

compliance obligations arising out of the order.

It is further ordered, That respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF
THE COCA-COLA COMPANY, ET AL.

Docket 8855. Order, Mar. 4, 1975

On pre-trial discovery, subpoena *duces tecum* issued by the administrative law judge was quashed, and the production of documentary materials was directed.

Appearances

For the Commission: *Raymond L. Hays, William D. Henderson, Michael J. Bloom and Duncan J. Farmer.*

For the respondents: *White & Case, New York City. Gordon B. Spivack, Lord, Day & Lord, New York City. Miller, Martin, Hitching, Tipton, Lenihan & Waterhouse, Chattanooga, Tenn. Richard F. Atwood, Atlanta, Ga.*

ORDER QUASHING SUBPOENA *Duces Tecum* AND DIRECTING
PRODUCTION OF DOCUMENTARY MATERIALS

This matter is before the Commission pursuant to Section 3.23 of the Rules of Practice and Procedure. Through that provision the Commission may *sua sponte* review a decision by an administrative law judge to issue a subpoena requiring the production of Commission records under Section 3.36 of the Rules.

On Oct. 9, 1974, the administrative law judge issued a subpoena *duces tecum* which required that the Secretary of the Commission make available to the respondents certain internal agency documents. Although the respondents' motion requesting the subpoena was accompanied by a memorandum in support thereof, and complaint counsel submitted a brief in opposition, the administrative law judge did not append to the subpoena any explanation of his decision to grant the requested discovery or any indication of the "terms and conditions for the production of the material * * * as may appear necessary and appropriate for the protection of the public interest." 16 C.F.R. Section 3.36(c).

The issuance by an administrative law judge of a subpoena calling for

internal Commission documents, without any explanation as to whether or not terms and conditions should be attached to their production and disclosure, does not in all cases indicate that the administrative law judge has failed to give appropriate consideration to the requirements of Rule 3.36. But where, as here, a wide array of documents relating to a number of different subjects is involved, and where the administrative law judge has neither ordered an *in camera* inspection of the documents nor required complaint counsel to describe their nature and content, the Commission cannot but conclude that the administrative law judge did not exercise his discretion in the matter and failed to give proper consideration to the question of whether or not terms and conditions to their production and disclosure are necessary and appropriate in the public interest.

Having concluded that the administrative law judge erred in the matter, the Commission may either determine the matter itself or remand the matter to the administrative law judge with instructions to reconsider the matter and to accompany his resulting decision with an appropriate opinion. In order to avoid further delay in the completion of pre-trial proceedings before the administrative law judge, and since the documents described by the subpoena have been compiled by the Secretary and have been inspected by the Commission *in camera*, and the parties have had the opportunity to fully brief the issues relating to disclosure and production of the documents, the Commission has determined to decide the matter itself.

The modern view of pre-trial discovery, as typified by the Federal Rules of Civil Procedure, is that all parties to a proceeding should be permitted access to whatever materials may be available for the uncovering of relevant probative evidence for use at trial. This principle applies to federal agencies as well as to private litigants. To that end, the Commission's own rules provide for a sweeping array of discovery tools, including the production of internal agency records when necessary and appropriate.

While permitting the issuance of subpoenas which call for internal documents, Rule 3.36 is, however, designed to accommodate the necessity of balancing the private litigant's right to prepare a proper defense against the government's vital interest in maintaining the integrity and efficiency of the administrative process.

The courts have traditionally honored the privilege which protects the government's decision- and policymaking processes from indiscriminate disclosure. See, e.g., *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 946 (Ct.Cl, 1958); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (C.C. Cir. 1966), *cert. den.*, 389 U.S. 952 (1967); *Cf.*,

Environmental Protection Agency v. Mink, 410 U.S. 73, 87 (1973); *United States v. Nixon*, 418 U.S. 683, 41 L.Ed. 2d 1039, 1064, n. 17 (1974).

This privilege, as do all evidentiary privileges, effects an adjustment between important but competing interests. There is, on the one hand, the public concern in revelations facilitating the just resolution of legal disputes, and, on the other, occasional but compelling public needs for confidentiality. In striking the balance in favor of nondisclosure of intra-governmental advisory and deliberative communications, the privilege subserves a preponderating policy of frank expression and discussion among those upon whom rests the responsibility for making the determinations that enable government to operate * * *. Nowhere is the public interest more vitally involved than in the fidelity of the sovereign's decision- and policymaking resources. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, supra*, 40 F.R.D. 318, 324.

