

authority to use the unit clarification procedure to merge bargaining units, and although the Third Circuit has specifically upheld this authority in *Glass Workers*, the Board has avoided using it. It remains an open, and interesting, question whether the Board will exercise its statutory authority to merge bargaining units when an appropriate case is presented to it, or whether its 1968 *Libbey-Owens-Ford* decision will become an isolated aberration.

The answer to this question may lie in the composition of the Board.⁸⁵ At present, none of the three members of the majority in the original *Libbey-Owens-Ford* case remains on the Board. Of their replacements, Member Kennedy agreed with their position that the Board possesses and should exercise the authority to consolidate bargaining units in an appropriate unit clarification proceeding;⁸⁶ it can be assumed that he will adhere to this position. A second new member, Chairman Miller, contended in his concurring opinion in the final *Libbey-Owens-Ford* case that consolidation of units should be a matter left to collective bargaining. Presumably, he also will not change his position.⁸⁷ Member Penello has not yet expressed an opinion on the consolidation of units in a unit clarification. Members Fanning and Jenkins, who dissented in the original *Libbey-Owens-Ford* case, are still on the Board. As they demonstrated in the final *Libbey-Owens-Ford* case, they had not, as of that time, changed their position that the Board does not have the authority to merge bargaining units in a unit clarification proceeding. It will be interesting to note whether, in light of the Third Circuit's *Glass Workers* decision, these two members will choose to exercise this court-sanctioned authority in an appropriate case.⁸⁸ Their views, along with that of Member Penello, will be decisive in determining the future position of the Board on merger of existing units through unit clarification.

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Administrative Law—Federal Trade Commission—Lack of Authority to Promulgate Trade Regulation Rules Having the Effect of Law—*National Petroleum Refiners Ass'n v. Federal Trade Commission*.¹—Plaintiff, a representative of the petroleum industry, brought this suit in the United States District Court for the District of Columbia

⁸⁵ See note 83 supra.

⁸⁶ *Libbey-Owens-Ford Co.*, 189 N.L.R.B. No. 139, 76 L.R.R.M. 1806, 1808 (1971) (dissenting opinion).

⁸⁷ In *Denver, Salt Lake & Pacific Stages, Inc.*, 198 N.L.R.B. No. 175, 81 L.R.R.M. 1085 (1972), decided after *Glass Workers*, Chairman Miller specifically reiterated his position. *Id.* at —, 81 L.R.R.M. at 1086 (concurring opinion).

⁸⁸ In the sole merger case since the *Glass Workers* decision, Member Jenkins concurred in dismissing the petition. The combined unit was not shown appropriate. *Id.* at —, 81 L.R.R.M. at 1085 & n.4. Member Fanning was not on the panel.

¹ 340 F. Supp. 1343 (D.D.C. 1972).

challenging the statutory authority of the Federal Trade Commission (FTC) to issue Trade Regulation Rules.² It was a case of first impression, no other courts having considered the issue on its merits.⁸ The particular rule in question⁴ states that failure to post specified octane numbers on gasoline pumps at service stations constitutes an "unfair method of competition" and an "unfair or deceptive act or practice" within the proscription of the Federal Trade Commission Act (FTCA).⁵

The FTC has claimed the authority to issue such rules since 1964, when it promulgated the first Trade Regulation Rule, one which concerned the advertising and labeling of cigarettes. The rationale for that claim was fully set out in the Statement of Basis and Purpose of Trade Regulation Rule⁶ (hereinafter 1964 Statement of Basis) that accompanied the 1964 Rule. In that Statement of Basis, the FTC

² Trade Regulation Rules are defined as follows:

(a) *Nature and authority.* For the purpose of carrying out the provisions of the statutes administered by it, the Commission is empowered to promulgate rules and regulations applicable to unlawful trade practices. Such rules and regulations (hereinafter called "trade regulation rules") express the experience and judgment of the Commission, based on facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes which it administers.

(b) *Scope.* Trade regulation rules may cover all applications of a particular statutory provision and may be nationwide in effect, or they may be limited to particular areas or industries or to particular product or geographic markets, as may be appropriate.

(c) *Use of rules in adjudicative proceedings.* Where a trade regulation rule is relevant to any issue involved in an adjudicative proceeding thereafter instituted, the Commission may rely upon the rule to resolve such issue, provided that the respondent shall have been given a fair hearing on the applicability of the rule to the particular case.

16 C.F.R. § 1.12 (Supp. 1972). The procedure for the promulgation of these rules is set forth in 16 C.F.R. §§ 1.15-16 (Supp. 1972).

⁸ Two suits, which challenged the legality of proposed rules, were dismissed on the ground that they were not ripe for adjudication. In the first case the District of Columbia Circuit held: "The rulemaking authority of an agency cannot usually be fairly tested in the absence of a specific legal and factual setting." *Bristol-Meyers Co. v. FTC*, 424 F.2d 935, 940 (D.C. Cir. 1970). The second case adopted the standards enunciated by the Supreme Court for determining the ripeness of such a suit: the issues must be fit for judicial decision, and there must be the possibility of hardship to the parties if court consideration is denied at the time. *Lever Bros. Co. v. FTC*, 325 F. Supp. 371, 373-74 (D. Me. 1971).

⁴ The rule provides in pertinent part:

In connection with the sale or consignment of motor gasoline for general automotive use, . . . it constitutes an unfair method of competition and an unfair or deceptive act or practice for refiners or others who sell to retailers, when such refiners or other distributors own or lease the pumps through which motor gasoline is dispensed to the consuming public, to fail to disclose clearly and conspicuously in a permanent manner on the pumps the minimum octane number or numbers of the motor gasoline being dispensed

16 C.F.R. § 422.1 (Supp. 1972).

⁵ 15 U.S.C. §§ 41 et seq. (1970).

