excluding that airspace within the Windsor Locks, CT Class C airspace area. This Class D airspace is effective during the specific dates and times established in advance by a Notice of airmen (NOTAM). The effective dates and times will thereafter be continuously published in the Airport Facility Directory.

* * * * *

Paragraph 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth

* * * * *

ANE CT E5 Hartford, CT [Revised]

Hartford-Brainard Airport, Hartford, CT
(Lat. 41°44′11″ N, long. 72°39′01″ W)

That airspace extending upward from 700 feet above the surface within an 11.5-mile radius of Hartford-Brainard Airport; excluding that airspace within the Windsor Locks, CT and Chester, CT Class E airspace areas.

Issed in Burlington, MA, on July 27, 1995.

John J. Boyce,

Acting Manager, Air Traffic Division, New England Region.

[FR Doc. 95–19141 Filed 8–2–95; 8:45 am]

BILLING CODE 4910–13–M

FEDERAL TRADE COMMISSION

16 CFR Part 3

Administrative Litigation Following the Denial of a Preliminary Injunction

AGENCY: Federal Trade Commission.

ACTION: Final rule, with request for public comment.

SUMMARY: Elsewhere in this issue, the Federal Trade Commission has published statements explaining how, after a court has denied preliminary injunctive relief to the Commission, the Commission decides whether administrative litigation should be commenced or, if it has already been commenced, should be continued. The Commission has also adopted a rule to facilitate such consideration in those cases where administrative litigation has already commenced. While the rule is effective upon publication in the **Federal Register**, the Commission will receive comment for thirty days, and will thereafter take such further action as may be appropriate.

DATES: The rule is effective August 3, 1995. Comments will be receive until September 5, 1995.

ADDRESSES: Comments should be sent to the Secretary, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, NW, Washington, DC 20580. Comments will be entered on the public record of the Commission and will be available for public inspection in Room 130 during the hours of 9 a.m. until 5 p.m.

FOR FURTHER INFORMATION CONTACT: Ernest Nagata, Deputy Assistant Director for Policy and Evaluation, Bureau of Competition, (202) 326–2714, or Marc Winerman, Office of the General Counsel, (202) 326–2451.

SUPPLEMENTARY INFORMATION:

I. Background

Elsewhere in this issue, the Commission has published a policy statement that explains the process it follows in deciding whether to pursue administrative merger litigation following denial of a preliminary injunction in a separate proceeding brought, under section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), in aid of the adjudication. The Commission has also determined to adopt a new rule, 16 CFR 3.26, to facilitate the consideration of these issues in matters where the Commission has issued an administrative complaint, and thus begun an adjudicative proceeding, before the court denied the preliminary injunction. Rule 3.26 provides two options for respondents to request such review [1]: (a) Respondents may move to have the administrative case withdrawn from adjudication so that the review may be conducted without the constraints of adjudicative rules, or (b) respondents may argue their case for dismissal within the adjudicative framework by filing a motion for dismissal of the complaint and briefing the matter on the public record.[2]

II. Motion to Withdraw From Adjudication

The first alternative open to respondents is a motion to withdrawn the matter from adjudication. A motion to withdraw a matter from adjudication pursuant to Rule 3.26(c) should be filed directly with the Commission (rather than filed with the Administrative Law Judge and then certified to the Commission), and will result, two days after filing, in automatic withdrawal from adjudication.[3]

In requiring that all respondents make a motion for withdrawal from adjudication, the rule implicitly obtains their unanimous consent to such withdrawal, and to ex parte communications that will be permitted during such time as the litigation is withdrawn.[4] Once a matter is withdrawn from adjudication, complaint counsel and respondents (and even third parties) can communicate informally with Commissioners to discuss the matter. In addition, since such communications will not be on the record of the administrative proceeding, counsel will be able to discuss the case without concern that their statements might compromise their litigation position if the case is returned to adjudication.

III. Motion for Consideration on the Public Record

If one or more respondents do not want the matter withdrawn from adjudication, Rule 3.26(d) permits any respondent or respondents to make a motion for dismissal that will be briefed on the public record. Such motions are similarly filed directly with the Commission rather than the Administrative Law Judge.