While taking action to establish a policy favoring openness and to support the citizen's right to inquire into the workings of the government, the Congress nonetheless incorporated into the Freedom of Information Act an exception for those internal memoranda which comprise the crucial decisionmaking process. 5 U.S.C. Section 552(b)(5). The Commission itself has very recently indicated that the highly sensitive nature of such documents should shield them during the discovery process in the absence of "the most compelling circumstances." *Chock Full O'Nuts Corp., Inc.*, Docket No. 8884, 82 F.T.C. 747 (Order Quashing Subpoena *Duces Tecum*, Mar. 2, 1973, p. 2).

The documents described by the subpoena are listed in Appendix A to our Opinion. Certain statistical tables contained in Documents 10, 15, 19 and 23 consist of purely factual materials and are severable from the context of the documents in which they are contained. Therefore, we are directing the Secretary to produce these tables.

Specification 2 of the subpoena, broadly interpreted, would appear to specify certain portions of a copy of an electronic data processing magnetic tape, which the Commission's Bureau of Economics has rented from Economic Systems, Inc., a private firm located at 41 W. 38th St., N.Y., N.Y. This magnetic tape includes certain purely factual information of a type generally available from published sources, respecting various companies including several companies engaged in one or another facet of the soft drink industry. However, in view of the availability of this information from alternative sources, respondents and intervenors have not shown, as required by Commission Rule 3.36(b), that this information is not available from other sources by voluntary methods or pursuant to Commission Rules 3.33-3.34. Respondents and intervenors will be permitted to seek discovery of this information from the Commission in the event that efforts to obtain such materials from alternative sources on a voluntary basis are unsuccessful.

As for the remaining materials described in the subpoena, the

Commission has concluded that all of them are of an advisory or deliberative nature and are privileged in that their disclosure "would be injurious to the consultative functions [of the Commission and its staff] which the privilege of nondisclosure protects." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1973), quoting from *Kaiser Aluminum & Chemical Corp. v. United States*, *supra*, 157 F. Supp. at 946.

While these privileged documents are of such a nature that disclosure might be authorized if circumstances of the most compelling nature were presented, respondents and intervenors have not demonstrated that any such circumstances exist in this case, nor are such circumstances apparent on the basis of the record presently before the Commission.

The order we enter today will not preclude respondents and intervenors from again applying for discovery of these documents and attempting to demonstrate before the administrative law judge that, notwithstanding the privileged nature of the documents, circumstances of the most compelling nature exist to warrant their production. If respondents and intervenors do so, the administrative law judge should make appropriate findings on this point in disposing of the application for discovery. To the extent that any such application is granted, the Administrative Law Judge should explain what, if any, terms and conditions for the production of the material are necessary and appropriate for the protection of the public interest. Accordingly,

It is ordered, That the subpoena *duces tecum* be, and it hereby is, quashed without prejudice. However, the Secretary of the Commission is directed to produce and disclose to respondents and intervenors copies of the statistical tables appearing at the particular pages indicated in the following described documents: (1) pages 2-6 of a memorandum from Edward Manfield to Michael Glassman, Chief, Division of Economic Evidence, dated Nov. 30, 1972, entitled "Soft Drink Industry" (identified in Appendix A hereto as Document No. 10); (2) pages 3-5, 7, 13 and 15 of an undated attachment entitled "Proposal for the Study of the Soft Drink Industry" to a memorandum from H. Michael Mann, Director, Bureau of Economics, to the Commission, dated Feb. 4, 1972, entitled "Study of Soft Drink Industry" (Document No. 15); (3) pages 3-5, 7-8, and 12 of a memorandum from the Bureau of Economics to the Commission, dated Oct. 18, 1973, entitled "Recommendation: That an Investigation be Initiated in the Soft Drink Industry" (Document No. 19); and p. 6 of a 6-page attachment entitled "Proposal for a Study of the Soft Drink Industry" to a memorandum from Robert Lerner, Chief, Division of Industry Analysis, and James Dalton, to H. Michael Mann, Director, Bureau of Economics, dated Oct.

