

Interlocutory Order

IN THE MATTER OF

(16 CFR 461); CHILDREN'S ADVERTISING. 43 FR 17967
(1978)

TRR No. 215-60. Interlocutory Order, July 31, 1978

This order denies various petitions filed by interested persons in the above rulemaking proceeding. The Commission made the following determinations respecting the questions raised in these petitions and motions:

1. Notice of proposed rulemaking is proper and need not contain specific proposed rule;
2. It is unnecessary to require proponents of proposed rule to proceed first;
3. Unlimited cross-examination by interested persons at legislative hearings is not necessary;
4. Schedule of proceedings will not be reviewed at outset;
5. Notice and opportunity to comment need not be given on procedures for conducting proceeding; and
6. Paragraph D(2) of procedures established for proceeding is proper.

ORDER DENYING VARIOUS PETITIONS

By Order of May 19, 1978, the Presiding Officer in TRR No. 215-60, Children's Advertising, certified certain questions to the Commission that were made in response to separate petitions by the Association of National Advertisers, Inc. ("ANA") and the American Association of Advertising Agencies, Inc. ("AAAA"). See Presiding Officer's Order No. 3. Since that time other petitions or motions raising these questions have been filed and the Presiding Officer has similarly certified them to the Commission. See Presiding Officer's Orders Nos. 6, 7, 8, 9, 10, 12, and 13. The Commission's determinations with respect to the questions raised in these petitions and motions are set forth below. Where the issues made by the various petitioners overlap, they are addressed together.¹

1. The Notice of Proposed Rulemaking is Proper And Need Not Contain a Specific Proposed Rule.

Petitioners argue that the notice of proposed rulemaking, 43 F.R. 17967 (1978), is deficient in that it does not contain a specific rule proposed by the Commission. The argument is made that Section 18(b)(1) of the FTC Act, 15 U.S.C. 57a(b)(1), requires that the notice contain "the proposed rule." In addition, petitioners claim that it is unfair to force them to comment on an ambiguous proposal, because

¹ The petitions of the ANA and the Toy Manufacturers Association raises all six questions that have been certified by the Presiding Officer; AAAA's petition and the Chocolate Manufacturers Association's petitions raise four of these issues (Nos. 1, 3, 5 and 6 addressed below); the Kellogg petitions raise two issues (Nos. 5 and 6); a letter from Irving Scher raises issue No. 5; and the remaining petitions or motions address themselves only to Paragraph D(2)(e) (question No. 6 below).

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of the burden created by having to address themselves to each possible remedy proposed. They also claim that the proposal is so broad that it may encroach on the jurisdiction of other agencies (*i.e.*, the FCC and FDA), and that the proposals should be more specific so that any jurisdictional claims can be addressed and resolved at the outset. Finally, it is argued that the "particular" reasons for the proposed rulemaking have not been identified.

Having examined the area of advertising directed toward children and concluded that a potential problem exists that may warrant the promulgation of a trade regulation rule, the Commission has set forth in its notice the reasons for the commencement of the proceeding, listed various potential remedial approaches and identified particular issues for which public comments are invited in order to determine whether a rule in fact is necessary and, if so, what form it should take. The issue raised by the petitioners challenges the adequacy of the notice.

The rulemaking provisions of Section 18 of the FTC Act, as amended by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Act"), 15 U.S.C. 57a(b), require the Commission to follow the procedures of Section 553 of the Administrative Procedure Act (the "notice and comment rulemaking" provided for by 5 U.S.C. 553) plus certain additional procedures.² With respect to commencing a rulemaking proceeding, Section 18(b) provides:

the Commission shall proceed in accordance with section 553 of title 5, United States Code (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (1) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule * * *

Combining the requirements of Sections 553(b)(3) and 18(b)(1), the notice of rulemaking must (a) include "either the terms or substance

² Section 553 provides in relevant part:

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. [5 U.S.C. 553(b) and (c).]

of the proposed rule or a description of the subjects and issues involved," Section 553(b)(3);³ and (b) state "with particularity the reason for the proposed rule," Section 18(b)(1). The additional requirement added by Section 18(b)(1) is that the *reason* for the proposed rulemaking must be stated in the notice.

