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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
HOUSTON LIGHTING & POWER COMPANY et al.	)	Docket Nos. 50-498A 50-499A
(South Texas Project, Units 1 and 2)	)	
TEXAS UTILITIES GENERATING COMPANY	)	Docket Nos. 50-445A 50-446A
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

MEMORANDUM OF HOUSTON LIGHTING & POWER COMPANY CONCERNING AUTHORITIES RELEVANT TO THE DISCOVERABILITY OF DOCUMENTS GENERATED IN CONNECTION WITH SETTLEMENT

By Order of March 28, 1980, this Appeal Board requested the parties to furnish additional authority bearing on whether courts do or ought to recognize the existence of a privilege against discovery of documents generated in settlement negotiations. Houston Lighting & Power Company respectfully submits this memorandum in response.

In this memorandum we make two basic points:

(1) While the pertinent case law is not extensive and arises in diverse contexts, it does reflect this important common theme: in recognition of the important public policy to encourage compromise, courts and tribunals will recognize a "privilege" against discovery of documents generated solely in connection with settlement negotiations unless the party seeking disclosure demonstrates extraordinary circumstances. Mere "suspicion" of abuse is not enough.

(2) The existence of such a privilege is supported by the Federal Rules of Evidence and the policies underlying them.

I.

THE APPLICABLE CASE LAW REFLECTS THE PRINCIPLE THAT DOCUMENTS GENERATED SOLELY IN CONNECTION WITH SETTLEMENT NEGOTIATIONS SHOULD BE PROTECTED FROM DISCOVERY, AS A MATTER OF PUBLIC POLICY, ABSENT A DEMONSTRATION OF EVIDENCE OF EXTRAORDINARY CIRCUMSTANCES BY THE PARTY SEEKING DISCOVERY

In this section of this memorandum we discuss the pertinent case law. We discuss separately the pertinent feder-

al agency decisions, and cases relied upon below by the movants, and conclude by analyzing these authorities as a whole.

A. Federal Court Decisions

Most of the pertinent federal court decisions have arisen principally in two types of cases, actions brought under Title VII of the Civil Rights Act of 1964 [1/] for discrimination in employment, and actions brought under the antitrust laws. We turn to the antitrust decisions first.

Requests for discovery of settlement-related materials have been rejected on several occasions in federal antitrust cases. For example, in City of Groton v. Connecticut Light & Power Company, 84 FRD 420 (D.Conn. 1979), several among a group of plaintiffs decided to settle a case brought against an electric utility company. The non-settling plaintiffs, claiming they had been excluded from the settlement negotiations, sought the terms of the settlement agreement itself, asserting, apparently largely on the basis of suspicion, that disclosure could reveal additional anticompetitive activities by the defendants. 84 FRD at 423.

1/ 42 USC §2000e.

The Court found this an insufficient basis to warrant disclosure. It pointed out that discovery of the settlement dollar amounts would give the non-settling plaintiffs a "bargaining advantage" (since they would know the dollar amount given to others would be a "floor" at which they could begin their bargaining). Thus, the effect of the decision in future cases would be to disincline plaintiffs from being the first among a group to settle. The ultimate consequence of disclosure would have been to inhibit compromise in subsequent cases. 84 FRD at 423.

Both Ayers v. Pastime Amusement Co., 240 F.Supp. 811, 812 (E.D.S.C. 1965) and Rohlfing v. Cat's Paw Rubber Co., 20 F.R.Serv. 541 (N.D. Ill. 1954) presented similar situations. In Ayers, a non-settling defendant was not permitted to discovery materials generated in connection with settlement negotiations between plaintiffs and other defendants which culminated in a covenant not to sue. While the court expressed a particular concern for avoiding incursions into the files of an attorney, the policy reasons underlying its decisions apply with some force here. In Rohlfing, too, where a defendant sought materials generated in connection with settlement dismissals negotiated by other parties, and sought them apparently because it suspected documents adverse to the plaintiff might thus be obtained, the court refused

to order production of anything more than the settlement agreements themselves.[3/]

Under Title VII of the Civil Rights Act, the Equal Employment Opportunity Commission (EEOC), in order to maintain an action, must first be unable to obtain a satisfactory conciliation agreement. It is a defense to Title VII actions brought by the EEOC to establish that the Commission did not engage in good faith efforts at conciliation.[4/] In Haykel v. G.F.L. Furniture Leasing Co., 76 FRD 386, 392, 395-96 (N.D.Ga. 1976) defendant G.F.L., upon being sued by the EEOC and a former employee, sought to obtain the conciliation material in the EEOC's files.[5/] G.F.L. contended that materials generated in connection with compromise were not privileged from discovery, and that it needed them to test and undermine the EEOC's assertion that it had been unable to obtain an agreeable settlement arrangement. In short,

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3/ Other antitrust decisions, while less directly apposite, have declined to order discovery of settlement-related materials in part owing to recognition of the public policy favoring settlement and the chilling effect of forced disclosure, e. g., Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1218-19 (4th Cir. 1976) (work of non-lawyers regarding settlement in prior litigation included, on policy grounds, under the "work-product" umbrella); United States v. Reader's Digest Association, Inc., 25 F.R.Serv.2d 1303 (D.Del. 1978) (FTC employees not required to answer deposition questions in civil penalty action concerning their subjective thoughts in negotiating a consent decree).

4/ 42 USC §2000e-5(f)(1); e.g., EEOC v. Griffin Wheel Co., 360 F.Supp. 424 (N.D.Ala. 1973).

5/ A copy of the decision is annexed as Exhibit A.

G.F.L. made arguments--lack of privilege and relevance to "justification"--similar to those propounded by the movants below. The EEOC countered, inter alia, that the documents were privileged, by reason of the possible chilling effect disclosure would have upon efforts to compromise. The court agreed:

> Plaintiffs argue with some force the conciliation negotiations should not be subject to discovery since discovery of this material would destroy the openness and informality of the conciliation process. . . . [citations omitted.] Plaintiff's arguments in this respect are meritorious. We can conceive of no purpose which would be served by allowing discovery concerning substantive aspects of conciliation negotiations except permitting one party to improperly gain access to interoffice memoranda and other confidential information.

76 FRD at 392.

Not satisfied, G.F.L. sought reconsideration, claiming that what it really desired was a narrow, in camera inspection of only the documents relevant to its defense. Even if it construed G.F.L.'s request so narrowly, the Court found, discovery would be "improper" in that it could have a chilling effect on settlement negotiations by other parties in the future. 76 FRD at 396.

Solicitude for the possible chilling effect arising from discovery on the parties' reflections on settlement porposals was likewise the basis for the decision in EEOC v. E. I. du Pont de Nemours & Co., 9 FEP Cases 65 (W.D.Ky. 1974).[6/]

6/ A copy of the decision is annexed as Exhibit B.

B. Administrative Decisions in Other Agencies

While the Board's Order expressly requested guidance on how "the courts" do or ought to consider the question at hand, Houston did not understand that order to suggest that the manner in which other federal agencies have dealt with this question would be unwelcome. We are aware of two administrative decisions on point. Black Marlin Pipeline Co., Federal Energy Regulation Commission Docket No. CP-45-93 (Remand), Initial Decision dated Oct. 18, 1979 at 12-13 (Exhibit C hereto); Seeburg Corp., 20 Ad.L.2d 603, 616-17, 20 Ad.L.2d 618, 625 (FTC 1966). (Exhibit D hereto)

Black Marlin Pipeline involved a request for internal documents generated in connection with a settlement proposal by a pipeline company that was the target of a FERC investigative proceeding. It was held that where such documents were not admissible under the Commission's regulations and the Federal Rules of Evidence, they should not be discoverable.

In Seeburg Corp., respondent moved to vacate an FTC complaint, on grounds, inter alia, that contrary to the Freedom of Information Act [FOIA] and due process of law, it had been improperly denied discovery of internal FTC "memoranda commenting on its settlement proposals to the Commission." The materials at issue thus were analogous to those at issue here. The FTC found that such discovery was unwarranted. The Commission noted that FOIA did not enlarge a private litigant's discovery rights in FTC litigation and went on to state that "documents of this nature. . . have hitherto never been considered as subject to discovery in this agency's proceedings." 20 Ad.L.2d at 616. Accord, 20 Ad.L.2d 618, 625.

C. Recent Licensing Board Ruling

Houston also calls to the Appeal Board's attention a recent ruling of the Licensing Board which is relevant in the instant controversy. Discovery revealed that Dr. Norman Lerner, expert economic witness for the Staff in this proceeding, has only once before performed an antitrust analysis in the electric utility industry. This work was done on behalf of the Commission Staff in the Consumers Power Company (Midland) settlement proceeding. 7/ Dr. Lerner there prepared documents analyzing the economic effect of various settlement proposals, documents parallel to those in question here. (Lerner Deposition, July 19, 1979 at 13-14, 28). Because that work offered Houston the only opportunity to discover the economic principles Dr. Lerner has applied in an antitrust analysis of this industry and to test whether he will depart from that prior application in this case, and in light of the Board's ruling here, Houston requested discovery.

The Licensing Board, however, in an oral ruling on March 28, 1980, denied Houston's motion for production of Dr. Lerner's work. While the Board has not articulated its precise rationale, it pointed out in the conference call that the Midland proceeding is not yet settled, and that discovery of analyses of settlement proposals would be denied. 8/

7/ Consumers Power Company (Midland Plant, Units 1 and 2) NRC Docket Nos. 50-329A, 50-330A.

8/ Houston does not seek review of that ruling here. However, we believe it does suggest that the difficulties posed by the Order under review are those which will arise in other contexts.

D. Cases Relied Upon by Movants Below

We are unaware of a single case in which documents of the type in question here, i.e. documents in the nature of studies of settlement proposals, have ever been ordered produced to adverse parties in the course of litigation. None of the cases relied upon by the movants below ordered production of such documents. See United States v. Reserve Mining Co., 412 F.Supp 705 (D.Minn. 1976), aff'd and remanded on other grounds, 543 F.2d 1210 (8th Cir. 1976); In re Special Nov. 1975 Grand Jury, 433 F.Supp. 1094 (N.D.Ill. 1977); Magnaleasing Inc. v. Stanton Island Mall, 76 FRD 559 (S.D.N.Y. 1977).

Reserve Mining involved a penalty proceeding subsequent to the litigation on the merits, wherein sanctions were sought for defendants' concealment of the numerous documents during that litigation. There, the court held that Reserve's assertion of a compromise privilege was untimely and went on to state in dicta that it would have been unavailing even if timely, because the documents in questions were not genuinely prepared solely in connection with settlement proposals and because Reserve was attempting to conceal facts unrelated to settlement proposals. In contrast, here the documents were generated solely in response to and as part of settlement proposals. Reserve Mining simply is not apposite to the situation at hand.

In re Grand Jury involved a grand jury subpoena for personal records of transactions by two trust officers of a bank. The case stands merely for the proposition that records as to transactions will not be withheld from the secret deliberations of grand juries. 9/

Magnaleasing, supra, involved an effort by a judgment creditor to obtain discovery under Rule 69(a) into demonstrably fraudulent transfers of assets to and from defendants made under the veil of "settlement." Even in this context, discovery was strictly confined to portions of the settlement revealing specific transfers of assets. The case bears no relation to the instant situation. See also the analysis in City of Groton v. Connecticut Light & Power Co., supra, 84 FRD at 422-23.

Each of the three cases relied on by movants below involved situations where there was no threat whatsoever that good faith compromise efforts would be chilled by disclosure. One does not need to launder non-settlement documents as in Reserve Mining, hide transactions from the grand jury as in

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9/ Indeed, Federal Rule of Evidence 408 is inapplicable in grand jury proceedings. See Fed. R. Evid. 1101(d)(2).

In a footnote, the court alluded to the argument propounded by the trust officers, that under Reserve Mining, supra only documents created prior to the commencement of settlement negotiations need be produced. The court found this argument "hazardous" and "unduly technical," particularly when made in the context of a grand jury proceeding. 433 F.Supp at 1097 n.2. To the extent the court meant that it is the relationship of the document in question to settlement that should control rather than the date of its composition, we would tend to agree.

In re Grand Jury, or defraud creditors as in Magnaleasing, to settle a case. Moreover, each involved blatant misconduct. The instant situation is the opposite on all counts.

E. Synthesis

The above authorities arise in diverse contexts, and some plainly are more apposite than others. But, fairly read, one common policy does appear in each of them -- an abiding concern that compromise be fostered and not fettered or chilled by unwarranted disclosure. The result is general recognition of the following proposition: documents prepared solely in connection with settlement negotiations should not be subject to discovery by adverse parties, absent a strong demonstration of extraordinary circumstances, such as fraud.

II

THE EXISTENCE OF A SETTLEMENT PRIVILEGE IS SUPPORTED BY FEDERAL RULE OF EVIDENCE 408

Prior to the enactment of Rule 408, compromise negotiations were deemed inadmissible at trial under common law on the theory of irrelevance, i.e., that they merely reflected a desire for peace. The Advisory Committee on the Rules of Evidence found this to be an artificial theory:

> It preferred to base the rule on the public policy favoring the compromise and settlement of meritorious disputes; in other words, it opted for the privilege approach. Advisory Committee Note to Court, Rule 408, 56 F.R.D. 183, 227-228 (1972).

Waltz and Huston, The Rules of Evidence in Settlement, 5 Litigation 11, 13 (Fall 1978); Compare C. McCormick, Law of Evidence §§ 76,251 (1954).

Where material is privileged at trial, policy considerations render it non-discoverable as a general rule. 8 Wright and Miller, Federal Practice and Procedure § 2016 (1970); United States v. Reynolds, 345 U.S. 1 (1953). The reason for this rule is that evidentiary privileges are ordinarily granted to encourage confidential communications and the development of materials related thereto. Permitting discovery of such communications and related materials innerently violates the privilege and moreover creates the risk that once dis-

closed such materials may be used to a party's detriment.

That the Supreme Court and the Congress explicitly carved out an evidentiary privilege regarding settlement negotiations serves to support the corollary proposition that settlement communications are to be protected from unwarranted disclosure via discovery. 11/

11/ The third sentence of Rule 408, referring to evidence "otherwise discoverable" was added so that where a party at trial sought to introduce facts obtained from "independent sources" his opponent could not prevent him from doing so simply by presenting that fact during compromise negotiations. Conference Report quoted in 10 Moore's Federal Practice § 408.01[8] (2d ed. 1979). The Conference Committee clearly thought documents generated solely in connection with settlement negotiations were in a different category from "independent sources."

CONCLUSION

Based on the authorities discussed above, and the arguments advanced in petitioners' previous pleadings and oral argument, Houston respectfully asks the Appeal Board to reverse the Licensing Board's ruling of March 7, 1980, and order that documents generated solely in connection with settlement of this proceeding remain confidential.

Respectfully submitted,

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April 4, 1980

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EXHIBIT A

ceive none and plaintiff has done nothing to enlighten us.

Defendants Sonnenberg and Raychem have filed affidavits which aver that Raychem Corporation has paid certain legal charges for the defense of itself and its employee, Sonnenberg. The underlying rationale for awarding attorney's fees in such a situation is punitive, *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973), and the determination of the amount to be awarded is left to the sound discretion of the trial judge.

We view the awarding of attorney's fees as an extraordinary remedy justified only by the unique circumstances of this case.

It is ADJUDGED and ORDERED that the defendants, Raychem and Sonnenberg, have judgment against the plaintiff, Misegades, Douglas & Levy, etc., for attorney's fees in the amount of $1,680.00.

Marianna T. HAYKEL

v.

G.F.L. FURNITURE LEASING COMPANY.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

v.

G.F.L. FURNITURE LEASING COMPANY.

Civ. A. Nos. 75-276A, 75-1751A.

United States District Court,
N. D. Georgia,
Atlanta Division.

Dec. 16, 1976.

Individual employee of defendant's Atlanta store and Equal Employment Opportunity Commission brought separate actions, which were consolidated, for discrimination in employment, pursuant to Title VII of Civil Rights Act of 1964 and equal pay provisions of Fair Labor Standards Act, praying for injunctive relief, back pay and other equitable relief. The District Court, Richard C. Freeman, J., held that: (1) plaintiffs' discovery motion for production of certain personnel files at defendant's affiliated stores in various cities across country would be granted; (2) however, in order to avoid any undue burden, it was appropriate for defendant to simply produce relevant documents for inspection at respective branch locations; (3) furthermore, defendant was entitled to protective order prohibiting EEOC from distributing material outside agency during pendency of litigation and to return all documents at close thereof; (4) discovery concerning substantive aspects of conciliation negotiations would not be allowed; (5) defendant's motion to vacate prior order of consolidation would be denied; (6) no harm or prejudice to plaintiffs could result from granting defendant's motion for leave to file amended answer so as to deny that district court had subject matter jurisdiction over action; (7) material issues of fact existed regarding defendant's allegedly discriminatory policies with respect to black entry into management levels of its organization and proper geographical area to be used to compile work force comparison statistics, precluding partial summary judgment in favor of defendant; (8) even if defendant's original request for discovery concerning conciliation negotiations were more narrowly construed, discovery would still not be allowed and (9) in light of more fully developed factual record, defendant's motion to reconsider that portion of order allowing plaintiff's discovery as to submanagement positions in defendant's affiliated stores would be granted.

Order accordingly.

1. Federal Civil Procedure ⇐1591

Discovery motion at litigation stage of employment discrimination action brought

pursuant to Title VII of Civil Rights Act of 1964 and equal pay provisions of Fair Labor Standards Act, whereby plaintiffs sought production of certain personnel files at defendant's affiliated stores in various cities across country, would be granted, there being some evidence that salary records were centrally held by defendant's Atlanta store, where alleged discriminatory activity involving individual plaintiff took place, and that Atlanta facility was responsible for appointing managers of outlying stores. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d) as amended 29 U.S.C.A. § 206(d).

