the formal and informal procedures of an agency, which are available.

That it was the legislative intent to set up a standard of realistic information rather than to require the recitation of all the details attendant upon an agency's procedures is evident from the legislative history. In that connection, the Senate Judiciary Committee print of June 1945, commenting on agency objections to the proposed notice requirement under the APA, specifically stated that if such objections were grounded on the difficulty of stating the procedures in detail, the answer to such objections was that the contemplated provision required only a statement of the general course and method of agency procedure.[4]

Furthermore, even if it were conceded, for the sake of argument, that Part II of the Commission Rules and the Statement of Organization do not sufficiently apprise respondent of the particulars of the Bureau of Restraint of Trade's role in the consent settlement procedure, it is clear on the facts of this record that respondent, as soon as it initiated the settlement procedure, had actual notice of the Bureau's role in the precomplaint settlement proceedings. As respondent itself states in the memorandum in support of its motion to vacate, of July 15, 1966:

> All negotiations with representatives of the Commission were held at the offices of the Chief of the Division of Mergers of the Bureau of Restraint of Trade. Attending the negotiations were the Chief of the Division, Division staff counsel, a member of the Division of Consent Orders, as well

[3] See Attorney General's Manual on the Administrative Procedure Act (1947), p. 21.
[4] S. Doc. No. 248, 79th Cong., 2d Sess. 16 (1946).

as counsel for the respondent. These discussions explored not only respondent's position, but also alluded to the recommendations ultimately to be made to the Commission by the staff.[5]

In short, it is apparent from respondent's own statements that it clearly knew from the inception of the consent settlement proceedings that it would be dealing and negotiating with personnel of the Bureau of Restraint of Trade and that personnel of that Bureau would make recommendations to the Commission with respect to the consent settlement proceedings. Furthermore, respondent knew, from §§ 3.2 and 3.3 of the Commission's Rules of Practice, that an adjudicative proceeding in this Agency commences only with the issuance and service of a complaint by the Commission. Accordingly, respondent was put on notice by the express wording of the Rules that the precomplaint settlement procedures are considered by the Commission to be in the stage *preceding* the adjudicative phase of the proceeding and therefore one in which *ex parte* contact with the staff is proper. In short, from the beginning of the procedure, Seeburg knew (1) that the Bureau of Restraint of Trade was to participate in the proceeding, (2) that the staff would offer comments on respondent's proposals to the Commission, and (3) that under the Commission's Rules the precomplaint settlement procedures were *ex parte,* nonadjudicative proceedings. Knowing all this, respondent nevertheless elected to proceed and only when the case was not settled to its liking did Seeburg choose to attack the Commission's consent settlement procedures under Part II of the Rules as conflicting with the Administrative Procedure Act and the requirements of administrative due process. Accordingly, respondent's challenge to the Rules in this instance must clearly fail in any case, since it had actual notice of the very facts which it claims were inadequately published. See *United States* v. *Aarons,* 310 F. 2d 341, 347–8 (2d Cir. 1962). In that case the court explained that the sanction in Section 3(a) for nonpublication does not apply where actual knowledge exists. Construing the Congressional intention on this point the court cited a memorandum of the Department of Justice put into the record on the floor of the House during the consideration of this law. This interpretation of the section is pertinent here.

Section 3(a) provides that there shall be publication in the Federal Register of the rules of the various agencies of the Government. The last sentence of section 3(a) states: no persons shall in any manner be

[5] Furthermore, the Commission's "A" and "B" letters, respectively, notifying respondent of the intent to issue complaint and replying to respondent's answer indicating an interest in the consent settlement procedure, routinely identify counsel responsible for the trial of the case. (See Appendices A and B.)

required to resort to organization or procedure not so published. But this does not mean that a person who has actual notice is not required to resort to agency organization or procedures if it has not been published in the Federal Register. If a person has actual notice of a rule, he is bound by it. The only purpose of the requirement for publication in the Federal Register is to make sure that persons may find the necessary rules as to organization and procedure if they seek them. It goes without saying that actual notice is the best of all notices. At most, the Federal Register gives constructive notice. See 44 U.S.C. sec. 307." (Foot note omitted.) 310 F. 2d at 348.[6]