Rule 3.26 imposes a fourteen-day time limit for respondents to file a motion under the rule, and fourteen days for complaint counsel to file an answer, and it imposes a limit of thirty printed pages, or forty-five typewritten pages, on respondent's motion (and any accompanying brief) and complaint counsel's answer. The rule also provides that a stay will be automatic, although the Commission could subsequently lift it.[5] Further, the rule provides that

---

[1] The Commission also reserves the right to consider sua sponte the public interests in continuing administrative litigation.

[2] It should be noted that, under its general rule governing adjudicative motions, 16 CFR § 3.22, the Commission has previously entertained motions to dismiss a complaint as no longer warranted by the public interest. See, e.g., *Boise Cascade Co.*, 101 F.T.C. 17 (1983), *American Home Products Corp.* 90 F.T.C. 148 (1977).

[3] The two-day delay will enable complaint counsel to object (and the Commission to defer or halt the withdrawal from adjudication) if there is a question respecting whether the motion meets the requirements of Rule 3.26(b). For example, the motion may be untimely, or there may be a question as to whether a particular court order constitutes a denial of preliminary injunctive relief. A brief delay in withdrawing a matter from adjudication is preferable to the risk that the matter might be prematurely removed from adjudication and placed back in adjudication shortly afterward.

[4] Various constraints on communications with Commissioners during the pendency of an administrative proceeding arise by virtue of the ex parte rule, 16 CFR 4.7 (which applies to communications with both complaint counsel and outside parties), of the separation of functions provision of the APA, 5 U.S.C. 554(d) (which applies to communications with complaint counsel), of the ex parte provision of the APA, 5 U.S.C. 557(d) (which applies to communications with outside parties), and of due process strictures.

[5] As noted previously, in the context of a motion to withdraw a case from adjudication under proposed Rule 3.26(c), the rule provides that the automatic withdrawal would be deferred to enable some opportunity to consider whether respondent's motion was consistent with the rule. Rule 3.26(d) does not provide for similar deferral of a stay. Withdrawal from litigation has serious consequences, insofar as it permits ex parte communications, and it is appropriate to defer withdrawal briefly rather than risk that a matter

materials whose confidentiality is protected under a court order or an administrative order shall be treated as if they had been granted in camera treatment by the Commission. Thus, assuming that the protective order does not preclude use in the administrative proceeding, the parties will be able to rely on such materials in nonpublic filings.

IV. Timing

Pursuant to Rule 3.26(b), the procedures under the rule become available if the Commission is denied preliminary injunctive relief in a judicial proceeding brought in aid of an administrative proceeding. Two details are discussed below.

First, these procedures become available following denial of preliminary injunctive relief. A temporary restraining order (''TRO'') is not ''preliminary injunctive relief,'' so the procedures will not become available on denial of a TRO.[6]

Second, the procedures become available when a district court denies the Commission preliminary injunctive relief and (a) all opportunity has passed for the Commission to seek reconsideration of the district court's denial or to appeal it to a court of appeals, and the Commission has neither sought reconsideration of the denial nor appealed it, or b) a court of appeals has denied preliminary injunctive relief.[7] Thus, these mechanisms will not be available while the Commission might seek reconsideration by the district court or appeal the denial to a court of appeals.[8] Rule 3.26(b) does not delay motions for reconsideration of the public interest in an administrative proceeding until after time has passed for seeking rehearing by the court of appeals of certiorari by the Supreme Court.[9]

List of Subjects in 16 CFR Part 3

Administrative practice and procedure, Investigations.

Accordingly, the Federal Trade Commission amends title 16, chapter I, subchapter A, part 3 of the CFR as follows:

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

1. The authority for part 3 continues to read as follows:

Authority: Sec. 6, 38 Stat. 721 (15 U.S.C. 46), unless otherwise noted.

2. Section 3.22(a) is amended by revising the first full sentence to read as follows:

§ 3.22 Motions.