2. Civil Rights ⇐31

Equal Employment Opportunity Commission may expand scope of an action beyond parameters of original charge.

3. Federal Civil Procedure ⇐1572

While liberal discovery is encouraged in actions brought pursuant to Title VII of Civil Rights Act of 1964, material sought must comport with traditional discovery notions of relevancy and must not impose undue burden upon responding party. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.

4. Federal Civil Procedure ⇐1634

In order to avoid any undue burden as a result of grant, at litigation stage of employment discrimination action brought pursuant to Title VII of Civil Rights Act of 1964 and equal pay provisions of Fair Labor Standards Act, of plaintiffs' discovery motion for production of certain personnel files at defendant's affiliated stores located in various cities across country, it was appropriate for defendant to simply produce relevant documents for inspection at respective branch locations. Civil Rights Act of 1964, §§ 701 et seq., 709(a) as amended 42 U.S.C.A. §§ 2000e et seq., 2000e-8(a); Fair Labor Standards Act of 1938, § 6(d) as amended 29 U.S.C.A. § 206(d); Fed.Rules Civ.Proc. rule 33(c), 28 U.S.C.A.

5. Federal Civil Procedure ⇐1623

Upon grant of discovery motion for production of certain personnel files at defendant's affiliated stores located in various cities across country, at litigation stage of employment discrimination action brought pursuant to Title VII of Civil Rights Act of 1964 and equal pay provisions of Fair Labor Standards Act, defendant was entitled to protective order prohibiting plaintiff, Equal Employment Opportunity Commission, from distributing material outside agency during pendency of litigation and requiring it to return all documents and copies thereof at close of litigation. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d) as amended 29 U.S.C.A. § 206(d).

6. Civil Rights ⇐32(2)
Federal Civil Procedure ⇐839

To extent that, as result of discovery permitted in employment discrimination action brought pursuant to Title VII of Civil Rights Act of 1964 and equal pay provisions of Fair Labor Standards Act, plaintiff Equal Employment Opportunity Commission desired to broaden scope of litigation, it would be incumbent upon it to first conciliate additional claims and to thereafter seek leave of court to amend complaint sub judice. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d) as amended 29 U.S.C.A. § 206(d).

7. Federal Civil Procedure ⇐1591

Discovery concerning substantive aspects of conciliation negotiations would not be allowed in employment discrimination action brought pursuant to Title VII of Civil Rights Act of 1964 and equal pay provisions of Fair Labor Standards Act. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d) as amended 29 U.S.C.A. § 206(d).

8. Federal Civil Procedure ⇐8

District court would not reconsider its prior determination ordering consolidation of employment discrimination actions commenced by individual employee and by Equal Employment Opportunity Commis-

sion against same employer, as requested by defendant which contended that its former counsel failed to oppose plaintiff's motion for consolidation in belief that settlement was imminent and that common questions of law and fact embodied in actions were insufficient to support prior determination of consolidation. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d) as amended 29 U.S.C.A. § 206(d); Fed.Rules Civ.Proc. rule 42(a), 28 U.S.C.A.

9. Federal Civil Procedure ⇐851

Voicing opposition to a motion to amend is an improper mode through which to raise objections as to legal adequacy of contents of putative amendment.

10. Federal Civil Procedure ⇐834

No harm or prejudice to plaintiffs could result from granting defendant's motion for leave to file amended answer so as to deny that district court had subject matter jurisdiction over employment discrimination action brought pursuant to Title VII of Civil Rights Act of 1964 and equal pay provisions of Fair Labor Standards Act, since district court could raise question of subject matter jurisdiction sua sponte at any point in proceedings. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, § 6(d) as amended 29 U.S.C.A. § 206(d).

On Defendant's Motion for Partial Summary Judgment

11. Federal Civil Procedure ⇐2557

On defendant's motion for partial summary judgment in employment discrimination action brought pursuant to Title VII of Civil Rights Act of 1964 and equal pay provisions of Fair Labor Standards Act, district court had to view facts in light most favorable to party opposing motion and deny motion if a material issue of fact remained. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, §§ 1 et seq., 6(d) as amended 29 U.S.C.A. §§ 201 et seq., 206(d).

12. Civil Rights ⇐9.10

Appropriate work area relevant to hiring practices of employer charged with employment discrimination ought to be that from which work force reasonably should be drawn, and one substantial consideration under such a reasonableness test is area from which employer's present work force is actually drawn. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, §§ 1 et seq., 6(d) as amended 29 U.S.C.A. §§ 201 et seq., 206(d).

13. Federal Civil Procedure ⇐2557

Determination, in employment discrimination action, as to "reasonableness" of area from which work force is drawn generally should not be made on a motion for summary judgment, particularly where case is "large" and entry of summary judgment is only partial. Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A.; Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, §§ 1 et seq., 6(d) as amended 29 U.S.C.A. §§ 201 et seq., 206(d).

14. Federal Civil Procedure ⇐2557

In employment discrimination action brought pursuant to Title VII of Civil Rights Act of 1964 and equal pay provisions of Fair Labor Standards Act, material issues of fact existed as to defendant employer's allegedly discriminatory policies with respect to black entry into management levels of defendant's organization and proper geographical area to be used to compile work force comparison statistics, precluding partial summary judgment in favor of defendant. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, §§ 1 et seq., 6(d) as amended 29 U.S.C.A. §§ 201 et seq., 206(d).

On Motion to Reconsider

15. Federal Civil Procedure ⇐1593

Even if defendant's request in employment discrimination action for discovery of

materials concerning conciliation negotiations were narrowly construed as a request for an in camera inspection of all documents of plaintiff Equal Employment Opportunity Commission relevant to question of whether EEOC had complied with its conciliation termination procedures, discovery would not be allowed, where information sought was already within knowledge of both parties and, with exception of legal consequences, appeared to be undisputed. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, §§ 1 et seq., 6(d) as amended 29 U.S.C.A. §§ 201 et seq., 206(d).

16. Federal Civil Procedure ⇐1271

In light of more fully developed factual record subsequently before district court in employment discrimination action, defendant's motion to reconsider that portion of prior order allowing plaintiffs discovery as to submanagement positions in defendant's affiliated stores, which order was based in part on plaintiffs' representation that they were not given an opportunity to examine applications of persons hired and not hired by defendant, a representation which was, at very least, a good faith error, would be granted. Civil Rights Act of 1964, § 701 et seq. as amended 42 U.S.C.A. § 2000e et seq.; Fair Labor Standards Act of 1938, §§ 1 et seq., 6(d) as amended 29 U.S.C.A. §§ 201 et seq., 206(d).

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ORDER

RICHARD C. FREEMAN, District Judge.

This is an action for discrimination in employment brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and the Equal Pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(d). Plaintiffs pray for injunctive relief, back pay, and other equitable relief due to defendant's alleged unlawful employment practices. The action is presently before this court on: (1) plaintiffs' motion to compel production of certain documents; (2) defendant's motion for a protective order; (3) defendant's motion to compel production of certain documents; (4) defendant's motion to vacate the order of consolidation; and (5) defendant's motion for leave to file an amended answer. The instant motions will be considered seriatim. At this juncture, a brief review of the salient facts is appropriate.

Plaintiff Haykel, the original charging party, alleges that she was denied promotion into a senior sales position or into a management training program when males with less seniority and experience were so promoted. Plaintiff allegedly discussed her situation with defendant's management several times, but received no satisfactory explanation of the defendant's failure to promote her to a higher position. Finally, on July 14, 1972, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission [hereinafter the "E.E.O.C."]. Thereafter, on July 19, 1972, plaintiff was terminated purportedly because of a personality clash between plaintiff and a male employee. Plaintiff followed the appropriate administrative channels and finally filed suit in this court on February 14, 1975.

Plaintiff E.E.O.C., which had investigated and conciliated plaintiff Haykel's claim, brought an independent action in this court against defendant G.F.L. Furniture Leasing

Co. [hereinafter "G.F.L."] on February 14, 1975. Plaintiff E.E.O.C. alleged *inter alia*[1] that G.F.L. had engaged in discrimination on the basis of race and sex with respect to its hiring and promotional policies.

On October 6, 1975, the E.E.O.C. moved to consolidate its action and plaintiff Haykel's individual action. Defendant's counsel obtained several extensions of time within which to respond to plaintiff's motion, but never in fact filed such a response. Defendant now contends that his failure to respond was due to what he believed to be the imminent settlement of this action. In any event, on March 10, 1976, this court ordered plaintiff Haykel's action and the E.E.O.C. action to be consolidated.

PLAINTIFFS' MOTION TO COMPEL PRODUCTION

[1] Plaintiffs move this court to require defendant to produce certain documents pertaining to applications and/or personnel files of employees, applicants and ex-employees employed by defendant in submanagement positions at defendant's affiliated stores in Nashville, Chicago, Corpus Christi, and Houston. Plaintiffs contend that the scope of this suit should include submanagement positions at the non-Atlanta facilities. Moreover, plaintiffs aver that their initial discovery efforts have revealed that defendant's allegedly discriminatory conduct in its personnel selection in Atlanta has had certain prenumbral effects in submanagement as well as management level jobs in defendant's non-Atlanta facilities. Finally, plaintiffs argue that since defendant selects the "branch" managers at the Atlanta facility, discriminatory conduct at the branch facilities is attributable to personnel decisions made at its home office in Atlanta.

Defendant in turn argues that the E.E.O.C.'s investigation only concerned the Atlanta facility and that plaintiffs now seek to extend the scope of this action improperly after the time for such expansion has passed. Moreover, defendant vigorously contends[2] that each of defendant's stores make their own hiring and firing decisions without formal or informal advice from the Atlanta store. Therefore, on the authority of *Joslyn Dry Goods v. Equal Employment Opportunity Commission*, 483 F.2d 178 (10th Cir. 1973), defendant argues that limitation of discovery to the Atlanta facility is appropriate.

[2] At the outset, it is important to note that plaintiffs' requested discovery presented some rather unusual circumstances. It is well settled in this circuit that the E.E.O.C. may expand the scope of an action beyond the parameters of the original charge. *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) (scope of judicial complaint is limited to scope of Equal Employment Opportunity Commission investigation which can reasonably be expected to grow out of a charge of discrimination). However, the instant action presents the question of whether information may be discovered at the litigation stage concerning purportedly independently operated facilities belonging to the defendant when no clear mention[3] has been made of those

1. In pertinent part the E.E.O.C.'s complaint stated that: "[defendant's] unlawful practices include but are not limited to the following:
   (a) Failing to hire because of race;
   (b) Failing to promote because of sex;
   (c) Failing to hire because of sex;
   (d) Discharging females because of their sex;
   (e) Failing to train because of race and sex;
   (f) Maintaining race and sex segregated job classification[s];
   (g) Failing and refusing to take appropriate affirmative action to eliminate its discriminatory employment policies and practices and to correct the effects of past discrimination against blacks and females.

2. Defendant supports these contentions with the affidavit of Mr. Millard Coghlan, President of G.F.L.

3. The original charge only mentioned the Atlanta facility. In addition, the original E.E.O.C. complaint in pertinent part stated that the company "has intentionally engaged in unlawful employment practices at its *Atlanta facility*. However, in its prayer for relief, the E.E.O.C. requested that the court order *the company* to refrain from given activity. Therefore, the question of whether the E.E.O.C. intended to proceed against the company as a whole or only against the Atlanta facility remains somewhat unclear.

facilities at the investigation, conciliation, or pleading stages of the administrative/judicial process.

[3] While it is clear that the Fifth Circuit Court of Appeals has encouraged liberal discovery in Title VII actions, *see, e. g., Georgia Power Co. v. E. E. O. C.*, 412 F.2d 462 (5th Cir. 1969); *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973), it is equally clear that the material sought must comport with the traditional discovery notions of relevancy and must not impose an undue burden upon the responding party. *See* G. Cooper, H. Rabb, and H. Rubin, *Fair Employment Litigation* (1975).

In a case very similar to this one, the Tenth Circuit Court of Appeals held on relevance grounds that the E.E.O.C. was not entitled to discover certain information about six other stores in defendant's chain when the charging party allegedly had been discriminated against by the seventh store and the plaintiff could not refute defendant's affidavit stating that there were no central personnel files or chain-wide hiring policies common to all the stores. *Joslin Dry Goods Co. v. Equal Employment Opportunity Commission*, 483 F.2d 178 (10th Cir. 1973). While we do not disagree with the reasoning in the *Joslin* decision, there are certain distinguishable facts herein which make *Joslin* inapposite. In the instant action there is some evidence that salary records are centrally held by the Atlanta facility and that the Atlanta facility is responsible for appointing managers of the outlying stores. Notwithstanding President Coghlan's somewhat conclusory affidavit, these factors tend to suggest informal involvement if not "policy making" by the Atlanta office. At a minimum, the E.E.O.C. should be entitled to conduct discovery so as to be in a position to controvert defendant's "no central policy making" allegation. Accordingly, we conclude that the documents which the E.E.O.C. requests are relevant. *Foster v. Boise Cascade, Inc.*, 10 F.E.P. 1287 (S.D.Tex.1974) (discovery as to nationwide corporate structure of defendant was proper because evidence of discrimination would justify the granting of an injunction to cover the breadth of geographically proved discrimination and because there was evidence of transfer of managerial personnel between defendant's plants); *Brennan v. J. M. Fields, Inc.*, 488 F.2d 443 (5th Cir. 1973).

[4-6] In addition, we believe that the burdensomeness question bears brief consideration. Since pertinent portions of defendant's records are not kept in one location, production of the documents which plaintiffs request may be somewhat burdensome even though the total number of people employed by defendant only numbers seventy. In order to avoid any undue burden, it is appropriate for defendant to simply produce the relevant documents for inspection at the respective branch locations. *See* Rule 33(c), Fed.R.Civ.P.; 42 U.S.C. § 2000e-8(a).[4] Furthermore, the defendant is entitled to a protective order prohibiting the E.E.O.C. from distributing material outside the agency during the pendency of this litigation and requiring the E.E.O.C. to return all documents and copies of documents discovered under this order at the close of the instant litigation. *Chrysler Corp. v. Schlesinger*, 412 F.Supp. 171 (D.C.Del.1976). Finally, to the extent that as a result of such discovery the E.E.O.C. should desire to broaden the scope of the instant litigation, it would be incumbent upon the E.E.O.C. to first conciliate additional claims and, thereafter, seek leave of court to amend the complaint *sub judice*. *See generally, Equal Employment Opportunity Commission v. Federated Mutual Insurance Company*, C.A.No.75-1925A (N.D.Ga. Sept. 29, 1976, O'Kelley, J.). Accordingly, with the reservations herein-

4. In pertinent part, this section provides that: In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

above expressed, we hereby GRANT plaintiffs' motion to compel the production of documents and GRANT defendant's motion for a protective order.

DEFENDANT'S MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS

[7] Defendant seeks to discover all conciliation material in the E.E.O.C. file. Defendant supports its motion by arguing: (1) that the material in question is not privileged in evidentiary terms; and (2) that defendant does not seek judicial review concerning the conciliation negotiations but rather seeks information concerning the Commission's alleged failure to comply with its own regulations. *See* 29 C.F.R. § 1601.-23. The plaintiffs argue *inter alia:* (1) that discovery must be confined to whether the Commission attempted conciliation and whether it was unable to obtain an agreement acceptable to it; (2) that conciliation efforts are privileged and inadmissible as evidence; and (3) that the Commission's determination that it cannot procure a conciliation agreement is not subject to judicial review.

The defendant cites two cases as being central to the proposition that conciliation material is discoverable; however, *H. Kessler and Company v. Equal Employment Opportunity Commission,* 472 F.2d 1147 (5th Cir. 1973) is clearly inapposite. In *Kessler* the Court of Appeals held that factual information concerning the merits of a charge was disclosable to the parties prior to the commencement of litigation for the purpose of allowing the parties to fully assess the merits of their relative positions in light of all the evidence which had been compiled. The policy reasoning behind this holding has little application to the instant situation in which after the election to commence litigation has already been made, one party seeks to discover all available material concerning conciliation negotiations.

The second case on which defendant places considerable weight is likewise inapposite. In *E. E. O. C. v. Raymond Metal Products Co.,* 530 F.2d 590 (4th Cir. 1970), the court held *inter alia* that the Commission was obligated to give the employer "one last chance" to conciliate before breaking off negotiations. The instant plaintiffs do not seem to contest the correctness of that proposition. *See* 29 C.F.R. § 1601.23. Moreover, defendant seems to have sufficient information to establish the alleged violation by the Commission of this rule without discovering additional material. However, the availability of discovery must not turn upon this court's evaluation of the strength of the parties' positions upon the merits. Rather, we believe that plaintiffs' arguments give us ample reason to deny the instant motion.

Plaintiffs argue with some force that conciliation negotiations should not be subject to discovery since discovery of this material would destroy the openness and informality of the conciliation process and chill the interest of future litigants in undertaking good faith conciliation negotiations. *E. E. O. C. v. DuPont Co.,* 9 F.E.P. 297 (W.D. Ky.1974); *E. E. O. C. v. Griffin Wheel Company,* 360 F.Supp. 424 (N.D.Ala.1973). Plaintiff's arguments in this respect are meritorious. Defendant's requests for all information concerning conciliation negotiations in effect inquires into the *substance* of those negotiations, thereby raising the possibility of producing chilling effects in subsequent conciliation efforts. We can conceive of no purpose which would be served by allowing discovery concerning substantive aspects of conciliation negotiations except permitting one party to improperly gain access to inter-office memoranda and other confidential information. Moreover, even if defendant posited a request for materials dealing purely with the procedural aspects of conciliation negotiations, (i. e. compliance with applicable statutes of limitations) it would seem that discovery would accomplish little since defendants would have almost as much access to this information as would plaintiffs. Therefore, while we cannot say that any discovery request which defendants might make concerning conciliation negotiation material would be denied a *fortiori,* we must conclude that the

instant request is overbroad and unsupported by relevant case authority. Accordingly, for the reasons hereinabove expressed, defendant's motion to compel production of all material concerning conciliation negotiations is hereby DENIED.

