

Interlocutory Order

IN THE MATTER OF

TENNECO, INC.

Docket 9097. Interlocutory Order, July 12, 1978

This order sets forth specific provisions to be followed relative to the designation of certain documents as exempt from release.

ORDER REGARDING REQUEST FOR DESIGNATION OF DOCUMENTS
AS EXEMPT FROM RELEASE

On March 22, 1978, Sears, Roebuck and Co. ("Sears") filed a motion to quash a third party subpoena duces tecum served upon it, claiming, *inter alia*, that the protective order issued by the administrative law judge ("ALJ") in this proceeding was insufficient to protect it from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552 (1970). The ALJ denied the motion to quash from the bench on April 25, 1978, on the assumption that the Commission would not release confidential information covered by the protective order. The transcript of the ALJ's ruling indicates that he recognized a limitation upon his authority with respect to FOIA disclosure. Sears filed a motion for reconsideration on May 3, 1978, arguing again, *inter alia*, that the protective order was inadequate, and that the ALJ was without authority to bind the Commission with respect to disclosure under the FOIA. Alternatively, Sears asked the ALJ to certify the matter to the Commission under Rule 3.23(b). By order of May 10, 1978, the ALJ denied the motion for reconsideration and found that the matters raised by Sears did not involve a controlling question of law or policy which would justify certification of an immediate appeal under Rule 3.23(b). The ALJ did not address in his order whether the confidentiality issue was within his authority to decide or should be forwarded to the Commission under Rule 3.22(a). By motion of May 22, 1978, directly to the Commission, Sears asks that the Commission enter an order designating documents produced in response to Specifications 5 and 8¹ as confidential and not subject to future release, noting that the ALJ cannot bind the Commission with respect to release of information under the FOIA.

The chronology of actions with respect to the subpoena duces tecum served upon the J. C. Penney Company ("Penney") charts a similar sequence of events. Penney filed a motion to quash on April

¹ Specification 5 requires production of documents showing, by part number, the net purchase price paid by Sears to Maremont, its supplier, for shock absorbers in 1975 and 1976. Specification 8 requests, *inter alia*, production of Sears' Redetermination Audit for 1975 which contains a summary of the price information requested in Specification 5.

25, 1978, claiming that the protective order issued by the ALJ provided insufficient protection for documents responsive to Specifications 1-5 and 7-8 of the subpoena. By order of May 9, 1978, the ALJ denied Penney's motion for the same reasons he rejected Sears' motion to quash. Penney then moved directly before the Commission for designation of the information produced in response to Specification 5 of the subpoena² as confidential information exempt from release under the Freedom of Information Act and as not subject to release or disclosure by the Commission.

Normally, the Commission would not entertain an interlocutory appeal on a discovery question in the absence of a certification by the ALJ. However, it is clear in this instance that under Rule 4.10(a)(2) the ALJ does not have authority to bind the Commission with respect to the release of documents³ and that these motions should have been certified, with the ALJ's recommendation, pursuant to Rule 3.22(a). Because remand of these motions to the ALJ would unnecessarily delay the administrative proceeding, the Commission, in its discretion, has considered both motions and issues the following order:

Notwithstanding any of the provisions of the protective order issued by the ALJ on January 9, 1978, in the event of a Freedom of Information Act request or an official request from any Congressional committee or subcommittee or from a court pursuant to compulsory process, for disclosure of any document or portion of any document submitted by Sears in response to Specification 5 of the subpoena duces tecum or to Specification 8, to the extent such information summarizes information provided pursuant to Specification 5, and by Penney in response to Specification 5 of the subpoena duces tecum, and which is designated as "Confidential" under said protective order, authorized representatives of the Commission's Office of General Counsel may inspect such document for purposes of considering the request and, where necessary, advising the Commission on the request and defending the Commission's interests in court. Furthermore, the Commission shall provide the party which supplied such "Confidential" document or portion thereof with ten (10) days' notice prior to release of such document or portion thereof in response to such a request or otherwise. *Provided, however,* that in the case of release of such document or portion thereof, designated as "Confidential," in response to

² Specification 5 requires production of Penney's net cost per item of shock absorbers and exhaust system parts for 1975 and 1976.

³ Such authority would be granted to the ALJ under the Commission's proposed confidentiality rules. 43 F.R. 3571 (January 26, 1978).

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an official request from a committee or subcommittee of Congress or to a court in response to compulsory process, the Congressional committee or subcommittee or the court will be advised that the party which supplied the document considers the material to be confidential and the party will be provided ten days' prior notice where possible, and in any event as much advance notice as can reasonably be given.

It is so ordered.

Modifying Order

92 F.T.C.

IN THE MATTER OF

LUSTRASILK CORPORATION OF AMERICA, INC., ET AL.

MODIFYING ORDER, IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-2894. Decision, Jan. 27, 1976 — Modifying Order, July 13, 1978.*

This is an order which modifies a cease and desist order issued January 27, 1976, 41 FR 7744, 87 F.T.C. 145, to conform with the product coverage of a consent order issued against a competitive company, by substituting the words "hair straightening products" for the word "cosmetics" in Sections I and II of the original order, and "is" for "are" in the *It is ordered* paragraph in Section I; and by deleting the words "as 'cosmetic' is defined in the Federal Trade Commission Act" in the *It is further ordered* paragraph in Section II.

ORDER MODIFYING ORDER TO CEASE AND DESIST

ORDER*

On April 26, 1977, respondents in this matter requested by letter that the Commission order of January 27, 1976, be modified, first by limiting the product coverage of the order to "hair straightening products" which would replace the broader "cosmetics" products description, and second, by excluding the individually named respondents from the order.

Complaint counsel support the limitation on product coverage and oppose the exclusion of the individually named respondents.

We agree that the product coverage should be limited as requested. After entry of its order in this matter the Commission issued a consent order against Revlon, Inc., a competitor of Lustrasilk in the sale of hair relaxers. The Revlon order's product coverage is identical to that recommended by complaint counsel here. For this reason the Commission believes that it is in the public interest to grant the modification of product coverage sought by Lustrasilk.

We reject respondents' request that the individually named respondents be released from the order. Nothing that respondents have cited indicates a change of facts or law that would warrant the exclusion of the two individually named respondents from the reach of the order, nor does it appear that the public interest would be served by their exclusion. To the contrary, because the corporation is run as the proprietorship of the two named individuals, we find it necessary to continue to hold them responsible under the order. Accordingly,

* Reported as modified by Commission Order Correcting Order Modifying Order to Cease and Desist issued August 7, 1978.