(a) *Presentation and disposition.* During the time that a proceeding is before an Administrative Law Judge, all motions therein, except those filed under § 3.26, § 3.42(g), or § 4.17, shall be addressed to the Administrative Law Judge, and, if within his authority, shall be ruled upon by him. * * *

3. Section 3.26 is added to subpart C to read as follows:

§ 3.26 Motions following denial of preliminary injunctive relief.

(a) This section sets forth two procedures by which respondents may obtain consideration of whether continuation of an adjudicative proceeding is in the public interest after a court has denied preliminary injunctive relief in a separate proceeding brought, under section 13(b) of the Federal Trade Commission Act, 15 U.S.C. 53(b), in aid of the adjudication.

(b) A motion under this section shall be addressed to the Commission and filed with the Secretary of the Commission. Such a motion must be filed within fourteen (14) days after:

(1) A district court has denied preliminary injunctive relief, all opportunity has passed for the Commission to seek reconsideration of the denial or to appeal it, and the Commission has neither sought reconsideration of the denial nor appealed it; or

(2) A court of appeals has denied preliminary injunctive relief.

(c) *Withdrawal from adjudication.* If a court has denied preliminary injunctive relief to the Commission in a section 13(b) proceeding brought in aid of an adjudicative proceeding, respondents may move that the adjudicative proceeding be withdrawn from adjudication in order to consider whether or not the public interest warrants further litigation. Such a motion shall be filed by all of the respondents in the adjudicative proceeding. The Secretary shall issue an order withdrawing the matter from adjudication two days after such a motion is filed, except that, if complaint counsel have objected that the conditions of paragraph (b) of this section have not been met, the Commission shall determine whether to withdraw the matter from adjudication.

(d) *Consideration on the record.* (1) In lieu of a motion to withdraw a matter from adjudication under paragraph (c) of this section, any respondent or respondents may file a motion under this paragraph to dismiss the administrative complaint on the basis that the public interest does not warrant further litigation after a court has denied preliminary injunctive relief to the Commission. Motions filed under this paragraph shall incorporate or be accompanied by a supporting brief or memorandum.

(2) *Stay.* A motion under this paragraph will stay all proceedings before the Administrative Law Judge until such time as the Commission directs otherwise.

(3) *Answer.* Within fourteen (14) days after service of a motion filed under this paragraph, complaint counsel may file an answer.

(4) *Form.* Motions (including any supporting briefs and memoranda) and answers under this paragraph shall not exceed 30 pages if printed, or 45 pages if typewritten, and shall comply with the requirements of § 3.52(e).

(5) *In camera materials.* If any filing includes materials that are subject to

would be withdrawn from adjudication and then returned to adjudication shortly thereafter. No similar concerns arise when a matter is stayed and the stay is subsequently lifted.

[6] This will rarely be an issue because the Commission rarely commences administrative litigation before a court rules on a TRO motion. Under section 13(b), the Commission must issue its administrative complaint within twenty days after entry of a preliminary injunction or a TRO. Thus, if a court issues a TRO bureau delays ruling on a preliminary injunction, the Commission may have no choice but to issue its administrative complain the before the preliminary injunction ruling. In contrast, section 13(b) does not compel the Commission to issue an administrative complaint before a TRO ruling. Even if the situation did arise, however, the denial of a TRO in and of itself will not trigger Commission review of the public interest in continued litigation, which will rather await dismissal of the proceeding or other action rejecting preliminary injunctive relief.

[7] In some cases, most likely involving consumer fraud, a court could grant a preliminary injunction as to some defendants but deny such relief as to others. When that occurs, Rule 3.26 would be available to the defendants as to whom relief was denied but not the defendants as to whom relief was granted. (In such a situation, though, the affected respondents would be limited to on-the-record consideration under Rule 3.26(d); the procedure for withdrawal from adjudication under subsection (c), which requires a motion by all the respondents in the adjudication, would not be an option.)

[8] This would not, however, preclude earlier communications by staff, respondents, or even third parties, that are occasioned by and concern whether the Commission will appeal the district court's decision. Such communications are permissible, even if the opposing parties are not given prior notice, because they are ''occasioned by and concerning'' a non-adjudicative function. See Rule 4.7(f).

