

IN THE MATTER OF
GENERAL MOTORS CORPORATION

Docket 9145. Interlocutory Order, March 7, 1984

ORDER

By letter of November 1, 1983, Chairman Florio of the House Subcommittee on Commerce, Transportation, and Tourism of the Committee on Energy and Commerce requested access to certain materials in the so-called "GM Defects" case, D. 9145. [102 F.T.C. 1741 (1983)] Generally, the Commission takes the position that it has no authority to withhold information that is responsive to an official request of a congressional committee or subcommittee acting within its jurisdiction. *See* 15 U.S.C. 57b-2(b)(3)(C), 57b-2(d)(1)(A); 5 U.S.C. 552(c). *See also, e.g., Ashland Oil Co. v. FTC*, 409 F.Supp. 297 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976).

The materials responsive to Chairman Florio's request have been subject to a protective order that was entered by the administrative law judge in December 1980. That protective order limits access to the documents to Commission employees involved in the conduct of the proceeding and ostensibly precludes the Commission from authorizing their transmittal to Congress. Although an ALJ's order that purports to preclude the Commission from complying with an official congressional request for access is of doubtful validity, the Commission concluded that notice of its intention to disclose was appropriate and, on November 23, 1983, it issued an order that General Motors Corporation ("GM") show cause why the ALJ's order should not be modified to conform to the confidentiality provisions of the FTC Act. GM filed a response to that order on December 22, 1983.

General Motor's Response ("Res.") makes three arguments in opposition to the proposed modification. In addition, it requests access to the internal FTC staff memoranda responsive to Chairman Florio's request, return of the documents it submitted as well as of all copies made by staff, and permission to make an *in camera*, oral presentation to the Commission.

A. *GM's Arguments in Opposition and Disposition*

1. Modification After GM's Production in Reliance is Unfair

GM first argues that it is "unfair" for the Commission to "rewrite" its obligations after the company has provided documents in reliance on the order. It points out that "[t]he preamble to the Order straightforwardly declares that it has been 'stipulated and agreed to' by coun-

sel for both General Motors and the Commission." Res. at 2. Finally, the company argues that the order to show cause offers two justifications for modification, both of which "were in existence and known to the Commission when the Order was issued" (*id.*), and neither of which provides, in GM's view, "basis for any subsequent modification." *Id.*

An ALJ has no authority to issue orders that are inconsistent with applicable law, Commission decisions, policy directives or the rules. See 16 C.F.R. 0.14. To the extent, therefore, that the ALJ's order in this case bars the Commission from fulfilling its obligation to provide documents in response to official requests of the Congress, it has no force and effect. Nevertheless, as a matter of fairness, the Commission determined to notify the company before responding to Chairman Florio and it issued the November 1983 show cause order. The Commission believes that because its consistent policy has been to provide documents in response to official congressional requests—a fact which has been no secret to the major companies subject to the Commission's jurisdiction¹—the agency has acted with scrupulous attention to fairness by offering GM formal notice of its intentions and soliciting its views.

Not only have other major companies been aware of the Commission's policy and practice with respect to official congressional requests (*see* note 1 *supra*), but also, GM itself has long been cognizant of the Commission's position by virtue of filings in the subpoena enforcement proceeding that preceded document production in the defects case. *FTC v. General Motors Corporation*, No. C-80-276 (N.D. Ohio 1980). Immediately prior to the enactment of the FTC Improvements Act of 1980, the district court had issued a protective order covering most of the documents subsequently made subject to the ALJ's protective order. The court order, which has now expired, limited access to the documents to FTC employees involved in the defects proceeding. Commission counsel sought to convince the court, prior to its issuance of the order, that it should conform the decree to the confidentiality provisions of the FTC Improvements bill, which was then expected to be passed by Congress within days. The court declined. Subsequently, the Commission filed a motion seeking partial relief from the order and arguing specifically for terms that would allow the Commission to provide the documents to Congress in the event they were responsive to an official access request. GM responded vigorously in opposition to the proposed change, among other things, referring to comments that had been made by the court in chambers on what it termed "the inherent tension between *hypothetical* congressional requests for documents and whatever order the

¹ See, e.g., *Ashland Oil Co. v. FTC*, *supra*; *Exxon Corp. v. FTC*, 589 F.2d 585 (D.C. Cir. 1978).

Court might impose." Respondent's Statement in Opposition to Petitioner's Motion for Relief from Order at 6 (emphasis added).

GM's argument opposing the Commission's current move to modify the similarly restrictive order of the ALJ is therefore inconsistent with its previous suggestion that absent an actual request, the basis for modification was too hypothetical. Moreover, its suggestion that the Commission was, or should have been, aware of the problem of congressional access in 1980 but chose to do nothing is ill-founded. As noted, the Commission did attempt to seek modification of the court's order and, when these efforts failed, complaint counsel should not be faulted for not pursuing the matter before the ALJ while a court order remained in effect that would have superseded any inconsistent provision in an order issued by an ALJ.

In light of the above, the Commission does not believe that modification of the protective order at this time would treat the company unfairly, and it does not consider GM's claims in this respect to bar such a modification.