18, 1971, entitled "Priority Rating of Soft Drink Study" (Document No. 23). The Secretary is further directed to excise all textual materials which appear on the aforementioned pages before producing them to respondents and intervenors.

APPENDIX A

Documents Described in Specifications of Subpoena Duces Tecum

1. A memorandum to the Commission from Division of General Trade Restraints dated June 18, 1969, entitled "Budget Plan and Program for Fiscal 1971-Response to Commissioner Jones' memorandum of May 27, 1969."

2. Two tables from a compilation of tables entitled "OPPE Antitrust Benchmark Data System for Key Competitive Characteristics: Volume 1. Agriculture, Construction, Mining and Manufacturing," as follows: (a) "Profile of Competitive Characteristics, SIC 2087, Flavoring Extracts and Sirups NEC" and "Profile of Competitive Characteristics, SIC 2086, Bottled and Soft Drinks."

3. A memorandum to the Commission from Bureau of Economics dated Jan. 25, 1972, entitled "Allocation of Commission Antitrust Resources-in Response to Commission Minute of September 15, 1971, Regarding Policy Planning Program," consisting of 3 pages.

4. A memorandum from William F. Long, staff economist, Bureau of Economics, dated Jan. 25, 1972, entitled "Allocation of Commission Antitrust Resources," a 42-page document.

5. A memorandum to the Commission from H. Michael Mann, Director, Bureau of Economics, dated Apr. 4, 1972, entitled "Allocation of Commission Antitrust Resources Regarding Policy Planning Program-Response to Commission Minute of Sept. 15, 1971," a one-page document attaching "Appendix A" to the Bureau of Economics' memorandum of Jan. 25, 1972. "Appendix A" is a 15-page econometric model consisting of a series of algebraic formulations, purporting to be a highly technical demonstration of the proofs necessary to sustain many of the documents contained in that memorandum.

6. A memorandum from William F. Long, Bureau of Economics, and Edward J. Heiden, Office of Policy Planning and Evaluation, dated Mar. 30, 1972, entitled "Pilot Project to Illustrate a Policy Planning Model for the Bureau of Competition-in Response to the Minute of Feb. 8, 1972." This is a 34-page document which presents a "provisional" model of a decisionmaking framework for the allocation of the Commission's antitrust resources and incorporating the "monopoly loss calculations" developed in the Bureau of Economics' memorandum of Jan. 25, 1972 (Item 4 above), information on competitive characteristics from the OPPE benchmark data system, and estimates of the probability of enforcement success from the Bureau of Competition.

7. Tables for Long/Heiden memorandum of Mar. 31, 1972, consisting of 13 tables amounting to a total of 30 pages, summarizing, industry by industry, the quantitative data developed in the referenced memorandum (Item 6 above).

8. A memorandum to the Commission from the Bureau of Economics and Office of Policy Planning and Evaluation dated Mar. 30, 1972, entitled "Prototype Resource Allocation Model for two Antitrust Activities: Shared Monopoly and Horizontal Mergers," a 6-page response to a Commission Minute of Feb. 8, 1972.

9. A one-page memorandum to the Commission from William F. Long, Bureau of Economics, dated May 10, 1972, entitled "Errata for BE/OPPE memorandum of Mar. 30, 1972," and attached revised Table 13.

10. A memorandum from Edward Manfield to Michael Glassman, Chief, Division of

Economic Evidence, dated Nov. 30, 1972, entitled "Soft Drink Industry", summarizing the author's views concerning market structural trends in the industry.

11. A memorandum from Edward Manfield to Staff, dated July 12, 1973, entitled "A Theory of Shared Monopoly," consisting of 5 pages.

12. A memorandum from Mr. Manfield to Mr. Glassman, dated Oct. 26, 1972, entitled "Preliminary Thoughts on Franchising" (12 pages).

13. A memorandum from Mr. Manfield to Mr. Glassman, dated Mar. 2, 1973, entitled "Barriers to Entry," consisting of 20 pages.

14. A memorandum from James Dalton and Robert Larnar to H. Michael Mann, Director, Bureau of Economics, dated Oct. 7, 1971, entitled "Data Requirements and Availability for the Proposed Soft Drink Study," consisting of 2 pages.

15. A memorandum from H. Michael Mann, Director, Bureau of Economics, to the Commission, dated Feb. 4, 1972, entitled "Study of Soft Drink Industry-Response to Commission Minute of Sept. 17, 1971," consisting of 20 pages.

