

IN THE MATTER OF

FORD MOTOR COMPANY, ET AL. — DOCKET 9073

GENERAL MOTORS CORPORATION, ET AL. — DOCKET
9074*Interlocutory Order, Nov. 16, 1976*

Denial of (1) consolidated motions to stay portions of ALJ's orders of October 29 and November 2, 1976, requiring immediate action pending interlocutory appeal and Commission review of those orders; and (2) consolidated application for intervention and for disclosure of names of NADA members subpoenaed.

Appearances — Docket 9073

For the Commission: *Sharon S. Armstrong, Randall H. Brook, Barry E. Barnes, David R. Pender and Ronald G. Sims.*

For the respondents: *Robert L. Wald, Carleton A. Harkrader and Gloria P. Stewart, Wald, Harkrader & Ross, Washington, D.C.; Weil, Gotshal & Manges, New York City and Washington, D.C.; Mike Esler, Hoessler, Stamer & Esler, Portland, Ore.; David R. Larrony, Dearborn, Mich.; and Basil Mezines, Stein, Mitchell & Mezines, Washington, D.C., for the Intervenor, National Automobile Dealers Association.*

Appearances — Docket 9074

For the Commission: *Gregory L. Colvin, Sharon S. Armstrong, Sarah J. Hughes, Randall H. Brook and Ronald G. Sims.*

For the respondents: *James P. Melican, Jr. and Robert C. Weinbaum, Detroit, Mich.; John J. Higgins, New York City; Ira M. Millstein and Carl D. Lobell, Weil, Gotshal & Manges, New York City; Robert C. St. Louis and Charles E. Siljeg, Aiken, St. Louis & Siljeg, Seattle, Wash.; Howard Daniels, Weil, Gotshal & Manges, Washington, D.C.; and Basil Mezines, Stein, Mitchell & Mezines, Washington, D.C., for the Intervenor, National Automobile Dealers Association.*

ORDER DENYING CONSOLIDATED MOTIONS FOR STAY OF ORDERS
PENDING INTERLOCUTORY APPEAL AND FOR PERMISSION TO
INTERVENE

This matter is before us upon the applications of the National Automobile Dealers Association ("NADA") and four named dealers¹ acting on behalf of themselves and all other similarly situated NADA dealers, requesting an emergency stay of certain portions of the

¹ Brandy Ford, Inc., Fuller Ford Co., Inc., Berry Pontiac - GMC, Inc., and M&O Chevrolet Co.

administrative law judge's orders of October 29 and November 2, 1976, pending interlocutory appeal and Commission review of those orders.

On October 22 and 26, 1976, counsel for NADA filed consolidated motions for: permission to intervene for the purpose of filing motions to quash or limit subpoenas issued to a number of Ford and General Motors dealers; disclosure of the names of NADA members subpoenaed; an extension of time on behalf of NADA to move to quash or limit; and an extension of time on behalf of the four named dealers to move to quash or limit.

The administrative law judge's order of October 29, 1976, denied all motions filed on behalf of NADA, and his order of November 2, 1976, denied the motion on behalf of the four named dealers. The order of October 29, 1976, required NADA to "inform those dealers [who had failed timely to file motions to quash or limit] about this order immediately on its receipt," and required the subpoenaed dealers to "immediately file motions to quash or limit the subpoenas if they wish to challenge them." The order of November 2, 1976, directed the four named dealers to "file motions to limit or quash the subpoenas duces tecum served on them immediately upon notification of this order."

A consolidated motion for a stay of those portions of the administrative law judge's orders requiring immediate action, pending interlocutory appeal, was filed by counsel for NADA and the four named dealers on November 4, 1976. That motion was denied by the administrative law judge on the same day.

On November 5, 1976, counsel for NADA and the four named dealers filed the consolidated motion for a stay now before the Commission. As with the motion filed with the administrative law judge on November 4, 1976, this motion seeks to stay the portions of the law judge's orders requiring immediate action. On November 10, 1976, complaint counsel filed a reply to this motion for a stay.

Finally, a consolidated application for review of the administrative law judge's ruling on NADA's motion for permission to intervene and for disclosure of the names of NADA members subpoenaed was filed by NADA on November 8, 1976.

The basis for NADA's intervention motion is that the subpoenas directed to its member dealers raise issues as to which NADA has an interest not adequately represented by any of the named parties. Issues specified by NADA include the burden and expense of compliance with the subpoenas, public disclosure of confidential business records, and characterization of those records in the administrative proceeding.

In denying the intervention motion, the administrative law judge observed that the subpoenaed dealers can adequately represent their own interests by filing their own motions to quash or limit if they

believe the subpoenas are burdensome. He determined that intervention would complicate rather than simplify the issues raised by the subpoenas, due to the likely variations in response among the subpoenaed dealers.

As we stated in our order of July 13, 1976, affirming the orders of the administrative law judge granting limited intervention to NADA in this proceeding, the factors to be considered in determining whether justification exists to warrant intervention are the interests of the applicant, the applicant's potential contribution to the proceeding, the detriment to the public interest resulting from unduly complicating and prolonging the proceeding, and whether the applicant desires to raise substantial issues of law or fact which would not otherwise be properly raised or argued. See *Heublein, Inc.*, 82 F.T.C. 1826, 1829 (1973); *Firestone Tire & Rubber Co.*, 77 F.T.C. 1666, 1669 (1970).