[9] After a court of appeals has rejected preliminary injunctive relief, the Commission has ninety days to see certiorari, 28 U.S.C. 2101(c), and forty-five days to seek rehearing, F.R. Appl. Proc. 40(a). (Although the rule permits respondents to seek reconsideration of the public interest in continuing an adjudication immediately after a court of appeals denies a preliminary injunction in aid of that adjudication, it does not preclude the Commission from seeking rehearing or certiorari, whether or not such a motion is filed.)

confidentiality protections pursuant to an order entered in either the proceeding under section 13(b) or in the proceeding under this part, such materials shall be treated as *In camera* materials for purposes of this paragraph and the party shall file two versions of the document in accordance with the procedures set forth in § 3.45(e). The time within which complaint counsel may file an answer under this paragraph will begin to run upon service of the *in camera* version of the motion (including any supporting briefs and memoranda).

By direction of the Commission, Commissioner Azcuenaga dissenting.

Donald S. Clark,

Secretary.

Dissenting Statement of Commissioner Mary L. Azcuenaga, Concerning FTC's Adoption of Rule 3.26, Respecting Administrative Litigation Following Denial of a Preliminary Injunction

On June 26, 1995, the Commission issued a Statement of Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction and an accompanying explanation.[1] These documents reaffirm the Commission's longstanding policy, consistent with section 5 of the FTC Act, 15 U.S.C. 45(b), of reconsidering whether to pursue administrative litigation following the denial of preliminary relief by the courts. Section 5 requires that the Commission premise issuance of an adjudicative complaint on finding reason to believe that the law has been violated and that enforcement would be in the public interest. This obligation continues implicitly throughout the proceeding, requiring the Commission to take all reasonable steps to assure itself that an enforcement action, once begun, remains in the public interest. I joined in that Statement.

The Commission now adopts new Rule 3.26 to govern how the agency will proceed if a court denies a requested preliminary injunction pending completion of an administrative adjudication.[2] A central feature of the new rule is that following the court's action, the respondents may choose to have the administrative matter removed from adjudication to permit the parties to discuss with the Commission privately, off the record and ''without the constraints of adjudicative rules,'' [3] the public interest in continuing the adjudication in light of the court's action.[4] Strictly speaking, no revision of the rules is necessary because existing provisions of the rules of practice are sufficient to permit the Commission to address any effect the court's action may have on the public interest in continuing the adjudication.[5] Nevertheless, I have no objection to adopting a new rule to provide specific procedures for reconsidering an administrative adjudication following denial of a preliminary injunction. My difference of opinion is this: I believe that a rule adopted to address this situation should provide that the matter be left in adjudication for any reconsideration by the Commission and that any communication between the parties and the Commission take place on the record.[6]

The Commission opines that complaint counsel will be more candid off the record because they ''will be able to discuss the case without concern that their statements might compromise their litigation position if the case is returned to adjudication.'' [7] It also suggests that the *ex parte* procedure will confer similar benefits on ''respondents (and even third parties).'' [8] It is unclear to me why all this candor cannot and should not take place on the public record.

Traditionally, the Commission acts as a prosecutor up to and including its decision to issue an administrative complaint. As soon as the vote to issue an administrative complaint is complete, the Commission assumes a judicial role with respect to that case, which then is said to be ''in adjudication.'' [9] It should go without saying that the Commission must not allow its prosecutorial role to intrude in any respect in carrying out its deliberative role in an administrative adjudication. Removing a matter from adjudication to chat off the record suggests that there is something that the Commission would prefer that the world not know. It also suggests an unease on the part of the Commission in carrying out its judicial function and an unseemly reluctance to relinquish its prosecutorial role. Although the automatic withdrawal provision may not disadvantage the respondent in any given proceeding, it may well undermine public confidence in the integrity of the Commission's adjudicative process.

Let us consider three scenarios following a court's denial of a preliminary injunction: First, complaint counsel have a strong case, notwithstanding the court's denial of a preliminary injunction. If this is so, complaint counsel can explain why on the record. After the case has been withdrawn from adjudication and reconsidered, presumably the Commission will return the case to adjudicative status. Even if the respondents initiated withdrawing the matter from adjudication, the procedure, in-and-out-and-in adjudication, may create a perception that complaint counsel, speaking off the record, had an unfair advantage. The respondents may believe that had they only known what the staff was saying to the Commission behind closed doors while the case was withdrawn from adjudication, they could have defended more effectively and won a dismissal. After all, the court gave the first round to the respondents on the record.