Petitioners interpret Section 18(b)(1) to require that a detailed, specific proposed rule, must also be included in the notice. But petitioners are unable to cite any legislative history to support their argument that the type of basic change in the requirements of Section 553 claimed by them was intended by Congress. Where substantial changes from the requirements of Section 553 were imposed — *e.g.*, the requirement of an informal oral hearing with limited rights of cross-examination and the necessity of a detailed statement of basis and purpose — the extensive discussion concerning these requirements in the legislative history makes clear that such changes were intended. In contrast, the Conference Report is silent on this issue (other than merely stating the change);⁴ the House Report on an earlier version of the Act commented only that "the Commission would observe the provisions of section 553 of title 5 of the United States Code and would also (1) issue an order of proposed rulemaking stating the reason for the proposed rule with particularity sufficient to allow informed comment* * *." H.R. Rep. No. 93-1107, 93rd Cong., 2d Sess. 46 (1974). Since Section 553 would be satisfied if only the "substance" of a rule is published, it is obvious that the passing use of the phrase "the proposed rule" in the report did not mean that the specific terms of a rule must be included in the notice.

Since the passage of the Act, the Commission has uniformly interpreted Section 18(b)(1), as requiring either the terms or substance of a proposed rule or a description of the subjects and issues involved be included in the notice commencing the proceeding. Rule 1.11, 16 C.F.R. 1.11, promulgated in 40 R.R. 33966 (Aug. 13, 1975), provides:

The initial notice shall include: (a) the terms or substance of the proposed rule or a description of the subjects and issues involved; * * * (c) a statement describing with particularity the reason for the rule* * *.⁵

This interpretation is also supported by the regulations promulgated by EPA under the Toxic Substances Control Act, 15 U.S.C. 2605, a

³ As set forth in greater detail *infra*, the case law interpreting Section 553(b)(3) clearly establishes the propriety of commencing a rulemaking proceeding without proposing a specific rule, so long as the notice adequately apprises those potentially affected of the nature and subject matter of the proceeding.

⁴ See H.R. Rep. No. 1606, 93d Cong., 2d Sess. 32 (1974).

⁵ On one previous occasion the Commission has initiated a rulemaking proceeding under the Act without publication of the text of a proposed rule. Advertising for Over the Counter Antacids. 43 F.R. 14534 (April 6, 1976).

statute having language identical to Section 18(b)(1) on the issue of what is required in a notice of rulemaking. Rule 750.2(b)(3) (42 F.R. 61259, December 2, 1977) provides that a notice of proposed rulemaking shall contain:

Either the draft text of the proposed rule (which may include alternative approaches among which a final choice has not yet been made) or a description of the approaches and provisions being considered for inclusion in the rule, or some combination of the above.

The focus of both Section 553 and Section 18(b)(1) is on "informed comment." As the court stated in *Forester v. CPSC*, 559 F.2d 774, 787 (D.C. Cir. 1977):

Section 553(b) does not require that interested parties be provided precise notice of each aspect of the regulations eventually adopted. Rather, notice is sufficient if it affords interested parties a reasonable opportunity to participate in the rulemaking process.⁶

The notice of proposed rulemaking published by the Commission allows for such a "reasonable opportunity to participate."

The notice of proposed rulemaking presents various alternatives for dealing with the two major concerns underlying the proceeding: (a) that television advertising of any product to young children may be unfair and deceptive because of their possible inability to comprehend and evaluate such advertising; and (b) that advertising of sugared products directed to children may be unfair and deceptive because of the possible health risks that may result from the consumption of sugar encouraged by such advertising. These two concerns are the particular reasons for the proposed rulemaking and are clearly identified. Specific remedial approaches are suggested and the Commission has invited comment on these approaches; sixteen additional issues on which the Commission desires comments are identified. The notice incorporates two outside petitions which prompted the rule as well as a detailed staff report, which is a matter of public record. Specifically, the notice stated that:

The petitions raise, and the Report discusses, facts which suggest that the televised advertising of any product directed to young children who are too young to understand the selling purpose of, or otherwise comprehend or evaluate, commercials may be unfair and deceptive within the meaning of Section 5 of the Federal Trade Commission Act, requiring appropriate remedy. The Report also discloses facts which

⁶ The proposition that Section 553(b) does not require that a precise rule be proposed in the notice commencing the proceeding is well supported by the case law. See, e.g., *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 684 (9th Cir. 1949); *Buckeye Cablevision, Inc. v. FCC*, 387 F.2d 220, 226 (D.C. Cir. 1967); cf. *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976). Indeed, courts have held that even where the proposed notice was technically deficient, actual notice of the issues involved suffices. *Texaco, Inc. v. FEA*, 531 F.2d 1071, 1078 (T.E.C.A.), cert. denied, 426 U.S. 941 (1976); *Common Carrier Conf. — Irregular Route v. United States*, 534 F.2d 981, 982-83 (D.C. Cir. 1976).