Furthermore, the challenge to the Commission's complaint in reliance on the notice provision of Section 3(a) of the Administrative Procedure Act is clearly inappropriate under any circumstances. The only penalty in the statute for the failure to make notification pursuant to its provisions is to excuse compliance by outsiders with the requisite procedure. *First National Bank of Smithfield* v. *Saxon*, 352 F. 2d 267, 273 (4th Cir. 1965). See also *Kessler* v. *F.C.C.*, 326 F. 2d, *supra* note 6, at 690. Obviously, the penalty provisions in Section 3 (a) give respondent no standing to sue for dismissal of the complaint on the grounds relied upon in this instance.

The resolution of respondent's contention that the Commission's consent order procedures are contrary to the Administrative Procedure Act and constitute a denial of administrative due process because they deny Seeburg a hearing and effective representation of counsel depends primarily on the validity of its assertion that consent order procedures are "adjudication" within the meaning of that term as it is used in the Administrative Procedure Act. Essentially, respondent argues in this connection that the consent settlement procedures come within the definition of "adjudication" as "agency process for the formulation of an order" set forth in Section 2(d) of the Administrative Procedure Act. The same section of the statute defines an order as "the whole or any part of the final disposition . . . of any agency proceeding in any matter other than rule making." In addition, respondent relies on the fact that Section 5(b) of the Administrative Procedure Act, which provides for informal settlement of cases otherwise to be decided on a hearing and record, is included in that section of the statute dealing with "Adjudication."

The short answer is that the Commission has already considered and rejected essentially the same contentions in *William H. Rorer, Inc.*, Docket No. 8599. The Commission, in its interlocutory order of March 5, 1964 [64 F.T.C. 1446, 1447], in that case, ruling on almost the identical argument, stated:

[6] See also *Kessler* v. *F.C.C.*, 326 F. 2d 673, 690 (D.C. Cir. 1963).

. . . Nothing in the Administrative Procedure Act or in the basic principles of fair procedure precludes the Commission from creating and following a procedure for settling disputes without recourse to adjudication. Consent negotiations are not a stage in adjudication but a means of establishing whether adjudication can be avoided altogether. Like investigations, consent negotiations are distinct from the adjudicative process and hence not governed by the standards which control adjudicative procedure.[7]

The definition of "adjudication" set forth in Section 2(d) of the APA, on which respondent relies, simply does not apply to consent settlement negotiations prior to the issuance of complaint. The consent order procedure, which follows the notification to respondent that this agency contemplates a proposed adjudicative proceeding, is not a final disposition in any sense. If the proposed respondent elects to do nothing upon such notification or if negotiations are unsuccessful, no disposition of any kind is, or can be, made. In such an eventuality, the complaint is issued and served; only then can final disposition be made after trial or upon default. In no case is there an order or final disposition made until after the issuance and service of the complaint and after full opportunity for hearing. Accordingly, since there is no final disposition prior to the issuance and service of complaint, there is no adjudication within the meaning of the Administrative Procedure Act. If a final disposition does result from consent order negotiations, it does so only upon respondent's consent. In such cases, the consent agreements customarily contain language wherein proposed respondent waives any further procedural steps and consents to the issuance of complaint and final order without further notice. Without such waiver and consent there can be no final disposition of any proceeding pursuant to the consent order procedures.

The Commission's position on this question is in accordance with the terms of Section 5(b) of the Administrative Procedure Act, which provides for settlement of disputes by consent. This section provides:

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, ...

* * * * * * *

(b) *Procedure.*—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the

[7] On May 13, 1964, the United States District Court for the District of Columbia, in Civil Action No. 644-64, *William H. Rorer, Inc.* v. *Federal Trade Commission*, dismissed Rorer's motion for preliminary injunction and summary judgment, which involved this issue, among others.

proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

In short, Section 5(b) provides that administrative agencies shall afford opportunities for informal settlement and that the hearing procedures specified by the Act in cases where consent settlement procedures have begun, apply only to the extent that the cases are not settled in this manner. Accordingly, the statute sanctions informal procedures for settling cases in order to avoid the complexities of adjudication.