DEFENDANT'S MOTION TO VACATE THE ORDER OF CONSOLIDATION

[8] Defendant requests this court to vacate the order of consolidation entered on March 9, 1976, for two reasons. First, defendant contends that its former counsel failed to oppose plaintiff E.E.O.C.'s motion for consolidation after procuring four extensions of time in which to answer, because counsel felt that a settlement was imminent. Second, defendant argues that the common questions of law and fact embodied in these two actions are insufficient to support this court's determination that consolidation was proper. *See* Rule 42(a), Fed.R.Civ.P. After careful consideration, we see no reason to reconsider our determination that consolidation was warranted under Rule 42(a), and, accordingly, defendant's motion to vacate the order of consolidation is hereby DENIED.

DEFENDANT'S MOTION FOR LEAVE TO FILE AN AMENDED ANSWER

[9, 10] Defendant moves this court to allow defendant to amend its answer so as to deny that this court has subject matter jurisdiction over the instant action. Plaintiffs in turn argue the merits of the defense sought to be added by amendment. It is well settled that voicing opposition to a motion to amend is an improper mode through which to raise objections as to the legal adequacy of the contents of the putative amendment. *See generally*, C. Wright and A. Miller, *Federal Practice and Procedure*, § 1484 at 420 (1971). Moreover, leave to amend is freely granted in federal court. *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). Certainly, no harm or prejudice to the plaintiffs could result from granting the amendment since this court may raise the question of subject matter jurisdiction *sua sponte* at any point in the proceeding. In light of the foregoing, defendant's motion to amend its answer is hereby GRANTED.

In sum, this court has today: (1) GRANTED plaintiffs' motion to compel production of certain documents at their present situs; (2) GRANTED defendant's motion for a protective order; (3) DENIED defendant's motion to compel production of certain documents; (4) DENIED defendant's motion to vacate the order of consolidation; and (5) GRANTED defendant's motion for leave to file an amended answer.

IT IS SO ORDERED.

ORDER

This is an action based on discrimination in employment brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e and the Equal Pay provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(d). Plaintiffs pray for injunctive relief, back pay, and other equitable relief due to defendant's allegedly unlawful employment practices. The action is presently before this court on (1) defendant's motion for partial summary judgment with respect to hiring and (2) defendant's motion to reconsider this court's order of December 16, 1976. These motions will be considered seriatim.

DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

[11-14] The gravamen of defendant's argument is that it is entitled to partial summary judgment on the racial discrimination in hiring charge since the percentage of blacks in the defendant's work force exceeds the percentage of blacks in the labor force in the surrounding area.[1] Ac-

1. In support of this argument defendant presents census information pertaining to the Atlanta Standard Metropolitan Statistical Area (SMSA) which it compares with hiring data compiled by the company. Defendant's figures show that while blacks comprised about 21.7% of the relevant population in 1970 and 21.1% of the relevant population in 1975, 23.4% of the persons hired by defendant were black.

cordingly, defendant asserts that systematic discrimination against blacks does not exist as a matter of law. *Robinson v. Union Carbide Corp.*, 538 F.2d 652 (5th Cir. 1976). Plaintiffs respond with a three-fold argument. First, plaintiffs contend that once black employee turnover is taken into account, the statistics reveal that very few black employees were left on the payroll at any given point in time. Second, plaintiffs contend that since blacks were hired into menial hourly positions, there was discrimination in hiring with respect to entry levels higher in the organization. Third, plaintiffs argue that the hiring area relevant to the instant action is the Atlanta-Fulton County area.

Plaintiffs' former argument initially appears to have some merit. Defendant, however, contends that *Robinson v. Union Carbide Corp., supra*, demands that this argument be rejected. In *Robinson*, the Court of Appeals examined the hiring statistics which were scrutinized by the district court and concluded that since the percentage of blacks hired by the company exceeded the percentage of blacks in the relevant work force, the district court was warranted in concluding that Union Carbide did not engage in discriminatory hiring practices. Union Carbide's promotional practices, however, were considered to embody a distinct category of potential discrimination upon which the appellate court reached a contrary result.

It might be argued that the category of discrimination denoted discrimination in "hiring" is only meaningful if we view the act of hiring as suggesting an intention to retain a person in a given position for some finite period of time. If a black is fired from a position and another black is hired to that position, there is no increase in black employment within the firm even though hiring statistics would suggest that the organization had retained an additional black employee. In these circumstances "percentage statistics, standing alone, [would] fail to convey the full picture." *Jones v. Tri-County Electric Cooperative, Inc.*, 512 F.2d 1 at 2 (5th Cir. 1975). If defendant's facility were in fact a revolving door[2] with respect to black employees, then the discrimination in promotion or training charges might be inadequate to deal with the problem since black employees might not be in the organization long enough to be under serious consideration for training or promotion. Nevertheless, it would appear that *Robinson* might preclude denial of the instant motion for summary judgment on the basis of the forgoing argument. While there are certain features which distinguish *Robinson* from the instant action[3] we believe on balance that *Robinson* represents the sense of the law in this circuit. Therefore, we must conclude that plaintiffs' former argument against entry of partial summary judgment is unpersuasive. Accordingly, we must examine plaintiffs' other contentions.

Plaintiffs' second argument is that since blacks were hired into menial hourly positions in defendant's organization, there was discrimination in hiring with respect to the higher entry levels into the organization. Defendant again argues that the question presented by this motion is discrimination in "hiring" and that *Robinson* concludes that question. In this instance, we are unable to agree with defendant's contention since *Robinson* fails to address the thrust of plaintiff's contention that defendant is dis-

2. Plaintiffs contend that while defendants hiring statistics suggest that their organization is 23.4% black, turnovers transform those statistics, with the result that only 4 of the 22 Atlanta employees (18%) are in fact black.

3. Perhaps the most basic distinction between *Robinson* and the instant action is found in the scope of review applied to the two actions. *Robinson* came to the Court of Appeals after a trial on the merits below. Therefore, the appellate court was examining what plaintiffs had in fact proven. In the instant action, we must view the facts in the light most favorable to the party opposing the motion (plaintiffs) and deny the instant motion if a material issue of fact remains. *See* Rule 56, Fed.R.Civ.P. Construed in the latter sense, we are not certain that *Robinson* creates an irrebuttable presumption of no discrimination upon a proffer by defendants of statistics such as those presented in the instant action. *See generally, Ochoa v. Monsanto Company*, 335 F.Supp. 53 (S.D.Tex.1971).

criminating with respect to entry into the organization at different levels[4] (e. g. at management as opposed to line levels).[5] While we believe that plaintiffs have succeeded in raising a material issue of fact with respect to discrimination in hiring at the higher levels in defendant's organization, we need not rest our decision upon that ground alone.

Plaintiffs' third argument is that the labor force relevant to defendant's hiring practices is the Fulton County—City of Atlanta area, *see Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *see also, Chance v. Board of Examiners*, 330 F.Supp. 203 (S.D.N.Y.1971) (general population comparisons rejected where jobs in question—school supervisory positions—were relatively sophisticated) rather than the wider Atlanta Metropolitan area which defendant posits. *See Taylor v. Safeway Stores, Inc.*, 365 F.Supp. 468 (D.Colo.1973) (Standard Metropolitan Statistical area used). According to plaintiff's statistics, blacks represent 36.52% of the civilian labor force in Fulton County and 47.90% of the civilian labor force in Atlanta proper. Therefore, plaintiffs argue that defendant's hiring statistics in fact demonstrate that blacks are underrepresented in defendant's organization.

It is extremely difficult to determine the appropriate labor pool area on purely an *a priori* basis.[6] Rather, "the appropriate work area ought to be that from which the work force reasonably should be drawn." G. Cooper, H. Rabb, and H. Rubin, *Fair Employment Litigation*, at 84 (1975). *See also* J. de J. Pemberton, *Equal Employment Opportunity—Responsibilities, Rights & Remedies*, at 235 (1975). One substantial consideration under such a reasonableness test would, of course, be the area from which defendant's present work force is actually drawn. In any event, a determination as to "reasonableness" generally should not be made on a motion for summary judgment, *see generally*, 10 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2729 (1971) (summary judgment rarely granted in negligence action), particularly where the case is "large" and the entry of summary judgment is only partial. *See generally*, 10 C. Wright and A. Miller, *Federal Practice and Procedure*, § 2732 (1971).

In sum, we believe that material issues of fact remain at least with respect to: (1) defendant's allegedly discriminatory policies with respect to black entry into management levels of defendant's organization; and (2) the proper geographical area which should be used to compile work force comparison statistics. Accordingly, for the reasons hereinabove expressed, defendant's motion for partial summary judgment with respect to defendant's allegedly discriminatory hiring practices is hereby DENIED.

MOTION TO RECONSIDER

Defendant also moves this court to reconsider its order of December 16, 1976, insofar as it ordered (1) that defendant's motion to compel production of "all conciliation material" in the EEOC files be denied; and (2) that plaintiff's motion to compel production of records concerning submanagement positions at defendant's affiliated locations be granted. These rulings will be addressed seriatim.

4. For instance, even if in *Robinson's* terms there was no discrimination with respect to entry into the firm in general, or with respect to promotion, there still might be discrimination with respect to black entry into the higher organizational levels.

5. For example, plaintiffs argue that while there were 11 vacancies for manager-trainees and 17 vacancies in sales and secretarial positions between 1969 and 1976, all of those positions were filled by whites.

6. The debate as to the geographical area which is relevant for statistical comparison purposes is a recurring one. As one author notes: "[i]t is usually to the advantage of a defendant in an urban area to prefer Standard Metropolitan Statistical area (SMSA) data over city population figures because predominantly white suburbs reduce SMSA minority group percentages. On the other hand, an employer located in a suburban area will usually prefer localized data, rather than that for SMSA." G. Cooper, H. Rabb, and H. Rubin, *Fair Employment Litigation*, at 84 (1975).

[15] In the first instance, defendant now argues that what it really requested was a narrow *in camera* inspection of all EEOC documents relevant to the question of whether plaintiff EEOC had in fact properly complied with its conciliation termination procedures. *See* 29 C.F.R. § 1601.-23 *et seq.* However, even if we construe defendant's original request this narrowly, we conclude that it may not be granted. The only legally operative information relevant to the termination of conciliation issue would be agency rules and procedures and the timing and content of the termination of conciliation letters that were issued. This information is already within the knowledge of both parties and, with the exception of the legal consequences which attach thereto, appears to be undisputed. Moreover, to the extent that defendant's request might seek any information which might touch on the substance of conciliation negotiations, it is improper. As we noted in our previous order, "discovery of this material would destroy the openness and informality of the conciliation process and chill the interest of future litigants in undertaking good faith conciliation negotiations." *EEOC v. Avon Products, Inc.*, C.A. No.75-1721A, (N.D.Ga. Jan. 14, 1977) (Henderson, C. J.); *EEOC v. Dupont Co.*, 9 F.E.P. 297 (W.D.Ky., 1974); *EEOC v. Griffin Wheel Company*, 360 F.Supp. 424 (N.D.Ala.1973). Accordingly, for the reasons hereinabove expressed, defendant's motion to reconsider this court's order denying defendant's motion to compel production of certain conciliation materials in the EEOC's files is hereby DENIED.

[16] Defendant also requests that this court reconsider the portion of our order allowing plaintiffs discovery as to submanagement positions in defendant's affiliated stores. In part, our decision was based on plaintiffs' representation that they had "not been given [an] opportunity to examine the applications of persons hired and not hired by defendant." It now appears that this representation was, at the very least, a good faith error, since plaintiffs have entered into certain stipulations with opposing counsel which have yielded a good deal of information concerning defendant's affiliates. In addition, plaintiffs' own brief reveals that they have previously been afforded access to certain data concerning submanagement positions at affiliated stores.[7] Also, defendant has now agreed to answer 56 interrogatories which were previously objected to and which bear on the question of defendant's employment practices at its affiliates. Moreover, careful scrutiny of plaintiff EEOC's complaint suggests on balance that it intended to lodge the instant action against defendant's Atlanta facility.[8] In light of the more fully developed factual record now before this court, we believe that defendant's motion to reconsider is well founded. Accordingly, defendant's motion to reconsider is hereby GRANTED as to the portion of this court's order granting plaintiff's motion to compel the production of documents concerning submanagement positions at defendant's affiliated stores.

In sum, this court has today: (1) DENIED defendant's motion for partial summary judgment; (2) DENIED defendant's motion to reconsider this court's order of December 16, 1976, denying defendant's motion to compel production of certain documents concerning conciliation negotiations presently in plaintiff EEOC's files; and (3) GRANTED defendant's motion to reconsider this court's order granting plaintiffs' motion to compel production of certain documents relative to defendant's employment

7. At page 2 of Plaintiffs' Memorandum In Opposition to Defendant's Motion for Reconsideration of the Court's Order of December 17, 1976, "plaintiff advises this court that its *previous review* of applications of persons not hired at submanagement positions in affiliated stores was solely for the purposes of settlement and not in order to prepare the case for trial."

8. The operative portion of plaintiff EEOC's complaint appears to be paragraph 7 wherein it is stated that "Since July 2, 1965, and continuously up until the present time, the company has intentionally engaged in unlawful employment practices *at its Atlanta facility*, in violation of Section 703 of Title VII of the Civil Rights Act of 1964.

practices at submanagement levels in defendant's affiliated stores.

IT IS SO ORDERED.

Albert KAUFMAN, Plaintiff,

v.

Mary Wells LAWRENCE, Charles Moss, Richard T. O'Reilly, John V. Burns, Frank G. Colnar, Frederick L. Jacobs, Barry E. Loughrane, Martin Stern, Stanley G. Dragoti, Warren J. Kratsky, Arnold M. Grant, Troy V. Post, Emilio Pucci, Catharine Gibson, E. Donald Challis and Wells, Rich, Greene, Inc., Defendants.

No. 74 Civ. 5081 (RLC).

United States District Court,
S. D. New York.

June 23, 1977.

Common stock owner, who had tendered shares pursuant to corporation's exchange offer, brought action on behalf of himself and all other holders of stock, except those who were directors or officers of corporation, and sought right to prosecute action as class action. The District Court, Robert L. Carter, J., held that: (1) although, following denial of motion for preliminary injunction, stock tender offer was consummated, case was not moot and motion for class action determination was viable, and (2) class action was proper, where putative class consisted of approximately 2,000 members dispersed throughout the United States, common questions of law and fact existed, test of typicality was met, putative class was fairly and adequately represented by plaintiff and class counsel, common questions of law and fact predominated over any questions affecting individual members of putative class, and class action was superior to series of individual suits.

Order accordingly.

1. Federal Civil Procedure ⇐187
Injunction ⇐22

Although, following denial of motion for preliminary injunction, stock exchange offer was consummated, case was not moot so as to prevent granting of alternative mandatory injunctive relief, where there had been no trial on merits; thus issues raised in complaints retained their vitality and motion for class action determination was viable. Fed.Rules Civ.Proc. rule 23(a), (a)(1), (b)(3), 28 U.S.C.A.

2. Federal Civil Procedure ⇐163

Numerosity test for class action was met, where putative class consisted of approximately 2,000 members who were dispersed throughout United States, making joinder impractical. Fed.Rules Civ.Proc. rule 23(a), (a)(1), (b)(3), 28 U.S.C.A.

3. Federal Civil Procedure ⇐187

Common questions of law and fact requisite for class action under federal rule were met by allegations that schemes and devices had been utilized by defendants to defraud public stockholders of corporation and that defendants had made false and misleading statements or withheld material facts from public stockholders in making exchange offer and soliciting acceptance by stockholders, so that a factual and legal nexus linking all members of the putative class was formed. Fed.Rules Civ.Proc. rule 23(a)(2), 28 U.S.C.A.

4. Federal Civil Procedure ⇐165

Claims asserted met test of typicality for class action purposes, where case involved general course of conduct by defendants affecting all members of putative class. Fed.Rules Civ.Proc. rule 23(a)(3), 28 U.S.C.A.

5. Federal Civil Procedure ⇐187

Putative class was fairly and adequately represented by plaintiff and class counsel for purposes of maintaining class action.

EXHIBIT B

EEOC v. du PONT CO.

U.S. District Court,
Western District of Kentucky

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. E. I. du PONT de NEMOURS AND COMPANY, INC., and NEOPRENE CRAFTSMEN UNION, No. 7874-B, November 1, 1974

CIVIL RIGHTS ACT OF 1964

—Discovery against EEOC—Deposition—Conciliation proceedings ▶108.8155 ▶108.7107

Employer and union being sued under Title VII by EEOC are not entitled to order compelling EEOC official, whose deposition is being taken, to answer questions regarding affirmative action program that was discussed during conciliation negotiations. Information sought deals directly with things said and done during conciliation proceedings, and (1) EEOC's conciliation efforts are not reviewable by court; (2) to allow investigation into details of conciliation negotiations carried out without formality or ceremony certainly would produce chilling effects on parties that effectively could emasculate entire conciliation procedure.

Action under Title VII of Civil Rights Act of 1964 by EEOC against employer and union, wherein employer and union moved for order directing EEOC official to answer certain questions propounded during course of deposition. Motion overruled.

See also 7 FEP Cases 975.

Milton Branch, Regional Attorney, and Lavelne S. Tisdale, Atlanta Regional Litigation Center, for plaintiff.

Edgar A. Zingman, Louisville, Ky., for defendant employer.

Morris Borowitz, Louisville, Ky., for defendant union.