Based upon our review of the pleadings filed by counsel for NADA and the four named dealers and by complaint counsel, we agree with the administrative law judge's determination that intervention by NADA to represent all subpoenaed member dealers is unwarranted and unnecessary. Those dealers who desire to challenge the subpoenas can adequately represent their own interests by filing motions to quash or limit pursuant to Rule 3.34(b) of the Commission's Rules of Practice. Any dealers who wish to utilize the services of NADA's legal counsel for responding to the subpoenas or otherwise may do so. However, we see no need for either the subpoenaed parties or the legal counsel of their choice to intervene in this proceeding for the purpose of raising legal issues regarding the third party subpoenas. Furthermore, the administrative law judge has determined that intervention by NADA to represent all subpoenaed member dealers would complicate rather than simplify the issues raised by the subpoenas. We cannot say this is in error. It does appear likely that dealers' responses to the subpoenas will not be identical; to the extent that there are variations in response, the responses will have to be individually considered by the law judge. As to issues concerning the burden and expense of compliance with the subpoenas and disclosure of business records of NADA members, the Commission's Rules of Practice charge the administrative law judge with responsibility for supervising discovery proceedings, issuing discovery orders and subpoenas, and determining the adequacy of subpoena returns. These Rules fully permit the subpoenaed dealers to move to quash or limit the subpoenas and to request *in camera* treatment for documents produced. The administrative law judge is in the best position to determine whether the subpoenas have been complied with in good faith and to determine the degree of protection to be afforded documents produced, subject to Commission review for

abuse of discretion. *See Koppers Company, Inc.*, 77 F.T.C. 1675, 1680-81 (1970).

NADA is also concerned about the characterization of records produced by NADA members which may become evidence in a public hearing, ostensibly because of the possibility that these records may bear upon liability issues in this proceeding. In our order of July 13, 1976, affirming the orders of the administrative law judge granting limited intervention, we observed that we would be favorably disposed toward a renewal of NADA's application to intervene on liability issues upon a showing that significant issues in which NADA's members have an interest will not be adequately presented by the parties. No such showing has yet been made by NADA. It is premature to determine at this point whether business records produced by subpoenaed dealers which may be introduced into evidence will bear upon liability issues in which NADA's members have an interest and which will not be adequately presented by parties. As we noted in our order of July 13, 1976, an appropriate time for reconsideration might be at a prehearing conference convened prior to the commencement of respondent's discovery.

Since we have determined to deny this consolidated application for intervention, it follows that NADA's request for an order requiring complaint counsel to inform it of the names of subpoenaed dealers will also be denied. In addition, the consolidated motion for a stay of the administrative law judge's orders of October 29 and November 2, 1976, pending interlocutory appeal, will be denied as moot. Accordingly,

It is ordered, That the aforesaid motions be, and they are hereby, denied.

Commissioner Dole did not participate by reason of absence.

IN THE MATTER OF
BANKERS LIFE AND CASUALTY COMPANY, ET AL.

Docket 9075. Interlocutory Order, Dec. 20, 1976

Order granting complaint counsel's application for review of ALJ's order directing disclosure of correspondence from Commission staff to persons other than third party complainants and other consumers; vacating said order; granting motion of complaint counsel for leave to file application for review in excess of 15 pages; and granting request filed by respondents for leave to file out of time its application for review.

Appearances

For the Commission: *Gerald H. Jagers, John W. Madden, III and William K. Hickey.*

For the respondents: *Robert Inman, Inman, Flynn & Coffee, Denver, Colo., Alan Bucholtz, Quiat, Bucholtz & Bull, Denver, Colo., Earl W. Kintner and Daniel C. Smith, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D. C., J. Wallace Adair and John F. Bruce, Howrey & Simon, Washington, D. C. and William T. Kirby and James T. Griffin, Hubachek, Kelly, Rauch & Kirby, Chicago, Ill.*

ORDER GRANTING APPLICATION FOR REVIEW

Complaint counsel, pursuant to Section 3.23(a)(1) of the Commission's Rules of Practice, apply for review of an order issued by the administrative law judge directing the disclosure of certain correspondence from the Commission's staff. According to complaint counsel's application, the ruling would require the disclosure of letters from staff "to federal, state or local governmental agencies seeking, providing or discussing information on several companies including some which are respondents in this matter and some which are unrelated to respondents herein" and "[c]orrespondence * * * with attached documentation, involving the Commission staff and five consultants who are potential expert witnesses. The materials discuss complaint counsel's preparation for trial including outlines of both objective and opinion evidence together with the methods of compilation, legal analysis and order of presentation of such evidence."¹ Complaint counsel have made available to respondents' counsel correspondence from staff to third party complainants and other consumers.

On November 15, 1976, the Commission granted complaint counsel's motion for a stay of the order pending appeal.

Complaint counsel object to the ALJ's order on the grounds that 1)

¹ Application for Review, pp. 11-12.