

Respondents do not contend even that the cases are factually similar; only that an issue as to a so-called "corrective" type order is involved in both. The possibility of "guidelines" seems to us to be a connection too remote to justify the delay which would follow if this case were to be stayed pending the outcome of the other. Cf. *Philip Morris, Incorporated*, Docket No. 8838, Order and Opinion issued December 6, 1971 [79 F.T.C. 1023]. We agree with the hearing examiner's recommendation on this point and will deny the requests to remove this case from adjudication.

The hearing examiner alternatively suggested withdrawal of the case from adjudication for the purpose of negotiating a consent settlement. While the Commission endorses and follows a policy of disposing of matters by agreement wherever possible, it does not appear that this proceeding has reached the stage where withdrawal from adjudication would be justified. Respondents assert only a single issue separates the parties from agreement but complaint counsel has indicated in their answer to Ocean Spray's motion that respondents' proposals are inadequate as a basis for settlement (footnote 1, page 1, complaint counsel's answer, filed January 20, 1972). Since there is no indication that the matter is ripe for a negotiated settlement, it seems that withdrawal would result only in delay in the trial of this proceeding. Withdrawal for the purpose of negotiating a consent settlement will not be granted. Accordingly,

It is ordered, That the motion of respondent Ocean Spray Cranberries, Inc., filed January 17, 1972, and the motion of respondent Ted Bates & Company, Inc., filed January 25, 1972, requesting that this case be removed from litigation pending the Commission's decision in the *Firestone Tire & Rubber Company* Docket No. 8818, be, and they hereby are, denied.

It is further ordered, That this matter be returned to the hearing examiner for further proceedings in accordance with the Commission's Rules of Practice.

AMERICAN GENERAL INSURANCE COMPANY

Docket 8847. Order and Dissenting Statement, February 11, 1972

Order dismissing complaint counsel's interlocutory appeal from the hearing examiner's order authorizing the Fidelity and Deposit Company of Maryland to intervene in this proceeding, because of failure to meet requirements of the Commission's Rules of Practice.

DISSENT BY JONES, *Commissioner*:

The Commission has dismissed complaint counsel's appeal in this matter as "improvidently granted," thus sustaining the hearing examiner's order permitting Fidelity and Deposit Company of Maryland (hereinafter F & D) to intervene in this proceeding challenging

its acquisition by its parent respondent. American General Insurance Company.

The Commission has not seen fit to accompany its order with an opinion. We are left, therefore, wholly in the dark as to the rationale for its decision except for a single recital in the order referencing Section 3.23 of the Commission's Rules of Practice respecting the review of interlocutory rulings.¹ By this reference the Commission is apparently stating that the addition of a party to a complaint by a hearing examiner is simply a procedural ruling merely affecting the conduct of the trial which should not be disturbed unless clearly erroneous.²

This casual approach to a request to intervene in a Commission proceeding is in striking contrast to the full Commission's opinion in *Firestone* where the Commission took careful note of the "importance" of intervention issues to the "effective functioning of the Commission's adjudicatory process." *Firestone Tire & Rubber Company*, FTC Docket No. 8818, Opinion and Order Granting Limited Intervention (October 23, 1970) [77 F.T.C. 1666]. In *Firestone*, the Commission referred to its decision in this intervention area as the beginning of "a delicate experiment, one requiring caution and close observation." The Commission laid down two tests which should be considered in ruling on intervention requests: (1) the issues of fact or law raised by intervenors must be substantial and ones which will not otherwise be raised or argued, and (2) the substantiality of these issues must be of such "importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer and more complicated proceeding in that case when considered in light of other important matters pending before the Commission." The Commission pointed out that resolution of this second factor will require a determination by the Commission "that such additional expenditure is fully consistent with the Commission's

¹ Section 3.23 provides that interlocutory rulings will not be reviewed except upon a showing that the ruling complained of involves "substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice."

² Neither the statute governing intervention in FTC cases nor the FTC's own Rules of Practice imply in any way that this issue is simply a matter of housekeeping affecting the conduct of the trial. Section 11(b) of the Clayton Act provides, in this proceeding:

The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission or Board, to intervene and appear in said proceeding by counsel or in person.

Section 3.14 of the Commission's Rules of Practice provides:

The hearing examiner or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper.

own assessment of overall priorities governing the allocation of its own resources.”