Full Text of Opinion

RHODES BRATCHER, District Judge:—This action is presently before the Court on the motion of defendants, pursuant to Rule 37 of the Rules of Civil Procedure, for an order directing the plaintiff, Equal Employment Opportunity Commission, through its designated agent and witness, to answer certain questions propounded by defendants during the course of a deposition taken on March 14, 1974. Prior to the deposition, the plaintiff had moved for a protective order pursuant to Rule 26(c). Because of the time factor, the Court was unable to rule on the motion before the deposition date.

[SOURCE OF CONTROVERSY]

The source of the present controversy is contained in paragraphs 8 and 9 of the complaint where it is alleged:

"8. More than thirty (30) days prior to the institution of this action, charges were filed with the Commission alleging that the Company and Union had engaged in unlawful employment practices under Title VII.

9. The Commission, after investigating and finding reasonable cause to believe that defendants had engaged in unlawful employment practices, has been unable, through informal methods of conference, conciliation and persuasion, to secure a conciliation agreement acceptable to it."

These allegations are jurisdictional pre-requisites.

The Commission designated Charles A. Dixon, Director of the Commission's Memphis office, to testify for the Commission at the aforementioned deposition, and he was asked the following questions:

"Q. 147. Mr. Dixon, do you not recall aside from the files, meetings with me and other representatives of Du Pont in which we went into the questions of this affirmative action program and in which it was put to you—

Q. 148. (continuing)—in which it was put to you that the EEOC ought to accept the affirmative action program which was acceptable to AEC and the OFCC?"

The plaintiff refused to answer these questions and contends that the subject of this inquiry is protected and not discoverable because the information is privileged and, in addition, is not relevant to the issues involved in this action.

It is apparent that the information sought deals directly with things said and acts done and performed during the period of time when the parties were engaged in conciliation negotiations. Two pre-suit issues may be explored: (1) whether or not the charge was initially filed with the EEOC more than 30 days before the suit was instigated; (2) whether or not the Commission attempted to, and concluded that it could not, obtain a conciliation agreement acceptable to it.

[ROLE OF COURT]

It is obvious from the authorities submitted herein that this Court should not function as a reviewing court or court of appeals for the Commission. Similarly, this Court should not permit an inquiry to be made into the relative merits of a conciliation effort on the part of the

parties. Such questions are not reviewable except to determine the existence of the threshold issue of whether or not the conciliation effort occurred. E.E.O.C. v. Griffin Wheel Company, 360 F.Supp. 424, 6 FEP Cases 297 (N.D. Ala., 1973).

To allow the parties the latitude requested here to probe into every aspect and detail of negotiations carried out without formality or ceremony would certainly produce chilling effects on the parties. This chilling effect could effectively emasculate the entire procedure and destroy the purpose of the regulations. A fear of future judicial scrutiny would discourage good faith efforts to reach an agreement acceptable to all concerned. Delicate conciliation efforts should be free and unfettered.

According to the record, the plaintiff has proffered to the defendants copies of the contents of its investigatory files applicable to this case which are not privileged nor made confidential by statute. It is not required to do more.

WHEREFORE, the premises considered, it is ORDERED AND ADJUDGED that the motion of the defendants to compel plaintiff to answer questions 147 and 148 is OVERRULED.

MORRIS v. CONN. GENERAL INSURANCE CORP.

U.S. District Court,
District of Connecticut

MORRIS v. THE CONNECTICUT GENERAL INSURANCE CORPORATION, No. H-172, January 16, 1974

CIVIL RIGHTS ACT OF 1964

—Parties — Parent holding company ▶ 108.742

Corporate entity will be dropped as party-defendant to individual's Title VII action, in view of affidavit of its secretary that it is parent holding company having no employees and that individual was employed by wholly owned subsidiary. Subsidiary will be substituted as defendant in place of parent.

—Notice of right to sue — Delegation ▶ 108.7135

Issuance of notice of right to sue by employee of EEOC district office rather than by EEOC itself does not deprive federal district court of jurisdiction of individual's Title VII action against employer, in view of another federal district court's decision in Stone v. E.D.S. Federal Corp. (5 FEP Cases 213).

—Class action — Class representative ▶ 108.7531

Black individual who is not college graduate and who has brought Title VII class action against employer may not represent "graduates of predominantly or wholly black colleges," since he is not representative of that class.

—Class action — Former employee ▶ 108.7532

Black former employee may represent blacks currently employed in his Title VII class action against employer, even though he has not worked for employer for two years, since he did not voluntarily resign but instead was involuntarily terminated.

—Abstention ▶ 108.697

Federal district court will not abstain from proceeding with individual's Title VII action against employer, even though identical claim filed by individual with state FEP agency is in conciliation stage; abstention doctrine applies where state court's decision of unsettled question of state law would obviate necessity for federal constitutional decision, but state law is irrelevant in present case, and federal-court claim is predicated upon federal statute as opposed to U.S. Constitution.

—Stay of proceedings ▶ 108.7373

Stay of further proceedings in individual's Title VII action against employer would be inappropriate, despite pendency in conciliation stage before state FEP agency of identical claim by individual, since there is nothing to indicate that stay of proceedings would either impede or facilitate further action on state level, and there is nothing to suggest that conciliation efforts on federal level would be any more fruitful than those already undertaken on state level.

—Discovery — Subpoena duces tecum — Privileges ▶ 108.8166 ▶ 108.8168

Employer sued by individual under Title VII is not entitled to have quashed individual's subpoena duces tecum seeking all materials involving employer's negotiations with state FEP agency and EEOC and all internal office memoranda regarding discussion of case, despite contention that some or all of information sought is either protected by attorney-client privilege, is work product, or would be inadmissible. Documents sought

the position that this statute is inapplicable to aliens who have the "EMPLOYMENT AUTHORIZED" endorsement on their Form I-94. For aliens without the endorsement, however, employment opportunities are limited to out-of-state jobs or to in-state employers willing to risk the penalties of the statute.

The failure of the INS to act promptly on requests for the endorsement, combined with the Connecticut statute, can create problems for aliens awaiting action on change of status petitions, especially when such petitions are based on marriage to a citizen. Obligations of support may be incurred by virtue of the marriage. Yet should the alien leave the state in order to get a job free of the burden of Connecticut's statute, he opens himself to a charge of a fraudulent marriage by virtue of his separation from his spouse. If the alien stays in Connecticut and continues to reside with his spouse, his acceptance of welfare disqualifies him from permanent resident status, and his wife's acceptance of welfare, even for the support of children by a prior marriage, may open the alien to a charge of a fraudulent marriage by virtue of his failure to support his spouse.

While such "Catch-22" situations were shown to be possible by the evidence presented at the hearing, there was no showing of any immediate irreparable injury to the named plaintiffs in this action. The plaintiffs have so far managed to obtain employment either in or out of state. The Court trusts that the INS will act promptly and equitably to grant the "EMPLOYMENT AUTHORIZED" endorsement where appropriate. But the Court finds no present basis for the issuance of injunctive relief against the INS.

The real source of plaintiffs' problems is the Connecticut statute which purports to regulate employment opportunities on the basis of alienage and aliens' status under federal law. Plaintiffs have indicated they are about to bring an action to restrain the enforcement of Conn. Gen. Stats. § 31-51k. Should the statute be found to be invalid,[2] plaintiffs will gain far more effective relief for alleviating the problems described to the Court in this action than any relief which could be fashioned herein.

The motion for a preliminary injunction is denied.

SO ORDERED.

EEOC v. du PONT CO.

U.S. District Court,
Western District of Kentucky

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. E. I. du PONT de NEMOURS & COMPANY, INC., and NEOPRENE CRAFTSMEN UNION, No. 7874-B, January 23, 1974

CIVIL RIGHTS ACT OF 1964

—Pleading—Preconditions to suit—More definite statement ▶ 108.72 ▶ 108.701

Employer and union being sued under Title VII by EEOC are not entitled to more definite statement setting forth with particularity EEOC's compliance with jurisdictional preconditions to suit, since EEOC's general allegation that all of necessary statutory conditions have been performed is sufficiently specific to satisfy requirements of Rule 8(a)(1) of Federal Rules of Civil Procedure.

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[2] The unconstitutionality of the statute would seem to be patent. A state cannot discriminate against aliens save when necessary to serve a compelling state interest. In Re Griffiths, 413 U.S. 717 (1973); Sugarman v. Dougall, 413 U.S. 634, 5 FEP Cases 1152 (1973); Graham v. Richardson, 403 U.S. 365 (1971). To the extent Connecticut seeks to discriminate among aliens, rather than simply between aliens and citizens, its classifications are still subject to strict scrutiny, not only because the suspect classification of alienage remains as an element in the classification, but also because the discrimination in employment opportunities impinges on aliens' right to travel, see Graham v. Richardson, supra, 403 U.S. at 375-376, and conflicts with the federal government's exclusive power to regulate the conditions of admission and residence of aliens within the United States. Graham v. Richardson, supra, 403 U.S. at 377-380. As the Supreme Court said as long ago as 1915, in overturning without the benefit of modern equal protection analysis a state's attempt to impose conditions on aliens' employment:

"[R]easonable classification implies action consistent with the legitimate interests of the State, and it will not be disputed that these cannot be so broadly conceived as to bring them into hostility to exclusive Federal power. The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. [Citation omitted.] The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality." Truax v. Raich, 329 U.S. 33, 42 (1915).

—Pleading — Names of charging parties — Underlying allegations ▶ 108.72

Employer and union being sued under Title VII by EEOC are not entitled to have EEOC's complaint enlarged to include names of charging parties and underlying allegations in all the charges alleged, since Rule 8 (a)(1) of Federal Rules of Civil Procedure requires only short and plain statement of claim showing that the pleader is entitled to relief, and pleadings meet these requirements in that they fairly notify employer and union of nature of claim. Any additional information that employer and union need should be sought under discovery provisions of Federal Rules.

Action under Title VII of Civil Rights Act of 1964 by EEOC against employer and union, wherein employer and union moved for more definite statement. Motion overruled.

Laverne S. Tisdale, Trial Attorney, Atlanta Regional Litigation Center, for plaintiff.

Edgar A. Zingman, Louisville, Ky., for defendant employer.

Morris Borowitz, Louisville, Ky., for defendant union.

Full Text of Opinion

BRATCHER, District Judge:—This action comes before this Court on motions of the defendants, E. I. Du Pont de Nemours and Co., Inc., (Du Pont) and Neoprene Craftsmen Union (Union), for a more definite statement pursuant to Rule 12(e), Federal Rules of Civil Procedure, 28 U.S.C. Plaintiff's cause of action being predicated upon Section 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (Supp. II, 1972), jurisdiction is founded on 28 U.S.C. § 451 and 1345.

It is defendants' position that the allegations in the complaint are so vague and ambiguous that they "cannot reasonably be required to frame a responsive pleading", and they are unable to determine whether the jurisdictional procedural requirements of the Statute have been met. Specifically, defendants contend the eighteen procedural steps delineated in 42 U.S.C. § 2000e-5 are a pre-condition to the institution of suit by E.E.O.C. and must be alleged with particularity for jurisdiction to attach, relying upon E.E.O.C. v. Container Corp., 352 F. Supp. 262, 5 FEP Cases 108 (M.D. Fla., 1972); E.E.O.C. v. Western Electric Co., 6 FEP Cases 709 (D.C. Md., 1973); and E.E.O.C. v. Griffin Wheel Co., 6 FEP Cases 297 (N.D. Ala., 1973).

In deciding this same question in E.E.O.C. v. Humko Products, Civ. Action No. 73-295 (W.D. Tenn., 1973), Chief Judge Bailey Brown found that the allegations in that suit, which were identical to paragraphs 8 and 9 in the instant complaint, were sufficient when they included "a general allegation that all of the necessary statutory conditions have been performed. . . .". This Court, having reviewed the complaint, pertinent statutory prerequisites, and authorities, concludes that the allegations in the complaint are of sufficient specificity to satisfy the requirements of Rule 8 (a)(1). For the foregoing reasons, the motions based on these grounds will be denied.

Defendants also seek to have the complaint enlarged to include the names of the charging parties and the underlying allegations in all the charges stated. All that Rule 8(a)(2) requires is "a short and plain statement of the claim showing that the pleader is entitled to relief". It is this Court's belief that the pleadings meet the requirements of that Rule in that they fairly notify the defendants of the nature of the claim, and any additional information Du Pont and Union need should be sought under the discovery provisions of the Civil Rules. See Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126, 14 WH Cases 257 (5th Cir., 1959); E.E.O.C. v. Humko Products, supra, and United States v. Gustin Bacon Division, Certain Teed Products Corporation, 426 F.2d 539, 2 FEP Cases 590 (10th Cir., 1970), cert. denied 400 U.S. 832, 2 FEP Cases 995 (1970).

WHEREFORE, IT IS ORDERED AND ADJUDGED that defendants' Rule 12 motion is overruled.

EXHIBIT C

BK + WJM + JBK

GENERAL FILE COPY

Antitrust 3C

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Black Marlin Pipeline Company) Docket No. CP75-93 (Remand)

PRESIDING ADMINISTRATIVE LAW JUDGE'S ORDER
RULING ON PRIVILEGE ISSUES

(October 18, 1979)

Participants in this investigation proceeding have found themselves at loggerheads over the privileged status of certain documents. The Commission Staff sought to obtain the documents, through discovery, from Black Marlin Pipeline Company and Union Carbide Corporation, two of the respondents. In all, about 1,200 documents were the subject of claims of privilege. Negotiations resulted in a waiver by the Staff of its discovery demands for some documents and a withdrawal, by the respondent companies, of their claims of privilege as to other documents. As a result, the status of about 150 documents remains at issue.

A procedure for resolving the disputes was proposed in a joint motion filed August 30, 1979. The Commission Staff, Black Marlin, and Union Carbide suggested in the motion that the disputes could be distilled into 13 categories; the first 11 of which were categorized as "pure questions of law." The resolution of each of the "pure questions of law," it was specified, would dispose of the issue of the discoverability of all documents governed by the question. It was agreed that the determination of each question would be made on the basis of memoranda of law and review of one or more "representative" documents selected by the parties and submitted for in camera inspection and consideration. If resolution of the legal issue presented was not deemed dispositive of the discoverability of the "representative" document or documents, it was agreed that the discoverability of the document or documents (as well as all other documents falling in the category) would be based upon the applicable law as applied to the face of the document or documents presented. The two remaining issues, Nos. 12 and 13, were to be resolved on the basis of the documents submitted and the issue cited. They were termed "combined issues of law and fact." The parties stipulated that, in their judgment, these latter issues could "be resolved on the face of the documents without taking evidence."

On September 4, 1979, the joint motion was granted, in an order which also approved the schedule suggested therein for the submission of briefs and memoranda on the law. All parties have filed such memoranda, and the issues are now ripe for ruling on the merits. The issues as framed by the parties, and the Presiding Judge's disposition of those issues, follow.

1. Is a request for legal services, otherwise covered by the attorney-client privilege, not privileged if it does not contain "facts" known only to the client?

Black Marlin contends that the attorney-client privilege protects all of a client's confidential communications to his attorney from disclosure, and is not restricted to communications of confidential "facts" or information. Black Marlin primarily relies on In Re Ampicillin Antitrust Litigation, 81 F.R.D. 377 (D.D.C. 1978), wherein the court held that "the [client-to-attorney] communication need not be of confidential information for the privilege to apply. Instead, . . . a client communication is privileged if it was made with the intention of confidentiality. . . ." Id. at 388 (Citations omitted; emphasis in original). Staff, on the other hand, cites Mead Data Central, Inc. v. U. S. Department of Air Force, 566 F.2d 242 (D.C. Cir. 1977) for the proposition that the privilege applies only to confidential communications containing confidential information provided by the client:

> The privilege does not allow the withholding of documents simply because they are the product of an attorney-client relationship. . . . It must also be demonstrated that the information is confidential. If information has been or is later shared with third parties, the privilege does not apply. Id. at 253 (Citations omitted).

These cases are not irreconcilable. The court in Ampicillin distinguished the Mead holding on the ground that the court was there addressing the role of the attorney-client privilege in an Exemption Five claim arising under the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(5). The Ampicillin court specifically noted that FOIA cases involve special policy considerations, including vindication of Congress' intent to permit comprehensive public access to government records. In Re Ampicillin Antitrust Litigation, supra, 81 F.R.D. at 388-89 n.21.

Restricting the privilege to clients' confidential communications to their attorneys which contain confidential information ("facts known only to the client") would not advance the policy of encouraging corporations to seek out and correct wrongdoings on their own. See, Diversified Industries, Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1978) (Rehearing en banc). Assuming that a request for legal services meets all other criteria for application of the attorney-client privilege, I conclude the communication need not contain "facts known only to the client" to qualify for the privilege.

2. Is legal advice, otherwise covered by the attorney-client privilege, not privileged if it does not contain facts known only to the client?

At the outset, it is worthwhile to eliminate an ambiguity caused by the manner in which the question was framed. Black Marlin's argument and analysis are predicated on the premise that all communications from an attorney to a client are privileged because they necessarily disclose the contents of the client's confidential communication to the attorney. This premise is incorrect as a matter of law. The phrase "otherwise covered by the attorney-client privilege" could, however, be construed as a stipulation to the contrary. It is not so construed here, because to do so would run contrary to the parties' main purpose, to obtain a ruling on the legal merits of their position.

The substantive issue presented in this second category concerns the scope of the attorney-client privilege as it applies to legal advice. As was the case with Issue No. 1, the Commission Staff maintains that the advice of an attorney to a client is privileged only if it contains confidential facts. Black Marlin contends that since disclosure of legal advice "inevitably" reveals the substance of the client's confidential communication, it is privileged.