A second scenario is that the case is weak, and complaint counsel's arguments in support of the complaint are correspondingly weak. The Commission suggests in its **Federal Register** notice that if discussion is held on the record, complaint counsel will be inhibited from pointing to weaknesses in the case for fear that if the Commission disagrees and requires the adjudication to go forward, complaint counsel will be disadvantaged by having conceded the weaknesses of the case on the record. An underlying assumption here is that any weaknesses in the case will remain undiscovered (by the courts, by the respondent and by the administrative law judge), as long as complaint counsel can confide in the Commission off the record. Perhaps more serious, the assumption suggests an abiding lack of confidence in the administrative system of adjudication and the Commission's place in it. Complaint counsel will not be able to

[1] These materials appear again in this volume of the **Federal Register**.

[2] *See* 15 U.S.C. § 53(b).

[3] Notice of Final Rule with Request for Public Comment, 60 FR __, Slip Notice at 2–3.

[4] I do not oppose the alternative procedure included in the new rule, which expressly authorizes a motion by any respondent to dismiss the complaint in the public interest. Although the alternative procedure is redundant in light of existing Rules 3.22 and 3.23, 16 CFR 3.22 and 3.23 (1955), I do not find it objectionable because the arguments would be presented on the record unless the Commission directs otherwise.

[5] *See, e.g.,* Rule 3.22 governing adjudicative motions and Rule 3.23 governing interlocutory appeals. The Commission also, of course, may act *sua sponte* to seek briefing from the parties or to dismiss the complaint.

[6] Confidential communications between the Commission and its staff before a matter enters adjudication and when the Commission is still carrying out its prosecutorial responsibility make sense. In our system of law, investigational and prosecutorial decisions are protected from public scrutiny. *See* 5 U.S.C. 552(b)(5). Such confidential communications after the prosecutorial function has concluded with the issuance of a complaint, however, raise issues concerning the exercise by the Commission of its quasi-judicial function.

[7] 60 FR __, Slip Notice at 4.

[8] *Id.*

[9] At this point, all further communications between the parties (complaint counsel and the respondent[s] are on the record with certain specified exceptions. Rule 4.7, 16 CFR § 4.7.

avoid the weakness of the case by confiding that fact in secret to the Commission. At most, they might conceal the weakness for a time, a result that ultimately would be wasteful of both government and private resources. Regardless of when during an adjudicative proceeding complaint counsel or the Commission itself discovers a possible weakness in the case, the Commission should base its decision whether to continue the proceeding on publicly available information.

The new rule may lend itself to a public perception that the staff of the Commission has an advantage over targets of enforcement actions because the staff has the secret ear of the Commission. If the staff is permitted secret access to the Commission, a decision to continue an adjudication, particularly one that, based on publicly available information, appears weak, likely would suggest that complaint counsel were able to persuade the commission to proceed only by ''hiding the ball'' form the respondents. Such a message hardly is consistent with fairness to the respondent or with the role of the Commission as an unbiased decisionmaker.[10]

A third scenario is that the case is weak, respondents move to withdraw the matter from adjudication, and complaint counsel file nothing in support of the complaint.[11] In such an instance, the Commission may agree with the respondents and dismiss the adjudication, or it may disagree and order that the proceeding continue. There seems no good reason not to have this occur on the public record. Again, private discussions between the Commission and its staff can create a public perception of unfairness to the respondents arising from apparent complicity the prosecuting attorneys and the purportedly impartial adjudicators—the very danger the separation of functions requirements of the Administrative Procedure Act and the Commission's *ex parte* rule are designed to avoid.[12]

In addition to undermining the separation of functions at the Commission, the new rule limits the Commission's discretion to decide when individual cases should be in adjudication and remain on the public record. The exercise of discretion in an adjudicative matter is a responsibility of the Commission, not an occasion for apology. This responsibility, which must be carried out consistent with the law and with fundamental fairness, should not be ceded without a reason for doing so. Here, I see none. Both the policy to maintain the separation of deliberative and prosecutorial functions and the appearance of having done so are enhanced when the Commission retains its discretion to determine the appropriate disposition of a motion to withdraw from adjudication. The shifting of a portion of that discretion in favor of the respondents may appear open-minded, but, in the long term, it will disserve the Commission and the public interest.