suggest that the current televised advertising of sugared products directed to older children may be unfair and deceptive, again requiring appropriate remedy. The staff Report sets forth the facts (Part III), applies the law to the facts (Part IV), examines jurisdictional and constitutional issues (Part V), discusses the advantages and disadvantages of five possible remedies, and recommends adoption of three of the five (Part VI). The Commission has carefully and deliberately considered the staff report and recommendations. Based upon that report, the Commission believes that a comprehensive rulemaking proceeding addressing the problems posed by television advertising to children is necessary and appropriate. [43 F.R. 17969 (1978).]

The notice is sufficient to allow "informed criticism and comments." *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir.) cert. denied, 426 U.S. 941 (1976).⁷

2. It is Unnecessary to Require Proponents of Proposed Rule to Proceed First

Petitioners claim that the proponents of the proposed rule have the burden of proof, both under Section 18(e)(3)(A), 15 U.S.C. 57a(e)(3)(A),⁸ and, because they view the rule as a form of censorship, under the First Amendment. Such a burden allegedly requires a showing that the advertising to be regulated is deceptive or misleading (and thus not protected by the First Amendment) and that the remedy chosen is the least restrictive means available. Because of this asserted burden of proof, they suggest that proponents of the rule be required to make their presentation first and that opponents of the rule then present their submissions, thus allowing the opponents of the rule to focus their presentation to counter whatever proponents advance.

The argument of petitioners assumes that the rulemaking proceeding is an adversarial proceeding; indeed, the reference to Section 57a(e)(3)(A) concerns judicial review of promulgated rules which, like appeal from any final agency action, is adversarial in nature. The instant proceeding, however, is not an adversary

⁷ With respect to jurisdictional issues, the Commission believes that the notice is sufficient to allow jurisdictional challenges to be raised. See, e.g., May 19, 1978, petition by the Chocolate Manufacturing Association (raising claims of encroachment on the FDA's jurisdiction).

⁸ Section 18(e)(3)(A) provides:

Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of title 5, United States Code (taking due account of the rule of prejudicial error), or if-

(A) the court finds that the Commission's action is not supported by substantial evidence in the rulemaking record (as defined in paragraph (1)(B) of this subsection) taken as a whole, or

(B) the court finds that-

(i) a Commission determination under subsection (c) that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or

(ii) a Commission rule or ruling under subsection (c) limiting the petitioner's cross-examination or rebuttal submissions, has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole.

The term "evidence", as used in this paragraph means any matter in the rulemaking record.

proceeding, but an attempt by the Commission to receive public comment to aid it in its decisions whether to issue a rule and, if so, what form such a rule should take. There is no "burden of proof" on any of the participants.⁹

Similarly, there is no constitutional requirement of sequential presentations. The rulemaking proceeding does not itself involve any restrictions on advertising; any restrictions will occur only if a rule is promulgated. The Commission is sensitive to the First Amendment issues involved and has explicitly sought comments thereon. See Issue No. 16, 43 F.R. 17970 (1978). Moreover, the Commission declines this invitation to transform this rulemaking proceeding into an adjudicative trial. In the Commission's view, adoption of this proposal would make neither good law nor good policy. As Professor Davis has stated:

A good deal of experience with trial-type hearings has accumulated since 1958, and all of it seems strongly to confirm the first two sentences of § 6.06 of the Treatise: "A trial is designed for resolving issues of fact, not for determining issues of law, policy, or discretion. In rule making the method of trial has no place except when specific facts are at issue, and even then it should seldom be used when the disputed facts are legislative." *Administrative Law of the Seventies* 222 (1976).

3. Unlimited Cross-Examination by Interested Persons at the Legislative Hearings is Not Necessary.

Petitioners ask that unlimited cross-examination by interested persons be allowed during the legislative hearing in order to identify those issues of material fact that are in dispute. They claim that questioning by the presiding officer is not an adequate substitute, and suggest that a failure to grant such cross-examination is a denial of statutory rights, which may lead to reversal of any resulting rule.¹⁰

Section 18(c)(1)(B) requires that interested persons be given the opportunity to cross-examine only with respect to disputed issues of material fact and the determination of whether there are such issues is left to the Commission:

[I]f the Commission determines that there are disputed issues of material fact it is necessary to resolve [an interested person is entitled] to present such rebuttal submissions and to conduct (or have conducted under paragraph (2)(B)) such cross-

⁹ Significantly, while Section 556(d) of the APA places the burden of proof on the proponent of a rule in a formal rulemaking proceeding subject to Section 556, 5 U.S.C. 556(d), informal rulemaking proceedings such as the present one under Section 553 and Section 18 of the FTC Act are not subject to Section 556, and neither Section 553 nor Section 18 contains any comparable provision imposing a burden of proof.