The authorities express different views on the scope of the attorney-client privilege as applied to legal advice. See, SCM Corp. v. Xerox Corp., 70 F.R.D. 508, 520-21 (D. Conn. 1976); Comment, "The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement," 91 Harv. L. Rev. 464, 472 (1977). The so-called broad view, espoused by Wigmore, protects any legal advice from an attorney to his client. 8 Wigmore, Evidence §2320 (McNaughton rev.

1961) (hereinafter Wigmore); Natta v. Hogan, 392 F.2d 686, 692-93 (10th Cir. 1968). The rationale for this view is that disclosure of an attorney's advice might lead to detection of the client's communication and should therefore be proscribed in all cases. Id.

A more restrictive position holds that legal advice is privileged only to the extent that its disclosure would reveal a client's confidential communication. Attorney General of the United States v. Covington & Burling, 430 F.Supp. 1117, 1120-21 (D.D.C. 1977); Herbert v. Lando, 73 F.R.D. 387, 398 (S.D.N.Y. 1977); Matter of Fischel, 557 F.2d 209, 211 (9th Cir. 1977); SCM Corp. v. Xerox Corp., supra, at 521; Burlington Industries v. Exxon Corp., 65 F.R.D. 26, 37 (D. Md. 1974). See also, McCormick, Evidence §89 (2d ed. 1972). The restrictive view is preferred because it adequately satisfies the rationale for the broad view and is also in keeping with the policy of restricting, rather than extending, privileges which have the effect of excluding relevant evidence from the factfinder. SCM Corp. v. Xerox Corp., supra, at 522; Matter of Fischel, supra, at 212; Fisher v. United States, 425 U.S. 391, 403 (1976). These latter considerations weigh heavily in an investigation proceeding conducted by a Federal administrative agency.

The burden rests with the proponent of the privilege to establish its applicability. Annot., 15 A.L.R. Fed. 771, 779; In Re Ampicillin Antitrust Litigation, supra, at 394; Matter of Fischel, supra, at 212. In the present context, this would, at a minimum, require a showing that the advice reveals the substance of a confidential communication from the client. Since Black Marlin chose to adopt the broad view, it did not furnish for inspection by the Judge the request giving rise to the legal advice. Consequently, there is no way of telling to what extent the legal advice discloses the substance of the request.

In the absence of a showing that disclosure of the legal advice in question would reveal a client's confidential communication, I conclude the documents categorized under Issue No. 2 are not privileged.

3. Is a communication from an attorney to a client detailing his progress in performing legal services, otherwise covered by the attorney-client privilege, not privileged if it does not contain facts known only to the client?

As with Issues Nos. 1 and 2, Staff argues that an attorney's communication to his client must contain confidential information in order to qualify for the attorney-client privilege. Black Marlin contends that an attorney's progress report "necessarily" divulges a client's confidential communication and thus is privileged.

The attorney-client privilege is designed to protect confidential disclosures by a client to an attorney made in order to obtain legal assistance. Fisher v. United States, supra, at 403 (citing Wigmore, supra, §2292; McCormick, supra, §87, at 175). Since the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose of encouraging clients to make full disclosure to their attorneys. Id.; Wigmore, supra, §2291 at 554.

Consistent with these principles, and those discussed under Issue No. 2, supra, an attorney's status report to his client is privileged only to the extent that it reveals a client's privileged communication. The two documents submitted for consideration under this issue disclose no more than that the attorney was working on some matter apparently of interest to the client. There is no reference to (or indication of) a request for legal advice or assistance. I conclude that t documents in this category are not privileged.

4. Are requests for legal services and legal advice, otherwise covered by the attorney-client privilege, not privileged if the communication is between in-house counsel and outside counsel?

To be privileged, communications between a corporation's house counsel and its outside counsel must reflect information originating with the client and must be divulged under such circumstances as would make the communication a privileged one between the client and house counsel. Annot., 9 ALR 3d 1420, 1423. Where the privilege applies, house counsel is, in effect, acting as the client's agent, confidentially seeking legal assistance on the client's behalf. Duplan Corp. v. Deering Millikin, Inc., 397 F.Supp. 1146, 1167 (D. S.C. 1974); Burlington Industries v. Exxon Corp., supra, at 36; Simon, "The Attorney-Client Privilege As Applied to Corporations," 65 Yale L.J. 953, 985-86 (1956).

The single document submitted under this issue is a letter from house counsel to outside counsel discussing legal aspects of a curtailment proceeding in which outside counsel is apparently involved, and asking for transcripts of the hearing. The communication is not a request for legal advice or assistance. Therefore, it is not privileged.

5. Are client's internal memoranda and communications which contain legal advice covered by the attorney-client privilege?

The only representative document in this category is a report of a 1972 meeting at which certain proposals (not disclosed in the report) were discussed between the client and its house counsel. One of the items reported was counsel's opinion on the client's legal position in the matter.

As discussed above, legal advice of an attorney is protected under the attorney-client privilege only to the extent it discloses the client's privileged communication. On its face, the report reveals no privileged communications of the client. Therefore, it is not protected under the attorney-client privilege.

6. Does the attorney-client privilege attach to an attorney's notes and memoranda regarding legal advice given to the client?

The parties essentially agree that the privilege applies to an attorney's notes or memoranda on legal advice given to a client "insofar as they . . . are a report of confidential communications. . . ." Colton v. United States, 306 F.2d 633, 639 (2d Cir.), cert. denied, 371 U.S. 951 (1963). But Black Marlin has gone one step further. It asserts that an attorney's advice "necessarily" reports communications made in confidence.

The documents, house counsel's hand-written notes (L-8250) and "memorandum for file" (H-34343), both disclose nothing of the client's request for assistance. To repeat a theme noted above, legal advice, be it recorded or remembered, is privileged only if its disclosure would divulge a client's privileged communication. See, discussion under Issue No. 2. It follows that an attorney's own notes on legal advice given must be shown to be records of the client's privileged communication before any privilege can attach

to them. Annot. 15 ALR Fed. 771, 776-77, 799-801; SCM Corp. v. Xerox Corp., supra, at 523; United States v. Brown, 478 F.2d 1038, 1040 (7th Cir. 1973). No such showing was made here.

It is also significant that the document on which house counsel's hand-written notes are found indicates that the advice-generating request for comments was also made to non-lawyer corporate officers. (See, Document No. L-8250). A document prepared for simultaneous review by legal and non-legal personnel is not privileged because it does not have as its primary purpose the acquisition of legal advice. United States v. International Business Machines Corp., 66 F.R.D. 206, 213 (S.D.N.Y. 1974).

I conclude that the attorney's notes and memoranda are not privileged under the attorney-client privilege.

7. Is proposed contract language, drafted by an attorney for the client's review, covered by the attorney-client privilege?

Black Marlin's position is that a draft contract, prepared by an attorney for the client's review, constitutes legal advice in that it reflects the client's confidential communication. Staff argues that a contract draft cannot be confidential because it is intended for disclosure to third parties. In response, Black Marlin points out that the client is free to reject a draft, so disclosure to third parties is not necessarily contemplated.

Even assuming that a draft contract, prepared by an attorney for his client's review, amounts to legal advice, Black Marlin has not shown that the draft in question discloses a client's confidential communication, and that is the critical factor. Moreover, it is entirely possible that the attorney was acting, in this instance, as a "mere scrivner" simply translating the intent of the parties into the legal terminology of a contract. See, McCormick, supra, §88 at 180 n.26; Pollock v. United States, 202 F.2d 281, 286 (5th Cir.), cert. denied, 345 U.S. 993 (1952).

I am not persuaded by Black Marlin's speculation that the attorney and client may have used the exchange or drafts as a method of communicating the client's request for legal advice. The draft contract was, if approved by the client, destined for disclosure to third parties. The document

cannot, therefore, be held to disclose a client's confidential communication. The contract draft is not covered by the attorney-client privilege.

8. Is a request for advice about obligations imposed by the Natural Gas Act, which would otherwise be covered by the attorney-client privilege, not privileged solely because an attorney is not required for FERC filings?

A client's request for advice is not privileged simply by virtue of the fact that it is addressed to a lawyer. Diversified Industries v. Meredith, 572 F.2d 596, 602 (8th Cir. 1977); Underwater Storage Inc. v. United States Rubber Co., 314 F.Supp. 546, 547-48 (D.D.C. 1970); Wigmore, supra, §2303 at 584. A client's request for advice must, among other things, be made to the attorney in his capacity as such. Wigmore, supra, §2298; 8 Wright & Miller, Fed. Pract. & Proc.: Civil §§2017, 2021-28.

Staff contends that since attorneys are not required for making FERC filings, a request for advice on duties under the Natural Gas Act is not a request for legal advice. Staff seizes upon some language in the case of Falsone v. United States, 205 F.2d 734 (5th Cir. 1953), to the effect that practitioners before administrative tribunals are sufficiently "professional" to be subsumed under the attorney-client privilege when the agency's regulations impose attorney-like professional responsibilities upon them. Id. at 740 (citing Wigmore, supra, §2300(a) at 583-84). According to Staff, because FERC regulations permit appearances by any "qualified representative," (18 C.F.R. §1.4(a)(1)) and there has never (to Staff's knowledge) been disciplinary action taken against a FERC practitioner, the attorney-client privilege cannot apply.

While Staff's point is both novel and imaginative, it is nonetheless immaterial to what should be our central concern, namely, whether the client's request sought advice that was distinctly legal in character. McCormick, supra, §88; 81 Am. Jur. 2d, Witnesses §182; Note, "Functional Overlap Between The Lawyer And Other Professionals: Its Implications For The Privileged Communications Doctrine," 71 Yale L.J. 1226, 1246-49 (1962).

Perusal of documents submitted in this category adequately demonstrates that the client's request was for advice of a legal nature. Although documents H-42406

through H-42408 and SH-704 through SH-705 contain inquiries which contemplate answers based upon business and technical considerations, in contrast to legal analysis, the attorney's response will ultimately rest on his legal judgment. See, Eutectic Corp. v. Metco Inc., 61 F.R.D. 35, 40-41 (E.D.N.Y. 1973); SCM Corp. v. Xerox Corp., supra, at 517. As such, and because the client's requests are "otherwise covered by the attorney-client privilege," the documents in question are privileged and protected from discovery.

9. Does the work-product doctrine apply to the work product of a prior litigation?

Staff contends that the work-product doctrine does not protect work products of prior litigation from discovery. Black Marlin contends that it does.

The qualified work-product doctrine and its underlying rationale were first articulated in Hickman v. Taylor, 329 U.S. 495 (1947), and later codified in Rule 26(b), Fed. R. Civ. P. */ In Hickman, the Court described the necessity for protection of an attorney's work products in the following language:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. Id. at 511.

Although there is some contrary authority, the prevailing view supports protection of an attorney's work product regardless of whether it relates to present litigation or

*/ As enunciated in Hickman v. Taylor (329 U.S. at 512) and incorporated in Rule 26(b), Fed. R. Civ. P., the doctrine is not absolute. Access to an attorney's work product may be had if the relevance, substantial need and undue hardship requirements of Rule 26(b)(3) are met. Since Staff has made no showing in this regard, resolution of the legal issue presented will determine the discoverability of documents in this category.

past litigation. In Re Murphy, 560 F.2d 326, 335 (8th Cir. 1977); United States v. Leggett & Platt, Inc., 542 F.2d 655, 659-60 (6th Cir. 1976); Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 487 F.2d 480, 483-84 (4th Cir. 1973). These cases reason that the underlying policy of protecting the effectiveness of a lawyer's trial preparation and preserving the integrity of the adversary process require that work product of prior litigation be covered by the rule. Id.; see also, Wright and Miller, Fed. Pract. & Proc.: Civil §2024 at 200-201; Comment, "Work-Product Privilege Extends to Subsequent Litigation," 27 Vand. L. Rev. 826, 833 (1974).

In contrast, the cases which refuse to extend the work-product doctrine to work product of prior litigation focus on the fairness aspect of the Hickman rationale for the doctrine. They reason that the party seeking discovery of the work product of prior litigation "seeks not to obtain the benefit of . . . [an adversary's] industry in the preparation of the case at bar for trial" and thus that the material sought should not be protected. Tobacco & Allied Stock, Inc. v. Transamerica Corp., 16 F.R.D. 534, 537 (D. Del. 1954) (Emphasis in original). See also, Hanover Shoe, Inc. v. United Shoe Machinery Corp., 207 F.Supp. 407, 410 (M.D. Pa. 1962); United States v. International Business Machines Corp., 66 F.R.D. 154, 178 (S.D.N.Y. 1974).

While it may be that allowing work-product protection to cover the work product of prior litigation would not advance the policy of preventing an adversary from gaining unfair advantage, its application would serve to further the more fundamental policy against invading the privacy of an attorney's course of preparation, thus preserving his morale and effectiveness. Hickman v. Taylor, supra, at 512; United States v. Nobles, 422 U.S. 225, 238 (1975). These are important goals which also deserve promotion. I conclude, therefore, that the work-product doctrine does apply to the work product of prior litigation. Material covered by the doctrine may not be discovered over objection.

10. Is a communication from a high-level to a low-level employee, ordering that data be gathered, covered by the work-product doctrine when the request originated with an attorney who intended to use the data in pending litigation?

There is only one document which, the parties agree, raises this issue. It is a hand-written memorandum — from a "high-level" employee to various "low-level" employees of Union Carbide — enumerating the information which an Administrative Law Judge ordered for production.

Black Marlin insists that this document is protected under the work-product doctrine as it was "prepared in anticipation of litigation." Staff argues that since the document was not prepared by an attorney for use in a trial, the work-product doctrine does not apply.

Work-product protection extends beyond the writings of an attorney:

> At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself. United States v. Nobles, supra, at 238-39.

As we have seen, the only document at issue consists essentially of a directive for the collection of data. The directive originated with an Administrative Law Judge, not with the attorney. A communication made by or to a party's agent which was not requested by, or prepared for, an attorney is outside the purview of the work-product doctrine as embodied in Rule 26(b)(3) and (b)(4). Thomas Organ Co. v. Jadranska Slobodna Providba, 54 F.R.D. 367, 372 (N.D. Ill. 1972); Spaulding v. Denton, 68 F.R.D. 342, 345 (D. Del. 1975); Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co., 61 F.R.D. 115, 118 (N.D. Ga. 1972); Burlington Industries v. Exxon Corp., supra, at 42; McDougall v. Dunn, 468 F.2d 468, 473 (4th Cir. 1972); Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 402 (E.D. Va. 1974). See also, 4 Moore's, Federal Practice, paragraph 26.64[3] at 50; 8 Wright & Miller, supra, §2024 at 196-99; Annot., 35 ALR 3d 412, 429.

Examination of the document does reveal some references to the company's legal strategy for compliance with the Administrative Law Judge's order. Nonetheless, since the issue is framed in terms of whether a communication "ordering that data be gathered" is covered by the work-product doctrine, further consideration of this aspect of the document is unwarranted. I conclude the document is not exempt from discovery under the work-product doctrine.

11. Are Union Carbide's internal documents regarding possible proposals to settle this litigation protected from disclosure?

Black Marlin relies on language in section 1.18(e) of the Commission's Rules of Practice and Procedure (18 C.F.R. 1.18(e)) conferring privileged status on certain communications relating to settlements. The language cited appeared in the old version of the rule and provided that "proposals of settlement . . . shall be privileged and shall not be admissible in evidence against any counsel or person claiming such privilege." Effective June 15, 1979, the rule was changed to read: "Offers of settlement . . . shall be privileged and shall not be admissible in evidence against any person claiming such privilege." (§1.18(e)(1)(v)). Procedure for Submission of Settlement Agreements (Order No. 32), Docket No. RM78-16, issued June 13, 1979, mimeo. 3. There is no indication, however, that the change in wording of the privilege applicable to abortive settlement proposals portended any alteration of the substance of the rule.

The Staff's argument is that section 1.18(e), by its terms, governs only the admissibility of evidence, as opposed to its discoverability. In any event, Staff argues, the privilege protects only "settlement proposals," not settlement discussions.

The Staff's position is far too disingenuous. The Commission, in section 1.18(e) of its procedural rules, has determined to make settlement proposals or offers "privileged." Under Rule 26(b)(1), Fed. R. Civ. P., privileged matter is not discoverable. The only document submitted for consideration is, in fact, a proposal for settlement. See, Document Nos. L-20023 through L-20035. I conclude that it is, therefore, immune from discovery.

To the extent that other documents in this category are discussions of settlement, the Federal Rules of Evidence offer guidance. Rule 408, Fed. R. Evid., provides in

pertinent part that "[e]vidence of conduct or statements made in compromise negotiation is . . . not admissible." The inadmissibility of settlement discussions is regarded as Rule 408's "most significant departure from the common law." 2 Weinstein, Evidence, paragraph 408[03] at 408-19; See also, Rothstein, Rules Of Evidence For The United States Courts And Magistrates, 119 (2d ed. 1978).

The policies that underlie §1.18(e) of the Commission's procedural rules and the Federal Rules of Evidence's ban on admissibility of settlement discussions would best be served by refusing to mandate discovery of the documents subsumed under this issue. Hence, I conclude that they are protected from discovery notwithstanding the Staff's technical quibbles about the scope of the rule.

12. Is the attorney-client privilege inapplicable to the contested documents because they contain business, rather than legal discussions?

For the purpose of resolving the issue presented, it need merely be noted that advice of counsel that principally involves business, rather than legal, judgment is not protected under the attorney-client privilege. SCM Corp. v. Xerox Corp., supra, at 517-18; Underwater Storage, Inc. v. United States Rubber Co., supra; United States v. Schmidt, 360 F.Supp. 339, 346-47 (M.D. Pa. 1973); Annot., 98 A.L.R. 2d 241, 248.

