

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.

the documents are privileged as “work product” and as inter-agency memoranda; and 2) “there has been no showing by respondents of any need at all for these records as [Administrative Law] Judge Parker has not yet even asked for a written application for them pursuant to Rule 3.36 of the Commission’s Rules of Practice.”²

We agree with complaint counsel’s latter contention. Rule 3.36 requires that an application for issuance of a subpoena requiring the production of documents or other material in the records of the Commission shall be made in the form of a written motion and “[t]he motion shall specify as exactly as possible the material to be produced, the nature of the information to be disclosed, * * * and shall contain a statement showing the general relevancy of the material [or] information * * * and the reasonableness of the scope of the application, together with a showing that such material [or] information * * * is not available from other sources by voluntary methods or pursuant to §§3.33-3.34.” We are not persuaded by respondents that the Rule, designed to protect sensitive information in the Commission’s files from disclosure absent an adequate showing of need, may be avoided simply because the discovery order did not purport to be premised on Rule 3.36. Respondents’ analysis would render the Rule and its safeguards meaningless.³

We likewise reject respondents’ contention that the instant appeal is not authorized by Rule 3.23(a)(1) since the order appealed from does not require the production of Commission records “pursuant to §3.36.” Rule 3.23(a)(1) was intended to authorize interlocutory appeals to the Commission, without a certification by the ALJ, from orders requiring the disclosure of Commission records. We are confident that reference was made to Rule 3.36 simply because it was assumed that such orders would issue pursuant to that Rule. Since we have concluded that orders directing the production of Commission records may issue only pursuant to Rule 3.36, we cannot see how the ALJ’s failure to cite the Rule in his order makes his ruling unappealable.

We, therefore, believe that the ALJ’s order should be vacated to the extent that it requires the disclosure of correspondence from the Commission’s staff to persons other than third party complainants and

² Application for Review, p. 16.

³ Respondents rely on Rule 3.21(a)(4), (6) which authorizes the administrative law judge to conduct a prehearing conference to consider “expedition in the discovery and presentation of evidence” and “such other matters as may aid in the orderly and expeditious disposition of the proceeding, including disclosure of the names of witnesses and of documents or other physical exhibits which will be introduced in evidence in the course of the proceeding.” Rule 3.21(d) authorizes the ALJ to enter an order which recites the results of the conference and includes his rulings on matters considered at the conference. However, the ALJ’s authority is limited by the requirements of other applicable Rules. The ALJ’s, of course, may encourage the parties to agree to procedures that will expedite the proceedings and issue orders that reflect their undertakings.

other consumers. See *Jewel Companies, Inc.*, 81 F.T.C. 1034, 1037 (1972).⁴ This ruling should not be taken to suggest that the Commission is inclined to review the merits of discovery orders issued by the administrative law judges. The Commission has repeatedly held that the ALJ's have broad discretion in procedural matters, including discovery. *E.g.*, *Kellogg Co.*, 83 F.T.C. 1756 (1974). The instant ruling is simply designed to ensure that the exercise of the law judges' discretion is based on a consideration of all of the factors indicated in the Rules of Practice.

Accordingly, *it is ordered*, That the aforesaid application for review be, and it hereby is, granted and the administrative law judge's order of October 27, 1976, directing complaint counsel to disclose correspondence from the Commission's staff addressed to persons other than third party complainants and other consumers be, and it hereby is, vacated;⁵

It is further ordered, That complaint counsel's motion for leave to file their application for review in excess of 15 pages be, and it hereby is, granted;

It is further ordered, That the request filed by respondents Bankers Life and Casualty Company, John D. MacArthur, Southern Realty and Utilities Corporation, Hartsel Ranch Corporation and Estates of the World, Inc., for leave to file out of time its application for review be, and it hereby is, granted.

. Chairman Collier dissenting.

DISSENTING STATEMENT OF CHAIRMAN COLLIER

I would affirm the order of the ALJ directing complaint counsel to produce these documents.

In an apparent attempt to expedite the hearing in this case the ALJ invoked Rule 3.21 and directed complaint counsel to produce all third party correspondence.¹ Rather than insisting that respondents file a

⁴ We reject respondents' claim that complaint counsel have been laggard in pursuing their objections to the ALJ's order. Some of the ALJ's comments at the June 28, 1976, and September 23, 1976, prehearing conferences indicated that he expected complaint counsel to "release everything you have in your files." Tr. 37, and "all letters between you and third parties." Tr. 106. However, the July 14, 1976, and October 8, 1976, prehearing orders indicated that complaint counsel were to produce documents they received from either respondents or from third parties. See also Tr. 50, 106. Until the ALJ advised complaint counsel by telephone on October 15, 1976, that he intended to include within his order correspondence to third parties, complaint counsel reasonably concluded that these documents need not be produced. In view of their lack of opportunity to address their objections to the production of these documents to the ALJ prior to issuance of the order, because of the judge's failure to require the filing of a motion under Rule 3.36, we believe that complaint counsel acted reasonably in moving for a protective order before filing their appeal with the Commission. This procedure, however, would not be countenanced where complaint counsel had an opportunity to address their objections to the ALJ before the entry of the order. See *Crown Central Petroleum Corp.*, 81 F.T.C. 1024 (1973).