This construction of the plain meaning of the statute is supported by a reading of the legislative history. In this connection, the House Report on the bill expressly states, with respect to Section 5(b), that where settlements do not dispose of the whole case, Sections 7 and 8, as well as Section 5(c), apply.[8] Significantly, in the light of respondent's arguments implying that the Commission's *ex parte* contact with the staff was improper in this instance, Section 5(c) provides for the separation of functions in adjudicative hearings. Accordingly, the conclusion is inescapable, both from the text of the Act, the statutory scheme and the legislative history, that consent settlement procedures under Section 5(b)(1) of the Administrative Procedure Act are properly *ex parte*. There is no right to a hearing except to the extent that the matter cannot be settled by the informal settlement procedures provided by the agency.[9]

In effect, respondent, in its motion, concedes that the requirements for hearings spelled out in Sections 5(c), 7 and 8 of the Administrative Procedure Act do not apply to consent settlement procedures. Nevertheless, respondent claims it has been denied due process because it did not get a hearing, although it does not spell out with any degree of precision the ground rules under which such a hearing should be conducted.[10] In this con-

[8] H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946); S. Doc. 248, *supra* note 4, at 262.

[9] The fact that the Congress did not intend to require trial-like proceedings under the settlement procedures authorized by Section 5(b)(1) of the Administrative Procedure Act is made clear by the Senate Judiciary Committee print of June 1945 on the legislative history of the Administrative Procedure Act, which states in pertinent part:

". . . The statutory recognition of such informal methods should both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. It should be noted that the precise nature of informal procedures is left to development by the agencies themselves." S. Doc. 248, *supra* note 4, at 24.

[10] In this connection, respondent states:

"And while the detailed hearing requirements in Sections 7 and 8 of the Administrative Procedure Act may be inappropriate to the Commission's consent order practice, the essentials of due process presupposing fair and impartial procedures are still required for such 'adjudication,' where substantial rights of proposed respondents are vitally affected. . . ." (Memorandum in support of motion, p. 17.) In connection with its contention that *ex parte* comments by the staff on settlement proposals are improper, respondent does not apparently rely directly on Section 5(c). (*Id.* at 19.)

nection, respondent is obviously not entitled to intra-agency comment on its settlement proposals on the ground that this is necessary to afford it a fair hearing since neither the Commission's Rules nor the Administrative Procedure Act, with which those Rules must comply, require a hearing in precomplaint settlement procedures.

A related question in this connection is: Is respondent entitled, as it claims, to intra-agency memoranda to the Commission commenting on the consent negotiations prior to complaint, on the ground that withholding such documents would deprive it of effective representation of counsel? Respondent, of course, has the right to be represented by counsel. It is obvious, however, that the degree to which counsel may participate in representing a client before the Commission will, of course, vary with the nature of the proceeding. The real issue involved here is whether the Commission may informally consult with its staff as to whether a complaint should issue once consent settlement procedures have begun. Respondent's counsel should not be permitted to inject himself into that procedure under the guise of rebutting staff representations with respect to the settlement proceedings. The requirements of Section 6(a) providing for representation by counsel in administrative proceedings do not go that far. Nor does Section 6(a) of the Administrative Procedure Act go so far as to permit respondent to, in effect, secure, by way of discovery, internal communications bearing on the question of whether complaint should issue, irrespective of whether the proceeding is in the adjudicative stage or not. The net effect of respondent's argument is that administrative due process requires that the informal settlement procedures should be converted into a preliminary trial on the Commission's decision to issue complaint. Neither the Administrative Procedure Act nor any other legislation warrants such a procedure. Respondent's rights will be fully protected in the adjudicative stage of this proceeding, which is subject to all the safeguards provided by the Administrative Procedure Act. Furthermore, the Commission's decision on whether to issue complaint is within its discretion. Preservation of the integrity of the administrative process precludes an inquiry into this Agency's mental processes leading up to that decision.[11]

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[11] *Graber Manufacturing Company, Inc.* (Order Ruling on Questions Certified by the Examiner and Respondents' Appeal From Hearing Examiner's Ruling, December 13, 1965 [68 F.T.C. 1235, 1247]), Docket No. 8038; *R. H. Macy & Co., Inc.* (Order Ruling on Questions Certified and Denying Motion to Strike Certification, September 30, 1965 [68 F.T.C. 1179, 1195]), Docket No. 8650. *Cf. Modern Marketing Service, Inc.* (Order Ruling on Question Certified, January 7, 1966 [69 F.T.C. 1077, 1083]), Docket No. 3783.

