

Interlocutory Order

92 F.T.C.

## IN THE MATTER OF

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

TRR 215-60. Interlocutory Order, Nov. 17, 1978

## ORDER DENYING PETITIONS TO RECONSIDER

The Commission has before it, upon certification by the presiding officer, three petitions<sup>1</sup> urging that it suspend proceedings in this matter and reconsider all actions previously taken by the Commission herein. A fourth petition requests that the proceedings be delayed and that the presiding officer step aside or be removed by the Commission.<sup>2</sup> The petitions have been filed in light of the decision of the District Court in *Association of National Advertisers, Inc., et al. v. Federal Trade Commission, et al.*, No. 78-1421 (November 3, 1978), ordering that Chairman Pertschuk cease further participation in this proceeding.

Except to the extent noted herein, the petitions are denied for the following reasons:

1. As a preliminary matter, we note that the District Court did not order that the Commission take the action requested by petitioners in order to eliminate the "taint" believed by the Court and petitioners to result from the Chairman's participation, nor does it appear to the Commission that the Court was of the view that action of this sort might be necessary. In ordering that the Chairman withdraw from further participation, the Court concluded that its immediate intervention was required because "*continued* participation of the Chairman would render the proceedings void and so irrevocably tainted that any final determinations which might flow from such proceedings would be invalid" (Opinion, p.5, emphasis added.) In resolving only to order disqualification of the Chairman, the Court had before it plaintiffs' prayer that it suspend and order reconsideration of the entire proceeding. Complaint Prayer ¶4, p.7. The Court did not grant the requested relief. Accordingly, we reject any suggestion that reconsideration of our decision or modification of

<sup>1</sup> "The Chocolate Manufacturers Association's Petition to Reconsider the Proposal and Procedures Previously Announced for this Proceeding in Light of the Disqualification of the Chairman;" "Petition for Reconsideration and Redetermination of the Decision to Commence the Children's Advertising Trade Regulation Rule Proceeding and of All Decisions Made Subsequent Thereto in Which the Chairman Participated and for Postponement of Proceedings," filed by American Association of Advertising Agencies, Association of National Advertisers, Inc., American Advertising Federation, Toy Manufacturers of America, Inc., Association of Independent Television Stations, Inc., and National Association of Broadcasters; "Kellogg Company's Petition to Rescind and Withdraw the Initial Notice of Proposed Rulemaking, and to Reconsider All Matters Which the Commission has Previously Decided in Connection with this Proceeding, in Light of the Disqualification of the Chairman."

<sup>2</sup> "GMA Motion for Extension of Deadline and Notice of Cause to Believe that Grounds Exist for Disqualification of Presiding Officer."

the proceedings in any way is necessary as a matter of law to cure any injury that may be thought to have occurred or been threatened by the Chairman's participation in this matter.

2. The foregoing notwithstanding, members of the Commission have *sua sponte* given considerable thought to the questions raised by petitioners since the District Court's ruling was issued on November 3, 1978. Having done so, it is the Commission's view that there exists no basis for modification of any of the Commission's earlier decisions in this matter, and that the public interest would best be served by continuation of this proceeding along the course previously set forth, without delay.

The determination to commence this rulemaking proceeding, and subsequent procedural determinations along the way, have all been made by the unanimous vote of the Commission, based upon the independent judgment of each Commissioner. *De novo* reconsideration of these issues has not led any of the Commissioners now participating in this matter to conclude that a different course of action should have been, or should now be taken. In particular, upon *de novo* reconsideration the Commission is of the view that the material presented by its staff indicates that certain advertising directed to children may be deceptive or unfair within the meaning of Section 5 of the Federal Trade Commission Act, and that the public interest would best be served by consideration of these possible violations of law and possible remedies thereto as set forth in detail in the Commission's Notice of Proposed Rulemaking, 43 F.R. 17967, *et seq.* To be sure, members of the Commission are not without significant reservations about portions of its staff's contentions, as were detailed in statements issued by individual Commissioners at the time this rulemaking proceeding was commenced, as well as in the questions raised in the Notice of Proposed Rulemaking. The manner in, and extent to which these reservations and other issues are addressed in the rulemaking proceeding will determine whether a rule should issue in this matter and, if one does, what its terms should be. Notwithstanding these reservations, however, it was the determination of each Commissioner in April 1978, and upon *de novo* reconsideration, it remains the determination of the Commission that a rulemaking proceeding is legally warranted and in the public interest.