Some of the documents proffered in this category are not privileged because their essence is mere business advice. The designations given to such documents are as follows:

L-4267, L-4268
L-4377, L-4378, L-4379
L-4380, L-4381
H-9380, H-9381; and H-30578, H-30579 [same document]
H-12127, H-12128, H-12129
H-22941, H-22942
H-34045, H-34046

Certain other documents proffered in this category are not privileged because they contain legal advice which has not been shown to disclose a client's privileged communication. They are:

L-4309, L-4310, L-4311
L-15051
L-15197
L-15290, L-15291
L-15299, L-15300
H-12769
H-31276, H-31277
H-34047
H-34519, H-34520, H-34521

The following documents are not privileged because the substance of the client-to-attorney communication contained therein was obviously already known to third parties:

L-15033, L-15034
L-15045
L-15046

The following documents are protected from disclosure under the attorney-client privilege:

L-4336, L-4337
L-15303, L-15304, L-15305
L-20319
L-15408, L-15409, L-15410
L-15413, L-15414, L-15415
H-12958
H-13102, H-13103

Documents L-15094, L-15095, and L-15096 constitute a three-page attorney-to-attorney communication which is apparently of a consultive nature. Its essence is a request by house counsel for legal advice and legal service. Although Black Marlin did not include the identity of outside counsel (the recipient) in its "index of personnel," we can take administrative notice of the status of a former FPC General Counsel and conclude, therefore, that this communication is privileged.

13. Are the contested documents arising from this litigation protected from disclosure by the work-product doctrine?

Documents L-15405 and L-15406 are a hand-written memorandum from a Union Carbide employee to a Washington lawyer, Mr. B. F. Kiely. Copies are sent to six other persons, some of them non-lawyers. The communication does

not on its face appear to be the work product of an attorney. The fact that it transmits material requested by Mr. Kiely does not make it his work product. It is, therefore, fully discoverable.

The remaining four memoranda, documents L-20036, L-20037; L-20248, L-20249, L-20250; L-20280, L-20281, L-20282; and L-20295, L-20296 are house counsel's status reports to his client on the progress of proceedings in prior phases of this case. These documents do, in large part, contain Union Carbide's house counsel's perceptions of the client's case and therefore qualify as the work product of an attorney. Absent Staff's showing of substantial need for these materials and inability to obtain their substantial equivalent elsewhere without undue hardship, these documents are immune from discovery.

Isaac D. Benkin
Presiding Administrative Law Judge

EXHIBIT D

compositions. In that connection the Commission has made it clear that it "considers these 'Guides' to be merely advisory."

In response to the request "for an Advisory Opinion, pursuant to Rule 1.51 of the Commission's General Procedures, as to the lawfulness of proposed revised labels", the Commission advised that the labels submitted would appear to be inconsistent with the advice set forth in the Guides and therefore inconsistent with the requirements of the law regarding the use of deceptive acts and practices. The recipient of this advice, of course, is free to disregard it. If in disregard of this advice, deceptive acts and practices should be used and brought to the attention of the Commission, the probabilities are that it would have reason to believe that Section 5 of the Federal Trade Commission Act was violated in that respect and perhaps issue a complaint to that effect. If so, the person charged with any wrongdoing would be provided with an opportunity for a hearing for the purpose of demonstrating that the challenged conduct was not deceptive and was not violative of Section 5 of the Federal Trade Commission Act.

Obviously no provision of the Constitution, of statutory law or rule of fairness in or remotely related to due process requires a hearing at this time on the question of whether the Commission provided faulty advice in its Advisory Opinion or in its Guides. To think otherwise would blur distinguishing requirements applicable to utterances and actions by government agencies and government officials and would promote confusion regarding provisions of law making distinctions in the requirements applicable to one utterance or action when compared with other utterances or actions.

SEEBURG CORP.

Federal Trade Commission, October 25, 1966

Docket No. 8682

3a. 1 [5b. 1(1), 5c. 2(2)] Sufficiency of notice of precomplaint consent order procedures.

Contention that the Commission's rules on precomplaint consent order procedures violate the notice requirements of Section 3(a) of the Administrative Procedure Act in that they pinpoint exclusive responsibility for consent negotiations with the Division of Consent Orders, which has no connection with investigation or litigation, as contrasted with staff counsel assigned to the Bureau of Restraint

of Trade, who are inherently adversary advocates predisposed against a proposed respondent whose conduct they have investigated with an eye toward litigation, is rejected. The Commission's rules, read together with its statement of organization, put respondents on notice of the nature of the staff participation in settlement proceedings. In any event, respondent had actual notice of the role of the Bureau in settlement proceedings and of the fact that in such proceedings ex parte contact with the staff was considered proper.

3a. 1 [5b. 1(1)] Sufficiency of notice of precomplaint consent order procedures.

Under the Freedom of Information Act, as before its enactment, the standard by which procedural rules (such as those relating to precomplaint consent order procedures) must be judged in order to determine whether they comply with the notice requirements of Section 3(a) of the Administrative Procedure Act is whether they are realistically informative to the public of the administrative procedures available.

3a. 3 [3a. 1] Penalty for failure to comply with notice requirements of Section 3(a).

Even if respondent's challenge to the Commission's rules on precomplaint consent order procedures on the ground that the procedure actually followed had not been published should be sustained, the penalty provisions in Section 3(a) of the Administrative Procedure Act would give respondent no standing to sue for dismissal of the complaint. The only penalty in the statute for the failure to make notification in accordance with its provisions is to excuse compliance by outsiders with the requisite procedure.

5b. 1(1) [2d. 2, 5. 1, 5b. 2(1), 5c. 2(2), 6a. 2(2), 8. 1] Propriety of consent order procedures.

Contention that the Commission's consent order procedures are contrary to the Administrative Procedure Act and constitute a denial of due process because they deny respondent a hearing and effective representation of counsel and allow the Commission to communicate ex parte with its staff is rejected. The definition of "adjudication" set forth in Section 2(d) of the Act does not apply to such procedures. Accordingly, the requirements for hearing spelled out in Sections 5(c), 7 and 8 are not applicable.

7c. 13(7) [5. 1, 5b. 1(1), 5b. 2(2), 8. 1] Right to information in agency possession in the course of consent order procedures.

In the course of consent order procedures, respondent is not entitled to intra-agency comment on its settlement proposals on the ground that this is necessary to afford it a fair hearing, since a hearing is not required in precomplaint settlement procedures.

7c. 13(7) [5b. 1(1), 5b. 2(2), 6a. 2(2)] Right to information in agency possession in the course of consent order procedures.

A respondent is not entitled to intra-agency memoranda to the Commission commenting on consent negotiations prior to complaint on the ground that withholding such documents would deprive it of effective representation of counsel. Although respondent has a right to be represented by counsel, the degree to which counsel may participate in representing a client before the Commission will vary with the nature of the proceeding. Due process does not require that the informal settlement procedures be converted into a preliminary trial on the Commission's decisions to issue complaint.

7c. 13(7) [3c. 3(1), 5b. 1(1), 8b.7(8)] Right to disclosure of intra-agency memoranda.

A respondent is not entitled to intra-agency memoranda to the Commission commenting on consent negotiations prior to complaint. Preservation of the integrity of the administrative process precludes an inquiry into the agency's mental processes leading to the decision on whether to issue complaint. The Freedom of Information Act does not enlarge the discovery rights of a private party engaged in litigation with the Commission to secure documents of this nature which have hitherto never been considered as subject to discovery in the Commission's proceedings.

[Ruling on respondent's motion to vacate the complaint]

BY THE COMMISSION. (Commissioner ELMAN concurring in the result). This matter is before the Commission on respondent's motion to vacate the complaint, certified by the Hearing Examiner with a recommendation that it be denied. 1/ In essence, respondent's motion to vacate alleges, in support of its request, that the Commission's

1/ [Footnote on following page].

consent order procedure preceding issuance of complaint violates the Administrative Procedure Act, the Freedom of Information Act of 1966, and administrative due process. Specifically, Seeburg attacks the Commission's consent order procedures as deficient on three grounds. It first alleges that the Commission's Rules of Practice delineating the consent order procedure, by omitting vital elements of the Commission's actual operations which are either unauthorized or unlawful, violate the notice requirement of Section 3(a) of the Administrative Procedure Act, as well as the Freedom of Information Act. Secondly, respondent alleges that it has been denied administrative due process on the ground that it was not apprised of, and had no opportunity to meet, the ex parte representations of the staff to the Commission in the course of the consent order procedure prior to the issuance of complaint. As a result, respondent argues, it was denied a fair hearing and effective representation by counsel. Thirdly, respondent argues the invalidity of the Commission's consent order procedure is confirmed by the Freedom of Information Act of 1966.

Respondent's motion to vacate the complaint presents two threshold questions: First, do the Commission's Rules comply with the notice requirement of Section 3(a) of the Administrative Procedure Act and, secondly, are the Commission's consent order procedures, prior to the issuance of complaint, "adjudication" as that term is defined by that statute? Or, are consent settlement procedures, at this stage of the proceeding, as the Rules contemplate, simply an exercise of this agency's administrative function where ex parte contact with the staff is appropriate and even desirable?

[3a.1, 3a.3, 5b.1, 5c.2] We first turn to the question of whether the Commission's Rules of Practice comply with the notice requirements of Section 3(a) of the Administrative Procedure Act. Respondent's contentions on the question of whether it had an adequate hearing and whether the consent order procedures permit improper commingling of the prosecutorial and adjudicative functions will be considered in connection with the issue of whether precomplaint consent settlement procedures are properly administrative or adjudicative functions.

1/ [Footnote from preceding page].

Respondent, in a separate motion to the Commission, opposed by complaint counsel, requests leave to file a brief and present oral argument in support of its motion to vacate the complaint. Seeburg subsequently requested the Commission to consolidate the motion to vacate the complaint with the Examiner's certification of respondent's motion for the production of certain documents from the Commission's files for briefing and oral argument.

Respondent contends that Section 3 of the Administrative Procedure Act has been violated by the failure of the Commission's Rules to authorize the participation or to define the role of the Bureau of Restraint of Trade in the consent order procedure. In this connection, Seeburg contends:

> ". . . the Commission's present Rules specifically pinpoint exclusive responsibility for consent negotiations with the Division of Consent Orders, which has no connection with investigation or litigation, as contrasted with staff counsel assigned to the Bureau of Restraint of Trade, who are inherently adversary advocates predisposed against a proposed respondent whose conduct they have investigated with an eye toward litigation."

Respondent's reliance on Section 3(a) of the Administrative Procedure Act, whose text is set forth in the margin, 2/ is misplaced. A reading of §§2.1-2.4 of the Commission's Rules and its Statement of Organization makes it clear that they adequately delineate the consent order procedure actually followed and authorized the participation of the Bureau of Restraint of Trade in that process.

In this connection, the Statement of Organization sets forth the functions of the Division of Consent Orders as follows:

> "Division of Consent Orders. – This office supervises the preparation and execution of agreements submitted to the Commission for settlement of cases by the entry of consent orders." (Emphasis supplied.)

The term "supervise" to describe the duties of the Division of Consent Orders is utilized for a purpose, namely, to inform respondent and all others to whom the consent order

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2/ "(a) Rules. – Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for

[Footnote continued on following page].

procedure applies that it is the duty of the staff members of this Division to oversee the preparation of agreements looking toward consent settlement by respondent and employees on the Commission's staff outside the Consent Order Division. The fact that the Statement of Organization does not specifically name the Bureau of Restraint of Trade, as such, is immaterial. Obviously, the Rules contemplate, in any case, that a proposed respondent desiring to settle a proceeding shall negotiate under the consent settlement procedure with those staff members primarily responsible for the case (in this case, attorneys belonging to the Bureau of Restraint of Trade), under the supervision of the Division of Consent Orders. Read together, §§2.1-2.4 of the Rules and the Statement of Organization clearly authorize, in the consent settlement process, participation by the Bureau of Restraint of Trade or other staff personnel engaged in the investigation or prosecution of the case.

In short, it is clear that the Rules and the Statement of Organization put respondents on notice that personnel from the Division of Consent Orders are not alone involved in the precomplaint consent order procedure. The Rules also make it clear that the final authority for deciding on whether proffered consent agreements should be accepted rests with the Commission itself. Accordingly, the Rules comply with the requirements of Section 3(a) that procedural rules shall describe the organization of the agency as well as the general course and methods by which functions are channeled and where final authority rests with respect to particular functions – in this case, the consent order procedure. Section 3(a) does not require that an agency's procedures be set forth in every detail but merely that they be "realistically informative to the public" 3/ so that it can intelligently take advantage of the formal and informal procedures of an agency, which are available.

That it was the legislative intent to set up a standard of realistic information rather than to require the recitation of all the details attendant upon an agency's procedures is evident from the legislative history. In that connection, the Senate Judiciary Committe print of June 1945, commenting on agency objections to the proposed notice requirements under the APA, specifically stated that if such objections were grounded on the difficulty of stating the procedures in

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2/ [Footnote continued from preceding page]

the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published."

3/ See Attorney General's Manual on the Administrative Procedure Act (1947), p. 21.

detail, the answer to such objections was that the contemplated provision required only a statement of the general course and method of agency procedure. 4/

Furthermore, even if it were conceded, for the sake of argument, that Part II of the Commission Rules and the Statement of Organization do not sufficiently apprise respondent of the particulars of the Bureau of Restraint of Trade's role in the consent settlement procedure, it is clear on the facts of this record that respondent, as soon as it initiated the settlement procedure, had actual notice of the Bureau's role in the precomplaint settlement proceedings. As respondent itself states in the memorandum in support of its motion to vacate, of July 15, 1966:

> "All negotiations with representatives of the Commission were held at the offices of the Chief of the Division of Mergers of the Bureau of Restraint of Trade. Attending the negotiations were the Chief of the Division, Division staff counsel, a member of the Division of Consent Orders, as well as counsel for the respondent. These discussions explored not only respondent's position, but also alluded to the recommendations ultimately to be made to the Commission by the staff." 5/

In short, it is apparent from respondent's own statements that it clearly knew from the inception of the consent settlement proceedings that it would be dealing and negotiating with personnel of the Bureau of Restraint of Trade and that personnel of that Bureau would make recommendations to the Commission with respect to the consent settlement proceedings. Furthermore, respondent knew, from §§ 3.2 and 3.3 of the Commission's Rules of Practice, that an adjudicative proceeding in this agency commences only with the issuance and service of a complaint by the Commission. Accordingly, respondent was put on notice by the express wording of the Rules that the precomplaint settlement procedures are considered by the Commission to be in the stage preceding the adjudicative phase of the proceeding and therefore one in which ex parte contact with the staff is proper. In short, from the beginning of the procedure, Seeburg knew (1) that the Bureau of Restraint of Trade was to participate in the proceeding, (2) that the staff would offer comments on respondent's proposals to the Commission,

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4/ S Doc No 248, 79th Cong, 2d Sess 16 (1946).

5/ Furthermore, the Commission's "A" and "B" letters, respectively, notifying respondent of the intent to issue complaint and replying to respondent's answer indicating an interest in the consent settlement procedure, routinely identify counsel responsible for the trial of the case. (See Appendices A and B.)

and (3) that under the Commission's Rules the precomplaint settlement procedures were ex parte, nonadjudicative proceedings. Knowing all this, respondent nevertheless elected to proceed and only when the case was not settled to its liking did Seeburg choose to attack the Commission's consent settlement procedures under Part II of the Rules as conflicting with the Administrative Procedure Act and the requirements of administrative due process. Accordingly, respondent's challenge to the Rules in this instance must clearly fail in any case, since it had actual notice of the very facts which it claims were inadequately published. See United States v. Aarons, 310 F2d 341, 347-8 (2d Cir 1962). In that case the court explained that the sanction in Section 3(a) for nonpublication does not apply where actual knowledge exists. Construing the Congressional intention on this point the court cited a memorandum of the Department of Justice put into the record on the floor of the House during the consideration of this law. This interpretation of the section is pertinent here.

> "Section 3(a) provides that there shall be publication in the Federal Register of the rules of the various agencies of the Government. The last sentence of Section 3(a) states: 'no persons shall in any manner be required to resort to organization or procedure not so published.' But this does not mean that a person who has actual notice is not required to resort to agency organization or procedures if it has not been published in the Federal Register. If a person has actual notice of a rule, he is bound by it. The only purpose of the requirement for publication in the Federal Register is to make sure that persons may find the necessary rules as to organization and procedure if they seek them. It goes without saying that actual notice is the best of all notices. At most, the Federal Register gives constructive notice. See 44 USC §307." (footnote omitted.) 310 F2d at 348. 6/

Furthermore, the challenge to the Commission's complaint in reliance on the notice provisions of Section 3(a) of the Administrative Procedure Act is clearly inappropriate under any circumstances. The only penalty in the statute for the failure to make notification pursuant to its provisions is to excuse compliance by outsiders with the requisite procedure. First National Bank of Smithfield v. Saxon, 352 F2d 267, 273 (4th Cir 1965). See also Kessler v. FCC, 326 F2d, supra note 6, at 690. Obviously, the penalty provisions in Section 3(a) give respondent no standing to sue for dismissal of the complaint on the grounds relied upon in this instance.

6/ See also Kessler v. FCC, 326 F2d 673, 690 (DC Cir 1963).

[2d. 2, 5. 1, 5b. 2, 5c. 2, 6a. 2, 7c. 13, 8. 1] The resolution of respondent's contention that the Commission's consent order procedures are contrary to the Administrative Procedure Act and constitute a denial of administrative due process because they deny Seeburg a hearing and effective representation of counsel depends primarily on the validity of its assertion that consent order procedures are "adjudication" within the meaning of that term as it is used in the Administrative Procedure Act. Essentially, respondent argues in this connection that the consent settlement procedures come within the definition of "adjudication" as "agency process for the formulation of an order" set forth in Section 2(d) of the Administrative Procedure Act. The same section of the statute defines an order as "the whole or any part of the final disposition . . . of any agency proceeding in any matter other than rule making." In addition, respondent relies on the fact that Section 5(b) of the Administrative Procedure Act, which provides for informal settlement of cases otherwise to be decided on a hearing and record, is included in that section of the statute dealing with "Adjudication".