16. A one-page memorandum marked "CONFIDENTIAL," from Robert Larnar, Chief, Division of Industry Analysis, Bureau of Economics, to John Ferguson, Assistant General Counsel, dated Sept. 23, 1971, attaching a first draft study of the soft drink industry.

17. A memorandum from Messrs. Dalton and Larnar of the Bureau of Economics, to Messrs. Bob Lee and Dave Wilson, attorneys, dated Dec. 8, 1971, entitled "Justification for Request From Soft Drink Companies," consisting of 3 pages.

18. A memorandum from Robert Larnar, Chief, Division of Industry Analysis, and Mr. Dalton to H. Michael Mann, Director, Bureau of Economics, dated Oct. 18, 1971, entitled "Priority Rating of Soft Drink Study," consisting of 2 pages.

19. A memorandum from the Bureau of Economics to the Commission, dated Oct. 18, 1973, entitled "Recommendation: that an investigation be initiated in the soft drink industry," consisting of 17 pages.

20. A memorandum from the Bureau of Economics to the Commission dated Mar. 1, 1972, entitled "Study of Soft Drink Industry-Response to Commission Minute of Feb. 22, 1972," consisting of 5 pages.

21. A memorandum from James W. Meehan, Jr., Assistant to the Director of the Bureau of Economics, to Commissioner Mary Gardiner Jones, dated May 25, 1972, entitled "Study of the Soft Drink Industry," consisting of 7 pages.

22. A memorandum from James Dalton to H. Michael Mann, *et al.*, dated Feb. 16, 1972, entitled "Commissioner Jones' Memorandum of Feb. 15, 1972," consisting of 2 pages.

23. A memorandum from Robert Larnar, Chief, Division of Industry Analysis, to H. Michael Mann, Director, Bureau of Economics, dated Oct. 18, 1971, entitled "Priority Rating of Soft Drink Study" (same as #18 above), with appended materials as follows: pages 2 through 22 of Item #18 above; an undated 6-page document entitled "Proposal for Study of the Soft Drink Industry"; four numbered undated pages beginning "What the Study Will Do"; and another copy of the Larnar and Dalton memorandum included as an attachment to Item #15 above.

Order

85 F.T.C.

IN THE MATTER OF
EXXON CORPORATION, ET AL.*

Docket 8934. Order, Mar., 4, 1975

Denial of complaint counsel's motion for (1) major integrated procedural relief relative to discovery, (2) manual for complex litigation, (3) a second administrative law judge, and (4) a firm schedule for prehearing phase of the case. Also denial of respondents' suggestions for dismissal of the complaint.

ORDER DENYING MOTION FOR MAJOR INTEGRATED PROCEDURAL
RELIEF

By order of Oct. 23, 1974, the administrative law judge certified to the Commission complaint counsel's "Motion for Major Integrated Procedural Relief" requesting (1) with respect to this matter, substitution with minor modifications of the discovery rules of the Federal Rules of Civil Procedure for the Commission's discovery rules or, in the alternative, liberalization of the latter to facilitate the taking of depositions; (2) adoption of the Manual for Complex Litigation as a guide for this matter; (3) appointment of a second administrative law judge to rule upon all discovery related matters in this proceeding; and (4) adoption of a firm schedule for the prehearing phase of this case. In a joint answer, all respondents except Texaco oppose this motion in all respects. For its part, Texaco also opposes the motion and suggests that this matter be withdrawn from adjudication for further investigation. Finally, in a separate pleading, respondent, Shell Oil Company proposes that this complaint be dismissed and that the Commission confine its future activities in the field of energy to the gathering and analysis of data.

Upon consideration of the voluminous pleadings filed in connection with this matter, the Commission has determined to deny complaint counsel's motion in all respects. As for request (1), as a general principle the Commission does not favor tailoring special rules for individual cases. Complaint counsel have not convinced us that we should depart from this general principle. Furthermore, the Commission presently has under consideration a number of proposed rule changes including revisions of the Commission's discovery rules for adjudicative proceedings. The revisions dealing with discovery rules will be published in the near future in the *Federal Register* as proposals, and public comment will be invited as well as the views of the Commission's operating bureaus and administrative law judges. Respondents in this and any other pending adjudicative matters which

* For appearances see p. 91 herein.