It is obvious that the factors enumerated in the Commission’s *Firestone* opinion are not ones for determination by its hearing examiners and quite clearly do not simply involve housekeeping matters associated with the conduct of the hearings. The addition of a party is and always has been regarded as an issue on which only the Commission can finally rule. Moreover, so long as rulings on intervention embrace in some significant respect issues of resource allocation and delicate weighing of priorities and long range benefits to the public interest, the Commission cannot duck responsibility for the ultimate decision by hiding behind its examiner’s ruling as it has tried to do in the instant case.

In the particular ruling made by the examiner the intervention request was granted and hence essential rights of parties are probably not foreclosed. Nevertheless, the effect of the ruling is to add a second party to the complaint with all of the consequences of a necessarily longer and more complex proceeding and the commitment by the Commission of additional resources to this case—factors which the Commission in its *Firestone* opinion pointed out must be weighed in determining the propriety of the requested intervention. This was not done. Moreover, the Commission’s instant order is not limited to instances where intervention is granted by its examiners. Rather the Commission order speaks in generalities as if it is to be equally applicable to rulings by examiners denying intervention. Yet when intervention is denied substantial rights of parties may be involved. In these instances, it is obvious that a determination of the correctness of such rulings before conclusion of the hearings is essential to serve the interests of justice. Finally, the Commission’s order here seems to reflect the majority’s view that questions of intervention involve issues solely committed to the discretion of the examiner. The court decisions make this view of intervention clearly erroneous and it is time that this Commission faces up to this reality. Intervention issues involve both questions of law and questions of policy. This Commission majority cannot continue to avoid this issue by some automatic recantation of principles about leaving hearing examiners’ rulings undisturbed. Nor can and should these Commissioners further obscure the intervention issue by automatically supporting the examiner’s ruling granting intervention, thereby ensuring no appeal. It is as important for this Commission to *deny* intervention requests where they are improperly grounded as it is to grant them where proper legal and factual basis has been demonstrated.

In the instant case, the Commission's majority is in error not only in the standards which it applies to its own role and that of the examiner with respect to intervention requests, it is equally in error in permitting the examiner's ruling to stand. A review of the law and the facts involved in this application as they are detailed in the papers clearly demonstrate that in fact and in law F & D's petition to intervene was improperly granted by the examiner.

F & D argues that it should be permitted to intervene because, *if* liability is found *and* if divestiture is ordered, the interests of its policy holders and bond obligees *might* be adversely affected and the rights of its agents and employees *might* be ignored.³

Petitioner indicates that these groups have an interest in the "preservation of F & D as a going enterprise with a successful and respected identity in the property-liability insurance business." (Statement by F & D in Opposition to Request to File Interloc. App. at 2). It also asserts that "crucial facts concerning F & D, its competitive position before and after the acquisition and its prospect for future competitive viability are all matters as to which F & D alone has first-hand knowledge." (Interloc. App. Ans. of F & D at 4.)

These arguments of F & D are supported neither by the facts in movant's papers nor by the law applicable to requests of this nature.

F & D is a wholly-owned subsidiary of respondent, not an independent third party over which respondent lacks control. American General and F & D have a complete identity of interest on the question of the legality of the merger, and it has not been demonstrated here why crucial facts in the possession of a wholly-owned subsidiary corporation would be unavailable to or would not be presented by the parent corporation in the preparation of the parent corporation's defense in this case. It is inconceivable that the crucial facts to which F & D alone has first-hand knowledge are unavailable to or, if relevant, will not be argued—first hand or second hand—by American General in these proceedings.

³ F & D states that the importance to it of intervening arises from the demand in the complaint that F & D be divested by American General and its desire to "be certain that its separate interests are fully protected." F & D argues that if divestiture were ordered, it would:

expose F & D to acquisition under circumstances which could be highly detrimental to the interests of its policyholders and bond obligees. * * * To seek to identify, as complaint counsel does, F & D, the obligor on these contracts, with its stockholder, American General, is to ignore the obvious fact that the policyholders and bond obligees depend upon solvency of the insurance company here involved and cannot look beyond to the stockholder, American General. Also ignored are the rights of thousands of F & D agents and employees. Indeed it is the preservation of F & D as a going enterprise with a successful and respected identity in the property-liability insurance business that the Complaint seeks to preserve by challenging its affiliation with American General and demanding divestiture of ownership with the latter. (Statement by F & D in Opposition to Request to File Interloc. App. at 2.)