⁵ This ruling is without prejudice to a redetermination of respondents' request pursuant to Rule 3.36.

¹ The Rule provides that:

The Administrative Law Judge in any case may, and upon motion of any party or where it appears probable that the hearing will extend for more than five (5) days he shall, direct counsel for all parties to meet with him for a conference to consider any or all of the following:

(Continued)

motion for subpoena under Rule 3.36,² complaint counsel agreed to production.

Much later, complaint counsel sought clarification of the ALJ's production order and learned that it contemplated the disclosure of correspondence *from* complaint counsel *to* third persons, including other government officials and prospective expert witnesses. A motion for a protective order for some documents in this class, based on their assertedly privileged nature, was promptly filed and promptly denied.

Complaint counsel's appeal to the Commission from this ruling for the first time invoked respondents' failure to follow Rule 3.36 procedures. I think it is far too late in the day for complaint counsel to insist that the strict requirements of Rule 3.36 be met.³

Although in my view the application of Rule 3.36 has been waived in this instance, I believe the motion for a protective order based on assertions of privilege was entirely appropriate in the context of Rule 3.21. Nonetheless, I cannot hold that the ALJ's denial of the motion was error. The motion for protective order failed to describe the documents in adequate detail and asserted the claim of privilege in conclusory terms. Indeed, the documents — although few in number — were not even submitted for *in camera* review nor are they in the record before us. One who claims privilege has a threshold burden to support the claim. The ALJ, in my view, did not err in concluding that complaint counsel failed to meet this burden.

(6) Such other matters as may aid in the orderly and expeditious disposition of the proceeding, including disclosure of the names of witnesses and of documents or other physical exhibits which will be introduced in evidence in the course of the proceeding.

Since I would find that Rule 3.36 procedures were effectively waived here (see *infra*), I would find it unnecessary to determine to what extent Rule 3.21 would allow the ALJ to abbreviate those procedures where complaint counsel resists discovery in the prehearing conference context.

² Rule 3.36(a) requires that "An Application for issuance of a subpoena requiring the production of documents, papers, books, physical exhibits, or other material in the records of the Federal Trade Commission, or for the issuance of a subpoena requiring the appearance of an official or employee of the Commission, shall be made in the form of a written motion filed in accordance with the provisions of §3.22(a)."

³ Respondents' claim that this appeal does not lie under Rule 3.23(b) is without merit. Although it is fair to imply waiver by failing to insist on Rule 3.36 procedures, it is illogical to limit appeals from 3.21 pre-hearing orders requiring disclosure of Commission documents. Rule 3.23(b) is available in these cases not for the benefit of complaint counsel but to allow the Commission to review production requests for its own documents.

IN THE MATTER OF
JIM WALTER CORPORATION

Docket 8986. Interlocutory Order, Nov. 23, 1976

Denial of respondent's motion that the Commission disqualify Chairman Collier from participating in the decision of the case.

Appearances

For the Commission: *Peter W. Kitson, Harold J. Lamboley, Gilbert E. Geldon and Joseph J. O'Malley.*

For the respondent: *John J. Voortman, W. Donald McSweeney, Susan A. Henderson, Schiff, Hardin & Waite, Chicago, Ill. and Dan L. Saltsman, Tampa, Fla.*

ORDER DENYING MOTION TO DISQUALIFY

During oral argument before the Commission on respondent's appeal from the initial decision of the administrative law judge in this matter, respondent's counsel questioned Chairman Collier's participation in the decision of the case because of his prior service as the Commission's General Counsel from July 1973 to April 1975. The Commission allowed respondent 30 days to file a motion for disqualification. Respondent now requests access to all records pertaining to the Chairman's participation in this matter as General Counsel and leave to file a motion for disqualification 15 days after delivery of the records. In the alternative, respondent moves that the Commission immediately require Chairman Collier's disqualification.

In response to the motion, Chairman Collier filed a memorandum stating that he declined to disqualify himself from participation and setting forth at length his reasons therefor.

The Commission has carefully reviewed respondent's motion, complaint counsel's answer, and the memorandum of Chairman Collier. In light of such consideration, the Commission has determined that no grounds exist for granting the requested disqualification. As the Commission stated in *Grolier, Inc.*, CCH [1973 - 76 Transfer Binder] Trade Reg. Rep. ¶21,095, at 20,957-58, [87 F.T.C. at 180],

The requirement that adjudicatory and prosecuting or investigative functions be segregated arose out of a concern that "a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of those who decide questions." See, Senate Judiciary Committee Print, June 1945. Those who have