Finally, respondent contends that the Commission's consent order procedures violate the letter and spirit of the Freedom of Information Act of 1966. Although that statute does not, as a technical matter, come into effect until July of 1967, respondent's arguments thereunder will be considered since the Commission desires to bring its procedures into line with the requirements of this Act as quickly as possible. Respondent, under this statute, also asserts that the rules relating to the Commission's consent order procedures do not adequately give notice of the nature of the staff participation in the consent settlement procedures, that they fail to establish criteria for opportunity to make oral presentations to the Commission,[12] and that they fail to give notice that the Commission may rely on *ex parte* representations by the staff. As stated above, it is the Commission's view that the consent order rules satisfy the notice requirements of Section 3(a) of the Administrative Procedure Act now in effect. It is further our view that the provisions of Section 3(a), as amended by the Freedom of Information Act, are not markedly different from the requirements of the statute prior to its amendment. As the Senate Report on the bill [13] states, this subsection has fewer changes from existing law than any other, primarily because there have been few complaints about omission from the Federal Register of necessary official material and that the complaints that have been received have been more directed to allegations that there has been too much publication rather than too little. According to the Senate Report, a number of minor changes have been made in the section to make it "more clear that the purpose of inclusion of material in the Federal Register is to guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests." Accordingly, under the Freedom of Information Act, as before, the standard by which procedural rules must be judged is whether they are realistically informative to the public of the administrative procedures available. The Commission's consent order rules for the reasons heretofore stated meet that test.

Seeburg also apparently relies on the Freedom of Information Act as support for its contention that it is entitled to intra-agency memoranda commenting on its settlement proposals to

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[12] Oral presentation to the Commission in the course of consent procedures has only been granted under unusual circumstances when in the Commission's belief such presentation served the public interest. If the consent settlement proceedings are to remain the flexible, informal procedures they are intended to be, the decision on whether to grant permission for such presentation must remain within the Commission's discretion.

[13] S. Rep. No. 813, 89th Cong., 1st Sess. 6 (1965).

the Commission. These, however, are internal communications relating to an administrative matter and clearly are within the exemptions set forth under Section (e) of the Act, which states in pertinent part:

> (e) Exemptions.—The provisions of this section shall not be applicable to matters that are . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency . . . .

As already noted, the Commission's precomplaint consent order procedures are properly *ex parte* and not in the category of adjudication. The Freedom of Information Act, of course, has no bearing whatsoever on the issue of whether the Commission's precomplaint consent order procedures are properly *ex parte* or not. The only question remaining is whether the staff memoranda commenting on respondent's consent settlement offers are properly within Exemption No. 5 to the provisions of the Act. We hold that the documents in question come squarely within the scope of this exemption. The Act does not enlarge the discovery rights of a private party engaged in litigation with the Commission to secure documents of this nature which have hitherto never been considered as subject to discovery in this Agency's proceedings.

The fact that Congress did not intend to enlarge discovery rights to encompass internal agency memoranda bearing on the question of whether the agency should issue complaint is supported by those passages in the House and Senate reports commenting on Exemption No. 5 of the Act. In this connection, the Senate Report states:

> Exemption No. 5 relates to "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency." It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation. (S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).)

The House Report makes it equally clear that the Act was not intended to enlarge a litigant's discovery rights to documents of this nature. It, too, recognizes the merit in the objection of agency witnesses that a complete exchange of opinions

within agencies would be impossible if all internal communications were made public, and that "advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.'" The report concludes its consideration of this point with the following significant interpretation of this exemption, which is pertinent here:

> . . . This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material "which would not be available by law to a private party in litigation with the agency." Thus, any internal memorandums which would *routinely* be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). (Emphasis supplied.)

