IN THE MATTER OF

BEATRICE FOODS CO., ET AL.

*Docket 9112. Interlocutory Order, Feb. 27, 1984*

ORDER DENYING EXTENSION OF *IN CAMERA* TREATMENT

In response to the Commission's October 14, 1983 order to show cause for a two-year extension of *in camera* treatment for certain documents, respondent Tropicana Products, Inc. has withdrawn its motion for such an extension for all but one document, CX 413B.

CX 413B contains statistical information on Tropicana shipments of chilled and canned citrus products during the four-week period ending March 26, 1978. It is alleged that this information is not otherwise available and that the public disclosure of it would cause "clearly defined, serious injury," justifying the extension of *in camera* treatment under the standard for confidentiality articulated in *H.P. Hood and Sons, Inc.*, 58 F.T.C. 1184 (1961). Tropicana asserts that by knowing its total shipments for a one-month period almost six years ago, competitors could extrapolate from generally available A.C. Nielsen data on chain store distribution to determine the extent and strength of Tropicana's current non-chain distribution to specific geographic markets. It is alleged that non-chain distribution is a "recognized strength of Tropicana's distribution system" and that knowledge of it derived from this information could be utilized by competitors in sales and marketing strategies to Tropicana's competitive detriment. Tropicana Response to Show Cause Order at 5.

It is difficult to evaluate Tropicana's claim that the information in CX 413B is not otherwise available to the competition. We do know that it was submitted to the Florida Canner's Association, some of whose directors were executives of Tropicana's competitors, CX 414 A-B, yet it is unclear whether such individuals ever saw the information in CX 413B or would have been free to share it with their companies if they had. Regardless of this ambiguity, however, it remains the case that this information is now nearly six years old and, therefore, presumably not competitively sensitive unless Tropicana can make a "convincing showing that such data would provide significant insight into its strengths and weaknesses." *General Foods, Corporation,* 95 F.T.C. 352, 353–354 (1980).

We are not convinced it would. Accepting Tropicana's premise that its non-chain distribution is generally competitively sensitive information, we fail to see how competitors could use such old, limited data on total shipments in conjunction with Nielsen data to derive accu-

rate information on Tropicana's *current* non-chain shipments. For such analysis to be possible, the total amounts and geographic areas of Tropicana's distribution today would have to be basically unchanged from what they were six years ago. In support of this assumption, all that Tropicana contends is that there has been "limited relative growth" in the citrus industry, but even if that is true, it does not necessarily follow that Tropicana's volume and pattern of distribution have stayed the same. Absent better proof, we are not convinced that competitors of Tropicana could use the information in CX 413B in the manner suggested to any effective competitive advantage. Adding to our doubts about Tropicana's showing is its equally unsubstantiated claim that *in camera* treatment is needed for only two more years because "predicted . . . industry growth will result in ultimate minimization of the competitive sensitivity of the information." Tropicana Response at 7.

We thus find that Tropicana has not made the convincing showing of competitive injury required in seeking confidential treatment of old documents. In addition to claiming injury, Tropicana argues that there is no "countervailing consideration" in support of disclosing CX 413B to explain the Commission's decision since it was never cited in the opinion. *See General Foods Corp., supra,* 95 F.T.C. at 355. Before such countervailing considerations can even enter the analysis, however, competitive injury from disclosure must appear to be likely. This showing has not been made.

Therefore, *it is ordered* that the motion for extended *in camera* treatment for CX 413B is hereby denied.

Commissioners Miller and Douglas voted in the negative.

IN THE MATTER OF

# GENERAL MOTORS CORPORATION

*Docket 9145. Interlocutory Order, March 7, 1984*

## ORDER

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

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

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

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

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

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

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

An ALJ has no authority to issue orders that are inconsistent with applicable law, Commission decisions, policy directives or the rules. *See* 16 C.F.R. 0.14. To the extent, therefore, that the ALJ's order in this case bars the Commission from fulfilling its obligation to provide documents in response to official requests of the Congress, it has no force and effect. Nevertheless, as a matter of fairness, the Commission determined to notify the company before responding to Chairman Florio and it issued the November 1983 show cause order. The Commission believes that because its consistent policy has been to provide documents in response to official congressional requests—a fact which has been no secret to the major companies subject to the Commission's jurisdiction[1]—the agency has acted with scrupulous attention to fairness by offering GM formal notice of its intentions and soliciting its views.

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

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

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

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

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

2. Modification Not in Commission's Interest

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

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

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

3. Practical Alternative Better Than Modification

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

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

B. *GM's Other Requests and Disposition*

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

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