¹⁰ The Commission notes that the opportunity for cross-examination is not constitutionally required in rulemaking proceedings. Compare *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915), with *Londoner v. Denver*, 210 U.S. 373 (1908). See also *Vermont Yankee Nuclear Power Co. v. NRDC*, 98 S.Ct. 1197, 1211 n.16 (1978); *United States v. Florida East Coast R. Co.*, 410 U.S. 224, 244-45 (1973).

examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues. [15 U.S.C. 57a(c)(1)(B).]

This right is further limited by the Commission's power under Sections 18(c)(2) to require "that any cross-examination to which a person may be entitled * * * be conducted by the Commission on behalf of that person in such manner as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to disputed issues of material fact, "and under Section 18(c)(3) to aggregate persons with the same or similar interests for the purpose of cross-examination. [15 U.S.C. 57a(c)(2) and (3).]

The Commission has adopted a procedure for this proceeding whereby ample opportunity is given to interested persons to identify "disputed issues of fact that are material and necessary to resolve within the meaning of Section 18 of the FTC Act." Interested persons are given the opportunity to submit written comments which may suggest such issues; this opportunity is enhanced by the provisions of Paragraph (D)(2)(d) of the procedures, which require detailed information concerning any surveys or studies that are submitted, so that they may be challenged. Oral presentation at the legislative hearing may also be used to demonstrate that such a disputed issue exists.

Although not required by the statute, the Commission has afforded interested persons the opportunity to submit questions to the Presiding Officer, a procedure that, as previously noted, is sufficient even on disputed issues of material fact, 15 U.S.C. 57a(c)(1)(B), (c)(2)(B). There is also an opportunity after the legislative hearing to submit issues to be designated as disputed issues (Paragraph #1) and to participate, with the right of cross-examination, in the adjudicative hearing. Finally, there is a rebuttal period after the disputed issues hearing (Paragraph F). The Commission believes that these procedures are sufficient to identify and resolve disputed issues of material fact, and that cross-examination by interested persons during the legislative hearing is unnecessary and would unduly delay the proceeding.

4. The Schedule of Proceedings will not be Revised at the Outset.

Petitioners suggest four areas where the schedule of proceedings should be changed.

- a. Termination of the written comment period coincides with the time to file requests to appear at the legislative hearing.

They suggest that the filing of comments at the very end of the comment period may make it impossible for persons wishing to appear at the hearing to take issue with such comments to file in time.

b. The following time periods are alleged to be too short:

- (1) The 30-day interval between the close of the legislative hearing and the deadline for proposing disputed issues;
- (2) The 40 days for legislative hearing; and
- (3) The three day period between the deadline for any oral rebuttal presentations and the start of the disputed issues hearing.

The schedule announced by the Commission was based on the Commission's experience with past proceedings and the tendency for such proceedings to be subject to a great deal of delay where strict timetables were not established and adhered to. The Commission has been criticized for such delay and the Commission has been exhorted to reduce delays. See, *e.g.*, H.R. Rep. No. 95-472, 95th Cong., 1st Sess. 5 (1977). The scheduling problems suggested by petitioners are based on the assumption that certain conduct may occur. Whether such conduct will in fact occur is a matter of speculation. For example, there may or may not be comments filed at the very end of the comment period, and these may or may not induce persons who would not otherwise be so inclined to seek to appear at the legislative hearing. Similarly, there may or may not be any designated disputed issues of material fact, or rebuttal may be limited to written submissions. Because of the speculative nature of these problems, the Commission declines to change the schedule at this time. This determination does not affect the ability of persons, during the course of the proceeding, to show that the schedule creates hardship for them and request that the schedule be changed by the Presiding Officer. The Commission declines to do so in advance, however.

5. Notice and Opportunity to Comment Need Not Be Given on the Procedures for Conducting the Proceeding

Various challenges are made to the method by which the procedures for the proceeding were adopted. Petitioners claim that the notice and comment provisions of Section 553 were required to be followed. They contend that the exceptions for "procedural" rules do not apply because of the substantial impact on substantive rights, and that the "good cause" exception is similarly inapplicable because no compelling reason for adopting these procedures without notice and comment has been demonstrated.