The Commission has also reconsidered, and finds no reason to disturb, procedural determinations announced in the Notice of Proposed Rulemaking and subsequent to the institution of the

rulemaking proceeding.<sup>3</sup> In particular, with respect to the choice of a presiding officer, which was made by the Chairman, it should be noted that this was done with the approval of the other Commissioners. It is now the *de novo* determination of the Commission, without the participation of the Chairman, that Mr. Needelman was and is appropriately designated and is well-qualified to preside in this matter, and should continue to preside. Having reviewed the allegations of the parties and Mr. Needelman's certifications in response thereto, the Commission finds no reason whatsoever to question the impartiality or appearance thereof with which Mr. Needelman has addressed the issues presented to him, and the Commission has complete confidence that he will address issues that arise in the future in similar fashion.

For the foregoing reasons, *it is ordered*, That the petitions to reconsider are granted insofar as they request *de novo* reconsideration of the rulings previously made by the Commission in this proceeding. In all other respects the petitions are denied. Upon said *de novo* reconsideration, the previous actions of the Commission, including designation of the presiding officer, are reaffirmed and it is directed that the rulemaking proceeding shall proceed as scheduled.

Chairman Pertschuk and Commissioner Pitofsky did not participate.

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<sup>3</sup> These include:

- a. The procedures set forth in the Federal Register notice of April 27, 1978.
- b. Order Denying Chocolate Manufacturer's Petition (July 31, 1978).
- c. Order Denying Various Petitions (July 31, 1978).
- d. Approval of Investigational Resolution, Unnamed Firms Engaged in Children's Advertising, File No. 782-3055 (April 4, 1978), and the closing of the earlier investigation, File No. 762-7037 (September 12, 1978).
- e. Appointment of Morton Needelman as Presiding Officer.

IN THE MATTER OF  
SEARS, ROEBUCK AND CO., ET AL.

*Docket 9104. Interlocutory Order, Nov. 22, 1978*

ORDER REJECTING CERTIFICATION AND DENYING MOTION TO  
STAY PROCEEDING

Respondent Sears, Roebuck and Co. (Sears) on September 25, 1978 moved before the administrative law judge (ALJ) for an order certifying a consent agreement executed by Sears but not agreed to by complaint counsel. By order of November 7, 1978, the ALJ certified the consent agreement to the Commission expressing the belief that the proposed consent order should be brought to the attention of the Commission because it raised a "law enforcement policy matter beyond the province of the law judge which only the Commission can properly evaluate." Although complaint counsel asserts that this language fails to meet the mandate of Rule 3.25(b), requiring that the law judge find a likelihood of settlement before certifying such orders to the Commission, we believe that a fair reading of the certification as a whole reflects the ALJ's conclusion that resolution of the proceeding on the basis of the proffered order is likely.<sup>1</sup>

Respondent's settlement proposal differs from the notice order attached to the complaint in that it is limited in coverage to dishwashers, the performance of which was allegedly misrepresented by respondent. By contrast, the notice order applies to "major home appliances" which "includes (but is not limited to) air conditioning units (room or built-in); clothes washers; clothes dryers; disposers; dishwashers; trash compactors; refrigerators; refrigerator/freezers; freezers; ranges, stoves, and ovens, stereophonic consoles and nonportable stereophonic sound systems and components; television receivers; and room humidifiers and dehumidifiers." [Notice Order, Part II, 5.] Additionally, the proposed agreement filed by Sears requires the Commission to act on a motion to modify the consent order within certain time periods if the Commission promulgates a trade regulation rule or guide concerning the practices covered by the order and where the rule or guide is less restrictive than the order.

<sup>1</sup> We would point out, however, that the law judge is within his authority to comment on the adequacy of any proposed settlement in light of the evidence presented in the case as well as outstanding orders of a similar nature involving other respondents. The ALJ's analysis of particular order provisions in the context of a certification under Rule 3.25(d) (irrespective of whether those provisions are addressed to specific violations of record or offered as "fencing-in" provisions) is not dramatically different from the analysis which the ALJ must perform when he considers the issue of relief in the course of his initial decision.