F & D has admitted that on the critical issue of liability its interests are identical to these of its parent American General. It has made no showing—and indeed made no effort to show—that its participation is necessary or that American General will not adequately protect those interests of F & D which they have in common. Nor has it sought to come to grips with the obvious question of how a wholly-owned subsidiary would be permitted by its parent to adopt a position in a lawsuit which differed in any way from that being taken by the parent whose entire interest in this pending matter is to defend the legality of the acquisition of the very party seeking intervention. Finally, it has failed to set forth how these interests may diverge from the respondent's interests, how they might be adversely affected by the type of relief ordered in this case if liability is established or in what way at this stage in the proceedings applicant's interests will not be adequately argued and protected by counsel supporting the complaint.

Administrative agencies and courts have consistently excluded petitioners from proceedings where, as in this case, they have found an identity of interests between petitioners and parties to the proceeding and where they have found that those same interests will be adequately protected by the current parties.⁴ This solid line of cases reflected in the Commission's own *Firestone* opinion has been wholly ignored by the Commission and by the hearing examiner.

It is alleged in the complaint that prior to their merger, F & D and American General were direct competitors in the business of underwriting fidelity and surety bonds, and that the merger substantially lessened competition in this market. Whatever relief may be ordered in this case, therefore, will have a single objective and justification—to restore competition. Certainly, there is no basis for assuming that F & D could or would be adversely affected by whatever remedies might be ordered here in order to achieve this objective.⁵

⁴ *Statesville v. AEC*, 441 F.2d 962, 977 (D.C. Cir. 1969) (intervention denied to Piedmont Cities, a power supply company, on the grounds that its interests in the AEC proceeding were identical to and would be adequately represented by the municipalities permitted to intervene); *City of San Antonio v. CAB*, 20 AD. L. 808, 817 (2d ser.) (Decisions) 6a.4(2) (D.C. Cir. 1967) (intervention denied two cities in route hearing in view of the large number of parties in the proceeding, the cities had been granted some participation, and "[t]he relevant needs of the geographic areas represented by petitioners * * * will be fully represented by the parties already participating"); *American Telephone and Telegraph Corp.*, 20 AD. L. 78 (2d ser.) (Decisions) 6a.4(1) (FCC 1966) (shareholders of respondent denied intervention in rate making proceeding on the ground *inter alia* that they failed to show that they had independent interests which corporate management would not adequately represent). See also, *New York-Florida Renewal Case*, 14 AD. L. 474 (2d ser.) (Decisions) 6a.4 (CAB 1963); *Semi-Steel Casting Co. v. NLRB*, 160 F.2d 388, 393 (8th Cir.), *cert. denied*, 332 U.S. 758 (1947).

⁵ Moreover in order to postulate differences in the interests in relief held by F & D and American General, it is necessary to assume that respondent in arguing remedy will be seeking to prevent re-establishment of F & D as a viable and strong competitor in this market.

Indeed, presumably F & D will be the principal beneficiary of the ruling ordered. In any event, at this point, we have absolutely no basis, nor has F & D provided any, for any assumption as to how and if F & D will be affected, adversely or otherwise, by this ruling. Perhaps more to the point is the fact that if this stage in the proceeding is reached and issues of relief then become central, the interests of F & D in being recreated as a viable healthy company will be identical to those of counsel supporting the complaint.

Finally, it has to be recognized that even at the relief stage in this case, F & D will still be a wholly-owned and controlled subsidiary of the respondent. As such, it is difficult to conceive that it would be permitted by respondent to represent any interests adverse to its parent corporation.

Petitioner has not only failed to indicate any *substantial* issues which it alone will raise, but it has failed to indicate that it has or could have any views at all to present in this hearing which will differ from those of its corporate parent.

Since F & D's petition has failed to make out any case entitling it to intervene as a matter of right, the question arises as to whether there is any reason grounded in considerations of equity or policy requiring the granting of its request as a matter of sound administrative discretion.

Here again the answer must be in the negative. The Commission's careful discussion of this issue in its *Firestone* opinion is directly applicable. It is obvious that if the Commission proceedings are to be conducted expeditiously, the Commission must do everything in its power, consistent with the rights of the parties, to ensure that no extraneous issues are introduced into its proceedings, that no discovery which is not absolutely essential to the issues is allowed and that no undue delays are permitted. The mere addition of extra counsel calls for another counsel making objections, conducting cross-examination, arguing in favor or against some requested ruling, another counsel filing proposed findings of fact or conclusions of law and another counsel filing briefs, and participating in the appeal. None of these factors is of importance if the intervenor has made out a case for his intervention as a matter of right. They become crucially important if his request is addressed simply to the discretion of the Commission. Where no affirmative benefit to the public interest can be shown to attach to the intervention, then the added inputs of extra parties and extra counsel become needlessly cumulative and duplicative.

In the instant case, the applicant here is in fact the respondent and in no sense an independent party capable of offering any different