The procedural format for conducting the rulemaking proceeding carefully preserves all the rights that interested persons are entitled to under Section 18; the proper notice, opportunity for written comments, and the oral hearing with appropriate cross-examination for disputed issues of material fact that are necessary to resolve are all provided. The challenged procedures do not have a substantial impact on the rights of interested persons, and, apart from providing for a more expeditious proceeding, it appears that they will have little effect on the ultimate decision of whether a rule should be promulgated and, if so, the form of such a rule. Thus, the procedures are "rules of agency * * * procedure or practice" and may be issued without notice and comment. 5 U.S.C. 553(b)(A). As the court noted in *Ranger v. FCC*, 294 F.2d 240, 244 (D.C. Cir. 1961): "Of course all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one." See also, *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963); *EEOC v. National Cash Register Co.*, 405 F. Supp. 562, 569-72 (N.D. Ga. 1975).¹¹

Petitioners also claim that the Commission has failed to demonstrate "good cause" for finding that its existing procedures are "impractical, unnecessary, or contrary to the public interest" as required by Rule 1.20, 16 C.F.R. 1.20. This argument is primarily linked to the claim that Section 553 requires notice and comment and that the "good cause" exception of Section 553(b)(B) is inapplicable. Petitioners recognize that the Commission did give a "brief statement of its reasons for dispensing with any such procedures,"¹² but they take exception to the adequacy of these reasons. They claim that expeditious procedures are not necessary, citing the "ingrained" pattern of sugar consumption, the prolonged study of these issues that has already occurred, and the lengthy schedule established for the proceeding as indicating that there is no "emergency." These arguments, intertwined as they are with the Section 553 claim, fail to distinguish between Rule 1.20 and Section

¹¹ The procedures for conducting the instant proceeding differ significantly from the cases cited by petitioners where notice and comment were required because the "procedures" had a substantial impact on substantive rights. For example, *Pickus v. U.S. Bd. of Parole*, 507 F.2d 1107 (D.C. Cir. 1974), involved regulations that established criteria for parole decisions, greatly narrowed the discretionary power of the Board, and could be expected to result in different parole decisions. *Pharmaceutical Manufacturers Ass'n. v. Finch*, 307 F. Supp. 858 (D. Del. 1970) concerned regulations that changed the type of evidence needed to establish the effectiveness of drugs; the regulations specified a much narrower range of acceptable evidence and a large number of existing drugs might have required retesting in order to stay on the market (as drugs not meeting the new regulation were subject to seizure).

¹² This statement appears at 43 F.R. 17968.

The Commission believes this procedural experiment, which is designed to expedite this proceeding while affording interested persons all of their statutory rights is necessary in view of need to explore expeditiously the health and other issues raised by this proceeding as well as generally to expedite the conduct of Commission rulemaking.

553(b)(B). The good cause finding in Rule 1.20 relates to whether the procedures themselves are impractical, unnecessary, or contrary to the public interest; that of Section 553 relates to the necessity of providing notice and comment. The Commission's interpretation of its own regulation is entitled to great weight. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Dev. Co. v. International Elec. Workers*, 367 U.S. 396, 400 (1961); *FCC v. Schreiber*, 381 U.S. 279, 290 (1965). Having found that expeditious procedures are desirable, and using its experience with its regular procedures, the Commission is fully justified in concluding that the regular procedures are impractical or contrary to the public interest.

6. Paragraph D(2)(e) of the Procedures Established for this Proceeding Is Proper.

Petitioners claim that the requirement of Paragraph D(2)(e) — that a commenter presenting surveys or studies also produce other surveys or studies relevant to that commenter's presentation and in the person's possession, custody or control — is an unconstitutional abridgement of speech, is overly broad, and imposes an unfair burden on participants, particularly organizations such as trade associations or advertising agencies, which have numerous offices and massive amounts of arguably relevant information. They also complain that the Paragraph does not take into account privileged information or provide for protective orders.