As the Assistant Attorney General of the Department of Justice's Office of Legal Counsel stated: "If an internal report, proposal, analysis, or recommendation is to be worth reading, it must be a free expression and not confined to matters 'cleared for publication.' This is as true in Government as it is in any other organization." [14] That reasoning is applicable in full measure to the documents which respondent claims should have been produced in the course of the precomplaint settlement procedures.

The final matter remaining for decision is the question of whether respondent should be granted leave to file briefs and present oral argument in support of its motion to vacate complaint and whether that certification should be consolidated with the certification of Seeburg's motion for production of documents for the scheduling of briefs and oral argument. The Commission has carefully examined the pleadings filed before the hearing examiner in connection with respondent's motion to vacate as well as respondent's subsequent request directly addressed to it, and complaint counsel's answer in opposition thereto. As a result of such review, the Commission is of the opinion that on the basis of the pleadings now in this record it has sufficient information on the respective positions of both respondent and complaint counsel on the issues raised by the motion to vacate the complaint, and that this matter should be decided without further delay. The Commission, therefore, has determined that

[14] Statement of Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Department of Justice; Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1666, 88th Cong., 1st Sess. 203 (1963).

respondent's motion to vacate the complaint, its request for leave to file briefs and present oral argument, and the request that the two certifications of respondent's motions be consolidated for briefs and oral argument should be denied. An order to this effect will issue.

Commissioner Elman concurred in the result.

APPENDIX A
FEDERAL TRADE COMMISSION
WASHINGTON, D. C.

OFFICE OF THE SECRETARY

Re:
File No.

You are hereby notified that the Commission has determined to institute a formal proceeding in the above captioned matter. A copy of the complaint which the Commission intends to issue, together with a proposed form of order, is enclosed.

As provided in the Commission's Rules, Part 2—Consent Order Procedure, you may, within ten days after the service of this notice, notify the Secretary as to whether or not you are interested in having the proceeding disposed of by the entry of a consent order. If your reply is in the negative, or if no reply is filed within the time provided, the complaint will be issued and served forthwith and thereafter adjudicated in regular course. If your reply is in the affirmative, the files will be referred to the Division of Consent Orders for further handling in accordance with established procedure. After the complaint has been issued, the consent order procedure provided for by Part 2 of the rules will not be available.

Counsel for the Commission in this matter is

By direction of the Commission.

/s/Joseph W. Shea
Joseph W. Shea,
Secretary

Enclosures:

Copy of complaint the Commission intends to issue and proposed form of order.
Copy of Statute.
Rules of Practice.
Notice of Appearance. (2)

APPENDIX B
FEDERAL TRADE COMMISSION
WASHINGTON 25, D.C.

OFFICE OF THE SECRETARY

Re:
File No.

The proposed respondent(s) having filed reply on indicating interest in having this matter disposed of by the entry of a consent order, the files herein have been referred to the Division of Consent Orders.

The Commission's Rules governing consent order procedure provide for the submission to the Commission of an agreement containing a consent order within thirty days after the filing of such a reply.

Counsel for the Commission will communicate with you with respect to securing the agreement.

Very truly yours,
/s/Joseph W. Shea
Joseph W. Shea,
Secretary.

ORDER RULING ON HEARING EXAMINER'S CERTIFICATION

Upon consideration of respondent's motion to vacate the complaint certified by the examiner, its request that the motion to vacate be scheduled for briefs and oral argument, and its request that the motions to vacate the complaint and for production be consolidated for briefing and oral argument, the Commission has determined, for the reasons stated in the accompanying opinion, that this motion and the requests for the scheduling of briefs and oral argument be denied. Accordingly,

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

It is further ordered, That the requests for the scheduling of briefs and oral argument be, and they hereby are, denied.

Commissioner Elman concurring in the result.

GLADSTONE-ARCUNI, INC.

Docket 8664. Order, Nov. 17, 1966

Order denying respondent's appeal from the hearing examiner's refusal to hear an additional witness after the closing of the record on the ground that the order in Docket No. 8629, p. 638 herein, required additional evidence.