The short answer is that the Commission has already considered and rejected essentially the same contentions in William H. Rorer, Inc., Docket No 8599. The Commission, in its interlocutory order of March 5, 1964, in that case, ruling on almost the identical argument, stated:

> ". . . Nothing in the Administrative Procedure Act or in the basic principles of fair procedure precludes the Commission from creating and following a procedure for settling disputes without recourse to adjudication. Consent negotiations are not a stage in adjudication but a means of establishing whether adjudication can be avoided altogether. Like investigations, consent negotiations are distinct from the adjudicative process and hence not governed by the standards which control adjudicative procedure." 7/

The definition of "adjudication" set forth in Section 2(d) of the APA, on which respondent relies, simply does not apply to consent settlement negotiations prior to the issuance of complaint. The consent order procedure, which follows the notification to respondent that this agency contemplates a proposed adjudicative proceeding, is not a final disposition in any sense. If the proposed respondent elects to do nothing upon such notification or if negotiations are unsuccessful, no disposition of any kind is, or can be, made.

7/ On May 13, 1964, the United States District Court for the District of Columbia, in Civil Action No 644-64, William H. Rorer, Inc. v. Federal Trade Commission, dismissed Rorer's motion for preliminary injunction and summary judgment, which involved this issue, among others.

In such an eventuality, the complaint is issued and served; only then can final disposition be made after trial or upon default. In no case is there an order or final disposition made until after the issuance and service of the complaint and after full opportunity for hearing. Accordingly, since there is no final disposition prior to the issuance and service of complaint, there is no adjudication within the meaning of the Administrative Procedure Act. If a final disposition does result from consent order negotiations, it does so only upon respondent's consent. In such cases, the consent agreements customarily contain language wherein proposed respondent waives any further procedural steps and consents to the issuance of complaint and final order without further notice. Without such waiver and consent there can be no final disposition of any proceeding pursuant to the consent order procedures.

The Commission's position on this question is in accordance with the terms of Section 5(b) of the Administrative Procedure Act, which provides for settlement of disputes by consent. This section provides:

> "Sec 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .
>
> . . . . . .
>
> "(b) Procedure. – The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with Sections 7 and 8."

In short, Section 5(b) provides that administrative agencies shall afford opportunities for informal settlement and that the hearing procedures specified by the Act in cases where consent settlement procedures have begun, apply only to the extent that the cases are not settled in this manner. Accordingly, the statute sanctions informal procedures for settling cases in order to avoid the complexities of adjudication.

This construction of the plain meaning of the statute is supported by a reading of the legislative history. In this connection, the House Report on the bill expressly states, with respect to Section 5(b), that where settlements do not dispose of the whole case, Sections 7 and 8, as well as Section 5(c), apply. 8/ Significantly, in the light of respondent's

8/ HR Rep No 1980, 79th Cong, 2d Sess (1946); S Doc 248, supra note 4, at 262.

arguments implying that the Commission's ex parte contact with the staff was improper in this instance, Section 5(c) provides for the separation of functions in adjudicative hearings. Accordingly, the conclusion is inescapable, both from the text of the Act, the statutory scheme and the legislative history, that consent settlement procedures under Section 5(b)(1) of the Administrative Procedure Act are properly ex parte. There is no right to a hearing except to the extent that the matter cannot be settled by the informal settlement procedures provided by the agency. 9/

In effect, respondent, in its motion, concedes that the requirements for hearings spelled out in Sections 5(c), 7 and 8 of the Administrative Procedure Act do not apply to consent settlement procedures. Nevertheless, respondent claims it has been denied due process because it did not get a hearing, although it does not spell out with any degree of precision the ground rules under which such a hearing should be conducted. 10/ In this connection, respondent is obviously not entitled to intra-agency comment on its settlement proposals on the ground that this is necessary to afford it a fair hearing since neither the Commission's Rules nor the Administrative Procedure Act, with which those Rules must comply, require a hearing in precomplaint settlement procedures.

9/ The fact that the Congress did not intend to require trial-like proceedings under the settlement procedures authorized by Section 5(b)(1) of the Administrative Procedure Act is made clear by the Senate Judiciary Committee print of June 1945 on the legislative history of the Administrative Procedure Act, which states, in pertinent part:

"... The statutory recognition of such informal methods should both strengthen the administrative arm and serve to advise private parties that they may legitimately attempt to dispose of cases at least in part through conferences, agreements, or stipulations. It should be noted that the precise nature of informal procedures is left to development by the agencies themselves." S Doc 248, supra note 4, at 24.

10/ In this connection, respondent states:

"And while the detailed hearing requirements in Sections 7 and 8 of the Administrative Procedure Act may be inappropriate to the Commission's consent order practice, the essentials of due process presupposing fair and impartial procedures are still required for such 'adjudication,' where substantial rights of proposed respondents are vitally affected. . . ." (Memorandum in support of motion, p. 17.) In connection with its contention that ex parte comments by the staff on settlement proposals are improper, respondent does not apparently rely directly on Section 5(c). (Id at 19).

[3c. 3, 5b. 1, 5b. 2, 6a. 2, 7c. 13, 8b. 7] A related question in this connection is: Is respondent entitled, as it claims, to intra-agency memoranda to the Commission commenting on the consent negotiations prior to complaint, on the ground that withholding such documents would deprive it of effective representation of counsel? Respondent, of course, has the right to be represented by counsel. It is obvious, however, that the degree to which counsel may participate in representing a client before the Commission will, of course, vary with the nature of the proceeding. The real issue involved here is whether the Commission may informally consult with its staff as to whether a complaint should issue once consent settlement procedures have begun. Respondent's counsel should not be permitted to inject himself into that procedure under the guise of rebutting staff representations with respect to the settlement proceedings. The requirements of Section 6(a) providing for representation by counsel in administrative proceedings do not go that far. Nor does Section 6(a) of the Administrative Procedure Act go so far as to permit respondent to, in effect, secure, by way of discovery, internal communications bearing on the question of whether complaint should issue, irrespective of whether the proceeding is in the adjudicative stage or not. The net effect of respondent's argument is that administrative due process requires that the informal settlement procedures should be converted into a preliminary trial on the Commission's decision to issue complaint. Neither the Administrative Procedure Act nor any other legislation warrants such a procedure. Respondent's rights will be fully protected in the adjudicative stage of this proceeding, which is subject to all the safeguards provided by the Administrative Procedure Act. Furthermore, the Commission's decision on whether to issue complaint is within its discretion. Preservation of the integrity of the administrative process precludes an inquiry into this agency's mental processes leading up to that decision. 11/

[3a. 1, 5b. 1] Finally, respondent contends that the Commission's consent order procedures violate the letter and spirit of the Freedom of Information Act of 1966. Although that statute does not, as a technical matter, come into effect until July of 1967, respondent's arguments thereunder will be considered since the Commission desires to bring its procedures into line with the requirements of this Act as quickly as possible. Respondent, under this statute, also

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11/ Graber Manufacturing Company, Inc. (Order Ruling on Questions Certified by the Examiner and Respondents' Appeal from Hearing Examiner's Ruling, December 13, 1965), Docket No 8038; R. H. Macy & Co., Inc. (Order Ruling on Questions Certified and Denying Motion to Strike Certification, September 30, 1965), Docket No 8650. Cf. Modern Marketing Service, Inc. (Order Ruling on Question Certified, January 7, 1966), Docket No 3783.

asserts that the rules relating to the Commission's consent order procedures do not adequately give notice of the nature of the staff participation in the consent sett'-ment procedures, that they fail to establish criteria fo. opportunity to make oral presentations to the Commission, 12/ and that they fail to give notice that the Commission may rely on ex parte representations by the staff. As stated above, it is the Commission's view that the consent order rules satisfy the notice requirements of Section 3(a) of the Administrative Procedure Act now in effect. It is further our view that the provisions of Section 3(a), as amended by the Freedom of Information Act, are not markedly different from the requirements of the statute prior to its amendment. As the Senate Report on the bill 13/ states, this subsection has fewer changes from existing law than any other, primarily because there have been few complaints about omission from the Federal Register of necessary official material and that the complaints that have been received have been more directed to allegations that there has been too much publication rather than too little. According to the Senate Report, a number of minor changes have been made in the section to make it "more clear that the purpose of inclusion of material in the Federal Register is to guide the public in determining where and by whom decisions are made, as well as where they may secure information and make submittals and requests." Accordingly, under the Freedom of Information Act, as before, the standard by which procedural rules must be judged is whether they are realistically informative to the public of the administrative procedures available. The Commission's consent order rules for the reasons heretofore stated meet that test.

[3c. 3, 5b. 1, 7c. 13, 8b. 7] Seeburg also apparently relies on the Freedom of Information Act as support for its contention that it is entitled to intra-agency memoranda commenting on its settlement proposals to the Commission. These, however, are internal communications relating to an administrative matter and clearly are within the exemptions set forth under Section (e) of the Act, which states in pertinent part:

> "(e) Exemptions. – The provisions of this section shall not be applicable to matters that are . . .

12/ Oral presentation to the Commission in the course of consent procedures has only been granted under unusual circumstances when in the Commission's belief such presentation served the public interest. If the consent settlement proceedings are to remain the flexible, informal procedures they are intended to be, the decision on whether to grant permission for such presentation must remain within the Commission's discretion.

13/ S Rep No 813, 89th Cong, 1st Sess 6 (1965).

> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency. . . ."

As already noted, the Commission's precomplaint consent order procedures are properly ex parte and not in the category of adjudication. The Freedom of Information Act, of course, has no bearing whatsoever on the issue of whether the Commission's precomplaint consent order procedures are properly ex parte or not. The only question remaining is whether the staff memoranda commenting on respondent's consent settlement offers are properly within Exemption No 5 to the provisions of the Act. We hold that the documents in question come squarely within the scope of this exemption. The Act does not enlarge the discovery rights of a private party engaged in litigation with the Commission to secure documents of this nature which have hitherto never been considered as subject to discovery in this agency's proceedings.

The fact that Congress did not intend to enlarge discovery rights to encompass internal agency memoranda bearing on the question of whether the agency should issue complaint is supported by those passages in the House and Senate reports commenting on Exemption No 5 of the Act. In this connection, the Senate Report states:

> "Exemption No 5 relates to 'inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency.' It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to 'operate in a fishbowl.' The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation." (S Rep No 813, 89th Cong, 1st Sess 9 (1965).

The House Report makes it equally clear that the Act was not intended to enlarge the litigant's discovery rights to documents of this nature. It, too, recognizes the merit in the objections of agency witnesses that a complete exchange of opinions within agencies would be impossible if all internal communications were made public, and that "advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl.'" The report concludes its consideration of this point with the following significant interpretation of this exemption, which is pertinent here:

". . . This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S 1160 exempts from disclosure material 'which would not be available by law to a private party in litigation with the agency.' Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." HR Rep No 1497, 89th Cong, 2d Sess 10 (1966). (Emphasis supplied.)

As the Assistant Attorney General of the Department of Justice's Office of Legal Counsel stated: "If an internal report, proposal, analysis, or recommendation is to be worth reading, it must be a free expression and not confined to matters 'cleared for publication.' This is as true in Government as it is in any other organization." 14/ That reasoning is applicable in full measure to the documents which respondent claims should have been produced in the course of the precomplaint settlement procedures.

The final matter remaining for decision is the question of whether respondent should be granted leave to file briefs and present oral argument in support of its motion to vacate complaint and whether that certification should be consolidated with the certification of Seeburg's motion for production of documents for the scheduling of briefs and oral argument. The Commission has carefully examined the pleadings filed before the Hearing Examiner in connection with respondent's motion to vacate as well as respondent's subsequent request directly addressed to it, and complaint counsel's answer in opposition thereto. As a result of such review, the Commission is of the opinion that on the basis of the pleadings now in this record it has sufficient information on the respective positions of both respondent and complaint counsel on the issues raised by the motion to vacate the complaint, and that this matter should be decided without further delay. The Commission, therefore, has determined that respondent's motion to vacate the complaint, its request for leave to file briefs and present oral argument, and the request that the two certifications of respondent's motion be consolidated for briefs and oral arguments should be denied. An order to this effect will issue.

14/ Statement of Norbert A. Schlei, Assistant Attorney General, Office of Legal Counsel, Department of Justice; Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S 1666, 88th Cong, 1st Sess 203 (1963).

Appendix A

You are hereby notified that the Commission has determined to institute a formal proceeding in the above captioned matter. A copy of the complaint which the Commission intends to issue, together with a proposed form of order, is enclosed.

As provided in the Commission's Rules, Part 2 – Consent Order Procedure, you may, within ten days after the service of this notice, notify the Secretary as to whether or not you are interested in having the proceeding disposed of by the entry of a consent order. If your reply is in the negative, or if no reply is filed within the time provided, the complaint will be issued and served forthwith and thereafter adjudicated in regular course. If your reply is in the affirmative, the files will be referred to the Division of Consent Orders for further handling in accordance with established procedure. After the complaint has been issued, the consent order procedure provided for by Part 2 of the Rules will not be available.

Counsel for the Commission in this matter is

By direction of the Commission.

Appendix B

The proposed respondent(s) having filed reply on _____ indicating interest in having this matter disposed of by the entry of a consent order, the files herein have been referred to the Division of Consent Orders.

The Commission's Rules governing consent order procedure provide for the submission to the Commission of an agreement containing a consent order within thirty days after the filing of such a reply.

Counsel for the Commission will communicate with you with respect to securing the agreement.

SEEBURG CORP.

Federal Trade Commission, October 25, 1966

Docket No. 8682

7c. 13(7) Right to disclosure of confidential data in possession of agency.

A showing of good cause for the production of confidential data from the Commission's files requires a demonstration of real or actual need A

showing of generalized relevance or possible helpfulness is not enough. Production of confidential data relating to customers of the industry and competitors of respondent (concerning marketing strategies, as well as technical, marketing and purchasing experiences and plans) will be denied where it is not shown that the data requested are unavailable to respondent under procedures to secure the data directly from the source rather than from the Commission's confidential files. Furthermore, as to some of the data requested, relevance to the issues in the case was merely conjectural.

7c. 13(7) [3a. 3, 7b. 8, 7b. 11] Authority of Examiner to rule on request for disclosure of confidential data in possession of agency.

Contention that the Examiner has the authority to order the production of confidential information from the Commission's files without reference to the Commission, under the exception relating to documents whose "use may become necessary in connection with adjudicative proceedings," is rejected. The exception includes that which complaint counsel must use in the presentation of his case and other vital documents such as Jencks type statements. It is not a general authorization for pretrial discovery bypassing the Commission's requirements in the pertinent rule governing the release of confidential data. This is a reasonable construction of the Commission's rules when read together. The contention that such a construction compels respondent to resort to a procedure not published is without merit.

7c. 13(7) [6a. 2(2), 7a. 2, 7c. 14(1), 12. 2] Right to disclosure of confidential data in possession of agency.

Contention that refusal of the Commission to disclose confidential information in its files, absent a showing of necessity, violates Section 6(a) of the Administrative Procedure Act (in that respondent would be deprived of its right to representation by counsel if complaint counsel were accorded a preferred position in their discovery and pretrial preparation), Section 7(a) (in that the requirement that adjudicative proceedings be conducted in an impartial manner would be frustrated), and Section 12's guarantee that all requirements or privileges relating to evidence and procedures shall apply equally to agencies and persons, is rejected. Respondent may obtain the information sought at some future time if a showing of necessity is made.

7c. 13(7) [3c. 3(1)] Right to disclosure of confidential data in possession of agency.

The Freedom of Information Act does not indicate that the Commission should abandon the standard of necessity in the case of discovery proceedings involving application for confidential documents from the Commission's files. In fact, the provisions of the Act indicate the contrary. The Act does not concern itself with discovery procedures applicable to adjudicative proceedings, but rather with enlarging the access of the public and clarifying the right of the public to documents in administrative files. However, Section 3(e)(4) exempts from the provisions of the Act trade secrets and commercial or financial information obtained from any persons and privileged or confidential, and Section 3(e)(7) exempts investigatory files compiled for law enforcement except to the extent available by law to a private party.

[Ruling on respondent's motion for production of documents].

BY THE COMMISSION. (Commissioner ELMAN concurring in the result). This matter is before the Commission on the Hearing Examiner's certification of respondent's motion for production of Commission documents pursuant to §3.11 of the Commission's Rules, with a recommendation that it be denied. The motion was certified to the Commission on the ground that the request should be treated as an application for confidential information from the Commission's files under §1.134 of the Rules. It should be noted at the outset that respondent has apparently had full disclosure of complaint counsel's case, both with respect to the witnesses to be utilized, the documents to be introduced, the underlying data supporting such exhibits, and the theory of the case. There is evidently no suggestion that complaint counsel will, in his presentation of the case, rely on the data included in the specifications of respondent's motion for production now under consideration.

In issue before the Commission, according to the Examiner's certification, are the following documents specified in respondent's motion for production:

3. Any documents showing the amount and manner of sales of bottle and can vending machines to the following listed classes of bottlers, including, but not limited to, any special policies, problems, and selling or other techniques applicable to such classes of bottlers:

a. Bottlers of Coca-Cola, whether independent or owned by the Coca-Cola Company;

b. Bottlers of Pepsi-Cola, whether independent or owned by Pepsi-Cola Co., Inc.;

c. Bottlers of Royal Crown Cola, whether independent or owned by the Royal Crown Cola Company;

d. Bottlers of Seven-Up, whether independent or owned by Seven-Up syrup manufacturers;

e. Bottlers of Dr. Pepper, whether independent or owned by the Dr. Pepper Company;

f. Bottlers of Canada Dry, whether independent or owned by the Canada Dry Corporation;

g. Bottlers of other soft drinks, whether independent or owned by soft drink syrup manufacturers.