The argument that Paragraph D(2)(e) improperly limits the right of interested persons to participate in the proceeding has been amply answered by the Presiding Officer in Order No. 2:

It is no more of a "limitation" on participation than the requirement in Notice Section D(1) that any person who appears in the legislative stage may be re-called for cross-examination. 43 Fed. Reg. 17970. To say that either the "Other Information Provision" or the prospect of cross-examination amounts to a limitation on the right to participate would be tantamount to defining participation as a license to make extravagant claims which cannot be exposed by cross-examination or contradicted by data in the possession of the very person who is making the claim. Neither the Administrative Procedure Act, nor the Magnuson-Moss Act, nor the Commission Rules (even the Commission's Rules in formal adjudications) require that an interested person be given an unfettered license to present facts only favorable to one "side" as well as an assurance that no one will discover what that person really knows. [pp. 3-4.]

The Commission notes that a similar provision is contained in FDA's regulations for formal public evidentiary hearings. 21 C.F.R. 12.85(a)(2). That rule provides that the director of the bureau responsible for the matter must submit:

All documents in his files containing factual data and information, whether favorable or unfavorable to his position, which relate to the issues involved in the hearing.

Section 12.85(b) extends this requirement to each participant in the hearing.

The issues of privileged information or protective orders have also been addressed in Order No. 2. In responding to Question No. 5 the Presiding Officer noted (p. 6) that Rule 1.18(b), 16 C.F.R. 1.18(b), provides for *in camera* treatment of documents when good cause is shown; his response to Question No. 6 (p. 7) indicates his willingness to consider questions of privilege. Rather than concluding at the outset that privileged material will be required to be produced and made public, the more appropriate course of action is for Paragraph D(2)(e) to remain in effect and for the Presiding Officer to deal with questions concerning its application as they arise. The Commission agrees with the interpretations that the Presiding Officer has made thus far and believes that he has the authority to deal with additional questions that may arise in applying Paragraph D(2)(e).

The contention that the Commission lacks authority to promulgate Paragraph D(2)(e) because Section 18(c)(2) provides authority only to prescribe such rules "as may tend to avoid unnecessary costs or delay," has been answered in the Presiding Officer's Order No. 3, pp. 2-3. The Commission is in full agreement that Paragraph (D)(2)(e) is authorized both under Section 18(c)(2) and pursuant to the Commission's inherent right to regulate its proceedings. As the Supreme Court recently noted:

[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress has confided the responsibility for substantive judgments. *Vermont Yankee Nuclear Power Corp.*, *supra*, [98 S.Ct. at 1202.]

The Commission notes that many of the petitions which are the subject of this order were inappropriately filed directly with the Commission or the Secretary. Section 1.13(c) of the Commission's Rules of Practice designates the presiding officer as the Commission official "responsible for the orderly conduct of the rulemaking," vests him with "all powers necessary to that end," including the power "to certify questions to the Commission for its determination." This section clearly establishes the presiding officer as the appropriate recipient of motions, petitions, and the like filed in this proceeding and the Commission reminds all parties in this proceeding to adhere to this requirement in the future.

Commissioner Pitofsky did not participate.

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IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, August 1, 1978

Clarification of Commission's position in adopting after modification of ALJ's protective order.

ORDER

On January 31, 1977, the Commission adopted, with modification, Paragraph 9 of the protective order issued by the administrative law judge, which paragraph had been certified to the Commission. [89 F.T.C. 107]

It has come to the Commission's attention that certain respondents who are appealing a District Court judgment enforcing the subpoenas issued to them in this matter (*FTC v. Anderson*, No. 77-1032 (D.C. Cir.)) have raised on appeal an issue concerning the scope of the protective order as adopted by the Commission. The issue, which they did not raise before the Commission or before the District Court, is whether the Commission has committed itself to give ten days' notice before disclosing respondents' "confidential" documents *sua sponte* or in response to requests not explicitly named in the order, such as requests that are not made pursuant to the Freedom of Information Act.

Paragraph 9 of the administrative law judge's protective order originally provided:

9. Notwithstanding any of the foregoing provisions, in the event of a Freedom of Information Act request or an official request from any Congressional committee or subcommittee for disclosure of any document designated "Confidential" hereunder or any information contained therein, authorized representatives of the Commission's Office of General Counsel may inspect the document for purposes of advising the Commission on the request and defending the Commission's interests in court. Furthermore, the Commission shall provide the party which supplied a confidential document with ten (10) days' notice prior to releasing the document in response to such a request or otherwise. [Emphasis added.]

In modifying Paragraph 9 to provide for qualified notice in the event of certain congressional requests or judicial compulsory process, it was the Commission's intent to affirm and retain the administrative law judge's language providing an unconditional ten days' notice before disclosing documents in response to Freedom of Information