

Interlocutory Order

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, March 27, 1981

Denial of motion for review of ALJ's orders of Jan. 29, 1981 and Feb. 13, 1981.

ORDER

On February 19, 1981, Respondent Standard Oil of California ("SOCAL") sought Commission review of ALJ Timony's January 29, 1981, order denying respondent SOCAL, Standard Oil of Indiana ("SOIND") and Exxon Corporations' ("Exxon") renewed application for discovery on the "reason to believe issue". SOCAL additionally sought "correction" of ALJ Timony's February 13, 1981, order denying interlocutory review of that order. Respondents SOIND and Exxon have joined in SOCAL's request for Commission review of these two ALJ orders.

Under the Commission's Rule of Practice 3.22 all discovery motions are to be addressed to the ALJ, and will be ruled upon by him. Pursuant to his authority, Judge Timony has denied respondents' discovery request. Respondents now request the Commission to exercise its discretion to review the ALJ's orders. While we may exercise such discretion under Rule of Practice 3.23(a) as to certain limited categories of filings, ALJ Timony's orders of January 29, 1981, and February 13, 1981, do not fall within any of these categories.

In addition, pursuant to Rule of Practice 3.23(b), ALJ Timony by his order of February 13, 1981, made the determination that his January 29, 1981, order does not involve a controlling question of law or policy.

Therefore, the respondents' motion is denied.

courts. Once the Commission has resolved these questions and issued the complaint, the issue to be litigated is not the adequacy of the Commission's pre-complaint information or the diligence of its study of the material in question but whether the violation has in fact occurred. *Exxon Corp.*, 83 F.T.C. 1759, 1760 (1974).²

See *Boise Cascade Corp. v. FTC*, No. 80-305 (D. Del., Sept. 30, 1980) at 7-9, *aff'd*, No. 80-2462 (3d Cir. Feb. 4, 1981).³

II

Respondent also contends that "industry and congressional pressure impermissibly influenced the filing of this complaint." Respondent, however, does not allege any facts which would even remotely support this allegation.

Aside from its bald claim of "congressional pressure," respondent neither alleges nor describes any congressional contact or involvement, proper or otherwise, with the Commission's investigation of respondent. The industry "pressure" apparently consists of complaints which were brought to this agency's staff by business rivals of respondent who might benefit if respondent were ordered to alter its practices. That the Commission may have investigated allegations by interested complainants, and ultimately made an independent determination it had "reason to believe" the law was being violated, imparts no impropriety to the Commission. Respondent has failed to allege, let alone establish, facts sufficient to overcome the strong presumption of regularity that attaches to the Commission's law enforcement actions. See, e.g., *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926); *FTC v. Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 975 (D.C. Cir. 1980); *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 696 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949).

III

Nor has respondent shown that the Commission improperly failed to name suppliers of respondent as parties. The selection of alleged law violators to be named in a complaint is a matter of prosecutorial discretion. As the Supreme Court stated in *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958), "[T]he Commission alone is empowered to develop that enforcement policy best calculated to achieve the

² *FTC v. Standard Oil Co.*, 101 S.Ct. 488 (1980), decided after respondent filed this motion, held that "the issuance of a complaint" by the Commission is neither "final agency action" nor otherwise "directly reviewable," 5 U.S.C. 704, before the administrative adjudication concludes. It did not reach the question whether the issuance of a complaint is "committed to agency discretion by law," 5 U.S.C. 701(a)(2), and hence is excepted from judicial review once the agency issues a final order. 101 S.Ct. at 492-93 n. 7, 496 n.13.

³ Once a complaint issues, "only in the most extraordinary circumstances" will the Commission review its reason to believe and public interest determinations. E.g., *TRW, Inc.*, 88 F.T.C. 544 (1976). Respondent has made no showing that any such extraordinary circumstances are present here.

ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically." See also *FTC v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Ger-Ro-Mar, Inc. v. FTC*, 518 F.2d 33 (2d Cir. 1975). The Court has specifically recognized the Commission's discretion not to name sellers as respondents in a Section 2(f) case. See *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 79 (1953). In view of the availability of discovery, respondent has not shown that the absence of suppliers as parties will preclude adequate litigation of the Section 2(a) issues in this proceeding.⁴

IV

Finally, respondent argues that the adjudicatory proceeding is in fact a disguised rulemaking because one of the issues, "whether the competing principles of *Doubleday* or of *Mueller*⁵ should be applied to dual distributors under the Robinson-Patman Act," is a "legislative" issue which "impacts upon all suppliers to dual distributors ***." However, "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); see *Beltone Electronics Corp. v. FTC*, 402 F.Supp. 590 (N.D. Ill. 1975). It is well recognized that "adjudicated cases may and do *** serve as vehicles for the formulation of agency policies which are applied and announced therein," and that such cases "generally provide a guide to action that the agency may be expected to take in future cases." *NLRB v. Bell Aerospace Co.*, 416 U.S. at 294. Respondent has not persuaded us that the legal issues to be addressed in this case are inappropriate for resolution in the course of an adjudicatory proceeding. Accordingly,

It is ordered, That the aforesaid motion, insofar as it was certified to the Commission, be, and it hereby is, denied.

⁴ Complaint counsel have represented that before trial they will furnish respondent a list of between five and ten manufacturers whose sales will provide the basis for the Section 2(a) violations. Respondent therefore will not be "confronted with a universe of conceivable claims that might be advanced concerning any one or more of hundreds of thousands of transactions involving over 24,000 different products, sold by many hundreds of suppliers." (Respondent's Brief at 13.) Moreover, non-party suppliers who believe that their interests may be adversely affected by the proceeding may move to intervene pursuant to Section 3.14 of the Rules of Practice.

⁵ *Mueller Co.*, 60 F.T.C. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963); *Doubleday & Co.*, 52 F.T.C. 169 (1955).

IN THE MATTER OF

OWENS-CORNING FIBERGLAS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF
THE CLAYTON ACT

Docket C-3061. Complaint, March 30, 1981—Decision, March 30, 1981

This consent order requires, among other things, a Toledo manufacturer of glass fiber products, including glass fiber-based asphalt roofing products, to divest to a Commission-approved buyer within 24 months from the effective date of the order, the four specified asphalt roofing plants acquired from the Lloyd A. Fry Roofing Company in 1977. Further, should the company decide to sell the Trumbull asphalt refinery located adjacent to each divested plant, during the ten-year period following the divestiture, it is required, in certain circumstances, to give the owner of the roofing plant the right of first refusal to purchase. Additionally, the firm is barred for ten years, from acquiring without prior Commission approval, any interest in an asphalt roofing plant located in the "Western Market."

Appearances

For the Commission: *David W. Long.*

For the respondent: *James T. Halverson and Gregory Bentley,*
Shearman & Sterling, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Owens-Corning Fiberglas Corporation ("OCF"), a corporation subject to the jurisdiction of the Commission, has violated Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45(a)(1)), through the acquisition of certain assets of Lloyd A. Fry Roofing Company ("Fry") and that a proceeding in respect thereof is in the public interest, hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definitions shall apply:

(a) *Asphalt roofing products* means saturated felt, roll roofing and