4. Any documents which are, or which mention, refer, relate to, or show correspondence, reports of meetings, meetings, negotiations, engineering tests, or other contacts between manufacturer of vending machines and any manufacturer of soft drink syrup in connection with the approval or acceptance of the vending machine manufacturer's products for sale to bottlers of soft drinks.

5. Any documents obtained from any manufacturer of soft drink syrup, including, but not limited to, the firms listed in specifications 3(a)-(f), which are, or which mention, refer, relate to, or show:

a. Laboratory or engineering procedures used by any such manufacturer in the testing or acceptance of bottle or can vending machines;

b. Laboratory, engineering or other reports (including summaries thereof) on the testing or acceptance of bottle or can vending machines by such manufacturers;

c. Negotiations, meetings, correspondence, or any other contacts between such soft drink syrup manufacturer and any manufacturer of bottle or can vending machines with respect to the testing or acceptance of said vending machine manufacturer's machines by said soft drink syrup manufacturer;

d. Modification and/or resubmission of vending machines by bottle or can vending machines manufacturers to overcome engineering or technical problems or objections raised by soft drink syrup manufacturers;

e. Technical problems encountered in actual operation of bottle or can vending machines;

f. Lists of bottle or can vending machines approved or accepted by any manufacturer of soft drink

syrup for sale or recommendation for sale to its owned, controlled, or contract bottlers;

g. Purchase volume of bottle or can vending machines, including particular types and models thereof, by soft drink syrup manufacturers and/or soft drink bottlers, from particular suppliers;

h. Any special promotional incentives, offered by soft drink syrup manufacturers in connection with the purchase of bottle or can vending machine equipment by soft drink bottlers.

6. Any documents obtained from any bottler of soft drinks, whether independent or company owned, or from any association of soft drink bottlers, which are, or which mention, refer, relate to, or show:

a. Purchase volume of bottle or can vending machines, including particular types and models thereof, from particular suppliers;

b. Identity of suppliers of bottle or can vending machines;

c. Technical problems encountered in the actual operation of bottle or can vending machines;

d. Incentive [illegible]ms, whether in cooperation with a manufa[illegible]r of bottle or can vending machines or a manufacturer of soft drink syrup, in connection with the purchase of bottle or can vending machines;

e. Any meetings, correspondence, conversations, or other contacts between a bottler and any manufacturer of soft drink syrup pertaining to or concerning purchase by the bottler of bottle or can vending machines not approved or accepted by said soft drink syrup manufacturer.

8. Any memoranda or documents in the Commission's files relating to the Commission proceeding denominated In the Matter of The Vendo Co., FTC Dkt 6646 (September 6, 1957), which will show the reasons or basis for the Commission's approval of the settlement which permitted Vendo, alleged to have been the nation's largest manufacturer of soft drink vending machines, to retain ownership of Vendorlator Mfg. Co., one of Vendo's major competitors in this market, where the combined sales of the merged company were alleged to have accounted for over 50% of the domestic bottle verding machine market.

Respondent asserts, with respect to specifications 3-6 and 8, that it requires this information in order to elicit evidence in support of its theory of the case as to the relevant

market in this Section 7 proceeding and to prepare for the cross-examination of complaint counsel's witnesses. To make its defensive showing respondent asserts that it desires to demonstrate "the separate nature of the Coca-Cola and other bottler markets". According to the Examiner, respondent intends to establish that there was no substantial actual or potential competition between Seeburg and Cavalier, the acquired concern, at the time of the acquisition.

The Examiner states that apart from the contention that the acquired concern was not competing in the alleged relevant market in which Seeburg did business, the purpose of the discovery in question under these specifications is obscure since the nature of the relevant market, functionally, which respondent proposes to establish, is not disclosed. The Examiner finds that respondent has not made the prerequisite showing of good cause necessary under §1.134. The Examiner further holds that an application for such disclosure should be supported by a specific indication of relevancy and materiality as to each and every class of document, supplemented by an explanation of how such documents would fit into respondent's pattern of defense, including "the functional" market structure which respondent believes the evidence may establish.

[7c, 13] The Examiner, in view of his proximity to the proceeding, is in a more favorable position than the Commission to judge in the particular instance the proper scope of discovery proceedings. 1/ As a result, the Commission will, of necessity, give considerable weight to his analysis of applications for production of confidential documents from the Commission's files under Rule 1.134. A showing of generalized relevance or possible helpfulness is not enough. A showing of good cause under §1.134 requires a demonstration of "real or actual need". Viviano Macaroni Company, Docket No 8666, Order Ruling on Question Certified (March 9, 1966). We agree with the Examiner that on the facts presented the showing of need requisite to the production under the rule has not been made. In this connection, we note further the Examiner's statement that the respondent has made no attempt, through the deposition procedures available to it, to document the necessity of securing the data demanded from the Commission's files.

Much of the data which respondent desires to secure from the Commission's files is obviously confidential, both in the case of customers of the vending machine manufacturing industry and competitors of Seeburg, since it relates to sensitive topics such as the marketing strategies, as well as the technical, marketing and purchasing experiences and plans of such customers and competitors. Sensitive information of this nature should not be released by the Commission from its confidential files without compelling need. Disclosing information from the Commission's confidential files under a lesser standard would necessarily engender

1/ Cf. Topps Chewing Gum, Docket No 8463, opinion and order disposing of motions, July 2, 1963.

resistance on the part of companies and individuals cooperating in Commission industry investigations. It would be likely to seriously retard voluntary compliance with the Commission's efforts to obtain the data which it needs in industry inquiries. Obviously, the cooperation which the Commission has received in the past from business depends in large part on the confidence of industry that confidential data submitted to this agency will not be released in an adjudicative proceeding unless specific and concrete need therefor has been shown.

The Commission, at this time, is not fully informed as to the measures respondent has taken or intends to take to secure the information requested in specifications 3-6 directly from the third parties involved under the procedures set forth in §§3.10 and 3.17 of the Rules. At this time no determination can be made that such data is unavailable to respondent under these procedures. Wherever sensitive data relating to customers or competitors of the nature involved in this request is concerned, respondent should utilize the procedures made available by the Commission's Rules to secure the data directly from the source rather than from the Commission's confidential files. Under these procedures, the third parties from whom information is sought are, of course, entitled to state their views on the competitive implications of disclosing the information requested and on the proper measures for preserving the confidentiality of the data produced pursuant to subpena where such measures are appropriate. 2/ In this connection, it appears from the Hearing Examiner's certification that certain of the data sought in specifications 3-6 has already been obtained by respondent. Certainly due process requires no more than that respondent be able to secure evidence to present its defense. Respondent, of course, does not have an unqualified right to demand confidential data from the Commission's files at any particular time or stage in a proceeding. See The Sperry and Hutchinson Company v. Federal Trade Commission, CCH Trade Reg Rep ¶71,800 (SD NY 1966). 3/

We turn now, specifically, to sepcification 8 of Seeburg's motion for production, which seeks any memoranda or documents in the Commission's files showing the reasons or basis

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2/ If a party responding to respondent's subpena states that it would prefer to have the Commission release documents already in this agency's files which it previously furnished in order to save itself the trouble of responding to Seeburg's subpena, then such data may be released to respondent.

3/ Cf. American Brake Shoe Company v. Schrup, 1965 Trade Cases ¶71,575 (D Del 1965).

tor the Commission's approval of the settlement in The Vendo Co., Docket No 6646, which permitted Vendo to retain ownership of the Vendorlator Mfg. Co. Respondent requests these files on the ground that the documentation sought may contain material necessary to adequately cross-examine complaint counsel's witnesses from the Vendo Company "as to the realities of competition in the industry, illustrated by Vendo's attempt to diversify by acquiring Vendorlator." In addition, Seeburg asserts "the requested documents may also support respondent's defensive showing as to the separate nature of the Coca-Cola and trade bottler markets." On both counts respondent's showing of need is so conjectural that it necessarily fails to meet the prerequisites for release of confidential information under §1. 134 of the Rules. 4/

Insofar as the demand encompasses internal memoranda of the Commission in an attempt to probe its mental processes in deciding to accept the consent settlement in Vendo, these are clearly not a proper subject of discovery. 5/ The fact that intra-agency memoranda of this kind come within the exemption of §3(e)(5) of the Freedom of Information Act has already been considered in connection with respondent's motion to vacate. [See 20 Ad L 2d 603]. That discussion also applies to this issue as well.

[3a. 3, 7b. 8, 7b. 11, 7c. 13] Respondent contends that the procedures for application to the Commission under §1. 134 of the Rules for the release of confidential information from the Commission's files are inapplicable here, on the ground that the Examiner has the power to order the production of the documents in question under §3. 11 without reference to the Commission. Seeburg relies on the clause in §1. 133(a) exempting from the procedures for the release of confidential information under §1. 134 those documents whose "use may become necessary in connection with adjudicative proceedings". The fact is that the Commission has already ruled on the scope of the exception in §1. 133 on which

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4/ The consent order in question was issued more than nine years ago, on September 5, 1957. See The Vendo Company, 54 FTC 253 (1957).

5/ Graber Manufacturing Company, Inc., Docket No 8038, Order Ruling on Questions Certified by the Examiner and Respondents' Appeal from Hearing Examiner's Ruling, December 13, 1965; R. H. Macy & Co., Inc., Docket No 8650, Order Ruling on Questions Certified and Denying Motion to Strike Certification, September 30, 1965. Cf. Modern Marketing Service, Inc., Docket No 3783, Order Ruling on Question Certified, January 7, 1966. See also Coro, Inc. v. Federal Trade Commission, 338 F2d 149 (1st Cir 1964), cert denied, 380 US 964 (1965).

respondent relies. In Viviano Macaroni Company, Docket No 8666, Order Ruling on Question Certified (March 9, 1966), the Commission stated:

> ". . . The exception in pertinent part relates to material and information which may be necessary for use in connection with an adjudicative proceeding and this, in general, includes that which complaint counsel must use in the presentation of his case and other vital documents such as Jencks type statements. . . . It is not a general authorization for pretrial discovery bypassing the Commission's requirements in §1. 134 governing the release of confidential data. . . ." 6/

There is no question here, as respondents states, of §3. 11 not meaning what it says if this construction of the Rules is followed. Obviously, on their face §§1. 133, 1. 134 and 3. 11 are expressly related by the terms of §1. 133. The Rules must be read together and the construction given §1. 133 is a reasonable one, doing no violence to the provisons of §3. 11. Respondent's argument that this construction of the Rules requires it to resort to procedures not published in the Federal Register and therefore violates Section 3(a) of the Administrative Procedure Act is without merit.

[6a. 2, 7a. 1, 7c. 13, 7c. 14, 12. 2] Seeburg further asserts that Sections 6(a), 7(a) and 12 compel the production of the documents which it seeks pursuant to §3. 11 of the Commission's Rules. Otherwise, respondent argues, its right under Section 6(a) to be represented and advised by counsel would be reduced to an empty formality if complaint counsel, in an adjudicative proceeding, were accorded a preferred position in their discovery and pretrial preparation by the Commission's interpretation of §3. 11. With respect to Section 7(a)'s direction that adjudicative proceedings be conducted in an impartial manner, respondent similarly argues that this provision would be frustrated if it is not granted the pretrial discovery which it seeks. Respondent, in addition, relies on Section 12's guarantee that all requirements or privileges relating to evidence and procedures shall apply equally to agencies and persons.

Contentions similar to those advanced by Seeburg were passed on by the District Court for the Southern District of New York, in The Sperry and Hutchinson Co. v. Federal Trade Commission, supra, when the court considered claims that the Commission's denial of motions under §3. 11 of the Rules for discovery contravened statutory rights

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6/ See also Inter-State Builders, Inc., Docket No 8624, Order and Opinion Directing Remand, April 22, 1966.

guaranteeing access to material evidence under Sections 7(c) and 12 of the Administrative Procedure Act. 7/ The court ruled:

> "I cannot agree. Section 7(c) provides simply that 'every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.' These rights certainly do not extend to an unlimited privilege to examine all the Commission's files, which in essence is what Sperry seeks. As previously pointed out, there has been no showing here that Sperry will be denied any rights to present its defense and this court is in no position to find that Sperry is likely to be deprived of essential material at what will undoubtedly be a lengthy hearing yet to be commenced.
>
> "Section 12 adds little to Sperry's argument. This provision states that 'except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons.' (emphasis added.) By no means can it be said that the Commission has plainly flouted this open-ended legislative direction." CCH Trade Reg Rep ¶71,800, supra, at 82,703.

That holding is applicable here. Seeburg, as we have noted already, is not foreclosed from seeking the evidence which it seeks pursuant either to §3.10 or §3.17 or even to again seek this data from the Commission's files if it can meet the standard of necessity outlined in this and previous decisions. The court, in Sperry and Hutchinson, clearly held that a respondent does not have the right, as we noted above, to confidential data from the Commission's files at any particular time or stage in the Commission's proceeding as long as there is a reasonable opportunity at future stages of the proceeding to adduce the evidence it needs.

Significantly, the district court characterized the requirement of Section 12 that all requirements or privileges relating to evidence or procedures shall apply equally to agencies and persons as an "open-ended legislative direction." In short, while it has the duty of insuring that Seeburg has the opportunity to secure and present its evidence, the Commission can make provision that this is done

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7/ Although respondent here relies on Sections 6(a) and 7(a), as well as 12, of the Administrative Procedure Act, its contentions are not materially different from those ruled upon by the court.

in a manner consistent to the greatest extent possible with the protection of confidential sensitive business data in the Commission's files. As the court stated:

> "Such 'equal' rights of access to evidence as Sperry may have under this provision are by no means unqualified. As the statute indicates these rights are plainly subject to the protections against disclosure of confidential information required by the Commission's rules . . .
>
> "Moreover, even assuming there is a statutory right of 'equal' access to evidence, it could scarcely be said to require such access at any particular time or at any particular stage in the proceeding. Nor would it include access to any evidence which is not shown to be necessary to the defense. There is no showing here that access to any such material will necessarily be denied in this adjudicative proceeding." CCH Trade Reg Rep ¶71,800, supra, at 82,703.

Finally, the Commission does not construe §1.133 "as a blanket of secrecy for all documents in [complaint] counsel's possession". The fact of the matter is that §1.133 and §1.134 do not constitute an impenetrable barrier to the Commission's confidential files, but merely require, as we have stated here and in other cases, that documents in the confidential category should not be released without a showing of necessity on the part of a respondent engaged in putting on his defense. This is by no means an insuperable barrier. The Freedom of Information Act of 1966 does not indicate that the Commission should abandon the standard of necessity in the case of discovery proceedings involving application for confidential documents from the Commission's files. In fact, the provisions of the Act indicate to the contrary. The Act does not concern itself with discovery procedures applicable to adjudicative proceedings. It does concern itself with enlarging the access of the public and in clarifying the right of the public to documents in administrative files. However, Section 3(e) of the Act provides expressly that documents in the categories enumerated therein shall be exempt from the provisions of the Act. In this connection, Section 3(e)(4) exempts from the provisions of the Act trade secrets and commercial or financial information obtained from any persons and privileged or confidential, 8/ while Section 3(e)(7) exempts investigatory files

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8/ "Exemption No 4 is for 'trade secrets and commercial or financial information obtained from any person and privileged or confidential.' This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be

[Footnote continued on following page].

compiled for law enforcement purposes except to the extent available by law to a private party. 9/ Certainly, while these exemptions do not exclude documents in this category from discovery proceedings when a proper request is made, they clearly indicate that it was not the intent of Congress to change with this legislation the standards whereunder discovery would be required with respect to such documents. In short, in the case of discovery proceedings relating to confidential information from the Commission's files coming within the exemptions of Section 3(e) of the Act, the test is still one of a showing of necessity, which has not been met in this instance.

Since the Commission is adequately informed of the issues raised by respondent's motion for production, the request for the opportunity to present briefs and oral argument will be denied. The motion for production is denied for the reasons set forth above.

STATESMAN LIFE INSURANCE CO.

Federal Trade Commission, December 7, 1966

Docket No. 8686

7c. 13(7) Disclosure of evidence in possession of agency denied.

In proceedings charging respondent with deceptive advertising practices, the Commission will deny respondent's request for the production of the Commission's memorandum closing proceedings

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8/ [Footnote continued from preceding page].

released to the public by the person from whom it was obtained. This would include business sales statistics, inventories, customer lists, and manufacturing processes. . . ." S Rep No 813, 89th Cong, 1st Sess 9 (1965).

9/ "7. Investigatory files compiled for law enforcement purposes except to the extent available by law to a private party: This exemption covers investigatory files related to enforcement of all kinds of laws, labor and securities laws, as well as criminal laws. This would include files prepared in connection with related Government litigation and adjudicative proceedings. S1160 is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." HR Rep No 1497, 89th Cong, 2d Sess 11 (1966).

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of	)	
	)	
HOUSTON LIGHTING & POWER COMPANY, et al.	)	Docket Nos. 50-498A 50-499A
	)	
(South Texas Project, Units 1 and 2)	)	
	)	
TEXAS UTILITIES GENERATING COMPANY, et al.	)	Docket Nos. 50-445A 50-446A
	)	
(Comanche Peak Steam Electric Station, Units 1 and 2)	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing:

MEMORANDUM OF HOUSTON LIGHTING & POWER COMPANY CONCERNING AUTHORITIES RELEVANT TO THE DISCOVERABILITY OF DOCUMENTS GENERATED IN CONNECTION WITH SETTLEMENT

were served upon the following persons, by hand *, or by deposit in the United States Mail, first class postage prepaid, this 4th day of April, 1980.

Douglas G. Green

Alan S. Rosenthal, Chairman
Atomic Safety & Licensing Appeal Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Thomas S. Moore
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