2. Modification Not in Commission's Interest

The GM memorandum suggests first that because the proposed modification was triggered by Chairman Florio's request for access to the protected documents on behalf of his subcommittee, the Commission's purpose is "to assist that congressman" (Res. at 6) rather than "to advance the interests of the Commission * * * [which] already enjoys full access to the documents." Res. at 7. GM then asserts that "Congress does not need the Commission's help * * * [because it] retains its full constitutional authority to seek discovery of the General Motors documents directly from General Motors." *Id.* Last, GM argues that the modification, if implemented, would cause future parties to be reluctant to provide documents to the Commission pursuant to a protective order "if such an order can be summarily rewritten by the Commission to restrict or even rescind the proffered protection." *Id.*

GM's suggestion that providing documents to Chairman Florio assists the congressman but not the Commission is without merit. Clearly, it is in the Commission's interests to comply with its legal obligations, including those under which it is bound to provide information to Congress upon receipt of an official request. As to the question whether parties might be deterred in the future from providing documents under protective orders issued by ALJ's, parties always are entitled to certain statutory protections and to additional safeguards included in the Commission's rules. These protections have been held by the courts to afford adequate protection for companies responding to compulsory process, and the Commission may not

modify a protective order in a manner that is inconsistent with the law or its own rules.

3. Practical Alternative Better Than Modification

Finally, GM suggests a "common sense alternative" to the proposed modification—"General Motors is willing to consider, on a document-by-document basis, allowing the Commission to release such documents to Congress or appropriate law enforcement agencies." Res. at 8. This alternative is predicated both on a recognition that some of the material may be less confidential in 1984 than when it was produced in 1980 and on the condition that the Commission will permit GM to inspect documents, including staff memoranda, that are responsive to official congressional or law enforcement agency requests for access, including this one.

GM's alternative is unacceptable because it would require the Commission to divulge to the company its internal deliberations and those of its staff. The internal memoranda and related documents responsive to Chairman Florio's request consist largely of predecisional and deliberative material such as analyses, opinions and recommendations about the conduct of the then pending investigation. The staff documents also constitute attorney work product that would reveal the mental impressions of the legal staff in preparation for litigation. The documents, therefore, are both exempt from mandatory public disclosure under the Freedom of Information Act (*see NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975)) and privileged from civil discovery. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324-25 (D.D.C. 1966), *aff'd on opinion below*, *V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967). The Commission declines to waive either of these protections by acceding to GM's alternative course of action.

B. GM's Other Requests and Disposition

For the reasons stated immediately above, the Commission denies GM's request for access to the internal Commission documents responsive to Chairman Florio's request. In addition, because it seems unlikely that GM will raise any arguments that would justify refusing to modify the order so as to permit transmittal of the documents in question to the Subcommittee, the Commission does not believe that oral argument on this matter is warranted.

GM's final request is for return of all documents submitted to the Commission as well as all copies of such materials that may have been made by the Commission staff. GM acknowledges that the Commission staff "was acting within its authority" to make copies of the company submissions (Res. at 10), but it proffers no argument to

justify their being surrendered to the company. Requests for return of documents are governed by Section 21(b)(5) of the FTC Act, 15 U.S.C. 57b-2(b)(5), and Section 4.12 of the Commission's Rules of Practice, 16 C.F.R. 4.12 (1983). Both of these provisions specify that the Commission must return company-submitted documents to their submitter at the close of any proceeding arising out of the investigation in which the documents were obtained, and both also allow the Commission to retain copies of those documents. In addition, Rule 4.12(b) provides:

The Commission will not return to the submitter copies of documents made by the Commission unless, upon a showing of extraordinary circumstances, the Commission determines that return would be required in the public interest.

GM has made no showing of extraordinary circumstances to justify its request for return of all copies of its submissions. The Commission however, hereby directs the Secretary to arrange for the prompt return of original submissions as required by the statute and Rule 4.12.

C. ORDER

In light of the above discussion:

It is hereby ordered, That the protective order issued by the ALJ be modified as described in the Order to Show Cause including provision for both congressional access and access by law enforcement agencies in a manner consistent with the confidentiality provisions of the FTC Act and the Commission's Rules, 15 U.S.C. 46(f), 57b-2(b), and 16 C.F.R. 4.10-4.11 (1983); and

It is further ordered, That GM's request for access to the Commission's internal documents be denied under Exemption 5 of the Freedom of Information Act; and

It is further ordered, That GM's request for return of all copies of documents it submitted to the Commission be denied; and

It is further ordered, That GM's request to make an oral presentation be denied.

IN THE MATTER OF
CLIFFDALE ASSOCIATES, INC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 9156. Complaint, July 7, 1981—Order, March 23, 1984

This order requires a Westport, Conn. firm and two individuals engaged in the advertising, sale and distribution of an automobile retrofit device variously known as the Ball-Matic, the Ball-Matic Valve, the Ball-Matic Gas Saver Valve and the Gas Saver Valve, among other things, to cease representing that the device is a unique or new product; and that it is needed on every vehicle except Volkswagens, diesels and fuel-injection vehicles. The company is barred from making fuel economy improvement claims for the device unless it can reasonably support those claims with competent and reliable substantiation. The order further prohibits the firm from representing that a consumer endorsement is a typical experience of a user of the product; using any endorsement unless they have good reason to believe that the endorser subscribes to the facts and opinions set forth in that endorsement; and failing to disclose any material relationship existing between the endorser and respondents. Additionally, the company may not make any unsubstantiated energy savings claims for any product or misrepresent the results of any test or survey.

Appearances

For the Commission: *William Haynes* and *Wendy Kloner*.

For the respondents: *Solomon H. Friend* and *Jerold Dorfman*,
Friend, Dorfman & Marks, New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Cliffdale Associates, Inc., a corporation, Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, hereinafter sometimes referred to as "respondents," have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Cliffdale Associates, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 180 Post Road, East, Westport, Connecticut.