

Order

85 F.T.C.

IN THE MATTER OF
EXXON CORPORATION, ET AL.*

Docket 8934. Order, Mar. 25, 1975

Affirmation of law judge's denial of respondents' motions to rescind the order for preservation of records.

ORDER AFFIRMING DENIAL OF MOTIONS TO RESCIND ORDER FOR
PRESERVATION OF RECORDS

This matter is before us on respondents' appeal, pursuant to Section 3.23(d) of the Commission's Rules of Practice, from the administrative law judge's denial of their motions to rescind his Order for Preservation of Records, issued Nov. 12, 1974 [hereinafter sometimes referred to as "the Order"], which prohibits respondents and complaint counsel from destroying "all presently existing documents, writings, recordings, or other records of any kind whatsoever which relate in any way to the exploration, production, transportation, and refining of crude oil and the transportation and marketing of refined petroleum products* * *." The Commission placed this matter on its docket for review, solely on the question of the authority of the Commission and the law judge to issue a record-preservation order.

Although respondents are correct in pointing out that such an order has never been issued in a Commission proceeding, the failure to exercise a power does not necessarily prove its non-existence. *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F.2d 672, 686 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). This is especially true when, as is the case here, the need for the order in question will arise only rarely. Normally, the parties to a suit will be able to identify the documents which they will need to support their respective cases with sufficient specificity to seek them by compulsory process. However, it is the position of complaint counsel that a considerable amount of discovery will be needed just to identify all of the relevant materials in respondents' possession. To prevent the destruction of such materials during this early phase of discovery, complaint counsel contend that the law judge should supervise the destruction of all materials which appear to be within the general scope of the case.

Thus the effect of this order, is not, as respondents have suggested, to require that they preserve irrelevant documents but, rather that they preserve records until their relevance to the proceeding can be determined with some degree of certainty. Respondents point out that

* For appearances see p. 91, herein.

the order has thus far caused them substantial burden and promises to cause them even more due to the expense of storing all of the documents encompassed by the order. However, if the order is within the power of the law judge to issue and he believes it necessary to the litigation, the hardship it brings upon the parties cannot be a ground for striking it. Furthermore, this burden can be, and has been, reduced by the law judge's permitting the destruction of materials which respondents can show are irrelevant, as well as those which can be duplicated from others. Order Interpreting Order for Preservation of Records, Nov. 27, 1974; Order Modifying Preservation Order, Feb. 6, 1975.

Having considered the pleadings filed by all parties in this matter, we conclude that the law judge acted properly in issuing an order of such nature. First, Section 5(b) of the Federal Trade Commission Act, empowering the Commission to conduct hearings into possible unfair methods of competition, necessarily implies the power to preserve evidence which might be needed in such hearings until it can be identified and brought before the Commission. This power is a logical extension of the fact finder's duty to make factual findings against a party which destroys material which is arguably relevant to the case at hand, concluding in that case that such material was relevant and contained information adverse to the party. Furthermore, Section 9 of the Act, in granting the Commission access to all evidence of any corporation against whom it is proceeding for inspection and copying must include the lesser power to merely preserve that which might be evidence.

We reject respondents' argument that the order is an "injunction," and that, as such, it can be obtained only from a court. We find the order to be analogous to a protective order which, although it may be prohibitive in nature and can govern the conduct of persons long after the conclusion of a proceeding has never, to our knowledge, been characterized as an injunction. In fact the order is distinguishable from an injunction in that it concerns the conduct of the proceeding rather than the actual merits thereof.

Having concluded that the Commission itself has the authority to preserve records, we also conclude that neither the Administrative Procedure Act nor any other applicable statute limits our authority to delegate such power to the law judge. In Section 556(c), the Act provides that employees presiding at hearings may, *inter alia*, "issue subpoenas authorized by law;" "rule on offers of proof and receive relevant evidence;" and "dispose of procedural requests or similar matters." These powers are essentially the same as those contained in the Federal Trade Commission Act and, for the reasons discussed

above, they must include the power to preserve records. Likewise, we find that Section 3.42(c) of our rules empowering the law judges to "issue subpoenas," "rule upon offers of proof and receive evidence," and "rule upon * * * all procedural and other motions appropriate in an adjudicative proceeding," in fact delegates to them the record preservation power.

As stated at the outset, the only issue now before us is whether the Commission and its law judges have the authority to issue a document preservation order. However, to clarify this novel matter of Commission procedure, we will briefly comment on several points raised by respondents, which do not bear directly upon the question of authority. First, they argue that the law judge erred in issuing the order *ex parte*, since there is nothing in the record to indicate any need for departing from the normal procedure set forth in Section 3.22 of the rules. We agree, but conclude that the error was harmless inasmuch as the law judge provided for immediate review of the order and he permitted this appeal.

Respondents also urge that the order is unfair in that it applies only to them and to complaint counsel and not to the rest of the United States Government, from whom they expect to obtain a great deal of material for their defense. Respondents contend that the entire Government is a party to this proceeding since the Commission as an agency of the Government filed the complaint. Although the Commission is in fact part of the Government, for litigation purposes it is independent of other governmental bodies, such as Congress, the executive branch and the courts. The principle of this independence was confirmed in *Humphrey's Executor v. United States*, 295 U.S. 602, 624, 625 (1935). Thus the fact that the Commission as a quasi-judicial, quasi-legislative body, is a party to an action does not mean that all other governmental bodies are also parties thereto.

Finally, respondents argue that complaint counsel failed to make an adequate showing of need for the order, especially because respondents' own procedures for preserving relevant evidence plus statutory prohibitions against the destruction of such evidence in Section 9 of the F.T.C. Act and 18 U.S.C. §§1101, 1505 (1970), fulfill the same function as the order. However, the question of need for a document preservation order, like the need for a protective order, is solely within the discretion of the law judge and, absent clear abuse thereof, which respondents have failed to show in this case, the Commission will not intervene. Accordingly,

It is ordered, That the law judge's denial of respondents' motions to rescind the order for Preservation of Records of Nov. 12, 1974, be, and it hereby is, affirmed.

IN THE MATTER OF

BRISTOL-MYERS COMPANY, ET AL.

Docket 8917. Order, Apr. 1, 1975

Rejection of administrative law judge's certification of respondents' requests for confidential treatment for documents produced under discovery demands.

Appearances

For the Commission: *Lynne C. McCoy.*

For the respondents: *Gilbert Weil* and *Gerald Guttman*, New York City.

ORDER REJECTING CERTIFICATION OF REQUESTS FOR
CONFIDENTIAL TREATMENT

By order of Mar. 18, 1975, the administrative law judge certified to the Commission the motion of respondent Bristol-Myers, in which respondents Ted Bates & Company, Inc., and Young & Rubicam International, Inc., join, requesting: (1) that certain materials which they submit to complaint counsel be deemed unavailable for public inspection pursuant to Section 4.10(a)(2) of the Commission's Rules of Practice and (2) that respondents be notified ten days prior to the release of such materials under the procedures of Section 4.11 of the rules. Respondents request such treatment for all materials which they designate as "confidential" and which were denied protection in the Law Judge's order of Jan. 31, 1975.

The Commission, in its discretion, will agree to give advance notice before disclosing certain materials voluntarily submitted in connection with an investigation. However, this matter has gone past the investigation stage into adjudication. Once a matter enters adjudication the Commission will not consider requests for advance notice before disclosure where the ALJ has denied protective status for said materials, nor will it consider a request for advance determination that materials will be withheld from the public. Accordingly,

It is ordered, That the certification of respondents' requests for confidential treatment be, and it hereby is, rejected.