On balance, the Commission and the public would be better served if the Commission retained its discretion to decide which, if any, cases should be withdrawn from adjudication following denial of a preliminary injunction. The new rule is likely to undermine the integrity of the Commission and its adjudicative process by breaking down the wall between the Commission's prosecutorial and adjudicatory roles in a manner inconsistent with the separation of functions requirement of the Administrative Procedure Act and its own *ex parte* rule.

I dissent.

[FR Doc. 95–19109 Filed 8–2–95; 8:45 am]
BILLING CODE 6750–01–M

[10] Off-the-record discussions with the respondents, followed by dismissal of the complaint, also may create misperceptions of unfairness and favoritism, with the implication that nonpublic communications that could not bear the light of day influenced the Commission's decision.

[11] This assumes that complaint counsel find themselves unable to make a principled argument in support of the complaint. *See* Jose Calimlim, M.D., Dkt. No. 9199 (June 24, 1986) (''complaint counsel represent the Commission's prosecutorial decision as embodied in the allegations of the complaint and in the notice of contemplated relief''); *accord* R.J. Reynolds Tobacco Co., Dkt. No. 9206 (interlocutory order, Dec. 1, 1986); *see also* R.J. Reynolds Tobacco Co. (interlocutory order, Dec. 10, 1986) (purpose of adjudication is ''to subject the Commission's complaint to an adversarial test'').

[12] *See* 5 U.S.C. 552(d); 16 CFR 4.7.

SECURITIES AND EXCHANGE COMMISSION

17 CFR PART 200

[Release No. 34–36031]

Establishment of Office and Delegation of Authority to Administer Functions

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (''Commission'') is amending its Rules of Organization and Program Management to establish the Office of Compliance Inspections and Examinations (''OCIE'') and to delegate authority to administer its functions to the Director of OCIE. This reorganization is designed to improve efficiency and allow for an enhanced integration of functions by combining the inspection and examination operations of the Division of Market Regulation and the Division of Investment Management.

EFFECTIVE DATE: September 5, 1995.

FOR FURTHER INFORMATION CONTACT: James A. Chan, 202/942–0742; Matthew O'Toole, 202/942–0694; or Philip H. Oettinger, 202/942–0784.

SUPPLEMENTARY INFORMATION: On March 22, 1995, the Chairman of the Securities and Exchange Commission announced the creation of a new office, OCIE, that would combine the inspections and examinations functions of the Division of Market Regulation and the Division of Investment Management. The goal of OCIE is to increase the efficiency of the inspection and examination process by integrating the functions and personnel of both Divisions. The Commission today is adopting Rules 19c and 30–18 of its Rules of Organization and Program Management to delegate responsibility for the examination and inspection of brokers, dealers, transfer agents, self-regulatory organizations, investment companies, and investment advisers to OCIE, and to establish the administrative and substantive responsibilities of the Office.

The Commission has determined that this addition to its rules relates solely to the agency's organization, procedure or practice. Therefore, the provisions of the Administrative Procedure Act (''APA'') regarding notice of proposed rulemaking and opportunities for public participation,[1] are not applicable. Similarly, the provisions of the Regulatory Flexibility Act,[2] which apply only when notice and comment are required by the APA or other law, are not applicable.

In the rare instances involving close questions or cases that may be potentially controversial, the staff would either consult with the Commission, or seek Commission authorization before acting.[3] The staff believes that its experience with the issues that may arise in this area

[1] 5 U.S.C. 553.

[2] 5 U.S.C. 601 *et seq.*

[3] Rule 30–18(i) states that ''[n]otwithstanding anything in the foregoing [delegations], in any case in which the Director of the Office of Compliance Inspections and Examinations believes it appropriate, the Director may submit the matter to the Commission.''