⁶ Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8325, 8365-73 (1964).

argued that the Trade Regulation Rules are the product of a valid exercise of statutory authority as granted in two provisions of the FTCA: first, Section 6(g),⁷ which explicitly mentions the making of rules and regulations; second, Section 5(a)(6),⁸ the general purpose section of the Act, which according to the FTC implies the requisite rule-making authority. The Statement of Basis accompanying the Rule that precipitated *National Petroleum* relied upon the rationale of the 1964 Statement of Basis.⁹ The validity of this rationale, then, was the issue before the *National Petroleum* court, and the court rejected both of its elements. Following a thorough analysis of the legislative history of the relevant section of the FTCA, the court refused either to accept the Commission's interpretation of the *explicit* rule-making section or to allow the Commission to infer an *implied* rule-making authority from the general purpose provision of the Act. The district court therefore granted the plaintiff's motion for summary judgment and HELD: "[T]he statute (FTCA) does not confer upon the Federal Trade Commission the authority to promulgate Trade Regulation Rules that have the effect of substantive law."¹⁰

This casenote will examine the treatment by the court of the Commission's two primary arguments supporting its assertion that it possesses the statutory authority requisite for the promulgation of Trade Regulation Rules. The note will then focus on what it considers a fundamental issue, one not directly considered by the court: whether or not the rules do indeed have the effect of law. A resolution of that issue appears essential because both the reasoning and the holding of the court are based sub silentio on the premise that the Rules do have the effect of law—that is, that they are what are commonly known as "legislative" rules.¹¹ To determine whether this premise is valid, a brief preliminary examination will be made of the nature of legislative rules. The note will then attempt to delineate the nature and effect of Trade Regulation Rules by examining the 1964 Statement of Basis, which describes the effect the FTC intends the Rules to be given at its adjudicative hearings. It will be submitted that the Rules must be classified as legislative due to the conclusive effect which will be given at the hearings to the factual conclusions that are inherent in the Rules. For example, underlying the Rule in the instant case are factual conclusions regarding the buying habits of the consuming public in connection with different grades of gaso-

⁷ 15 U.S.C. § 46(g) (1970).

⁸ 15 U.S.C. § 45(a)(6) (1970).

⁹ Statement of Basis and Purpose of Trade Regulation Rule, 36 Fed. Reg. 354, 365-66 (1971).

¹⁰ 340 F. Supp. at 1350.

¹¹ Pursuant to the holding that an FTC rule is unauthorized if it has the effect of substantive law, but without any express determination that the challenged rule had that effect, the court issued an order declaring the rule null and void. Order filed, *National Petroleum Refiners Ass'n v. FTC*, Civil No. 1180-71 (D.D.C., filed Apr. 4, 1972).

line;¹² a respondent who is summoned to a hearing for an alleged violation of the Rule would not be permitted to offer evidence in rebuttal of these conclusions. Finally, an evaluation of this effect in terms of its impact on procedural rights will be made in order to underline the correctness of the *National Petroleum* court's requirement that rules having such an impact be authorized by a clear delegation of power from Congress.

The *National Petroleum* court rejected the assertion that the FTC is statutorily authorized to issue rules having the effect of substantive law. The first basis of authority upon which the Commission relied is Section 6(g) of the FTCA, the only provision which explicitly mentions rules and regulations:

The Commission shall also have the power—. . .
From time to time to classify corporations and *to make rules and regulations* for the purpose of carrying out the provisions of sections 41 to 46 and 47 to 58 of this title.¹³

The court determined exactly what is embraced by the words "rules and regulations" by first turning to an analysis of the legislative history of this section of the Act.¹⁴ The Commission claimed in the 1964 Statement of Basis that there is no need to resort to such an analysis since the meaning of this provision is plain on its face.¹⁵ In other words, since the word "rules" is used without qualification, it may be deemed to refer not only to procedural rules, which merely explain the procedures by which the Commission follows in applying the law, but also to substantive rules, which pertain to the law that the Commission administers.

There are strong reasons, however, for not construing the grant of power in section 6(g) so as to include both types of rules. First of all, it is a well-established principle that statutory language must be interpreted according to its context.¹⁶ The rule-making clause in section 6(g) is located side-by-side with the grant of a procedural power to classify corporations, within section 6, which delineates the Commission's investigative powers.¹⁷ Thus the context in which the words "rules and regulations" are placed casts doubt upon the proposition that the rules may govern more than simple procedural matters con-

¹² See note 92 *infra*.

¹³ 15 U.S.C. § 46(g) (1970) (emphasis supplied).

¹⁴ 340 F. Supp. at 1345-48.

¹⁵ 1964 Statement of Basis, *supra* note 6, at 8369 & n.143.

¹⁶ 2 J. Sutherland, *Statutory Construction* § 4703 (3d ed. 1943) (hereinafter cited as Sutherland).

¹⁷ The different subsections of section 6 concern the following matters, in order: (a) investigation of corporations; (b) reports by corporations; (c) investigation of compliance with antitrust decrees; (d) investigations of violations of antitrust statutes; (e) readjustment of corporations violating antitrust statutes; (f) publication of information and reports; (g) classification of corporations and regulations; (h) investigations of foreign trade conditions and reports. 15 U.S.C. § 46 (1970).

sequent to the Commission's investigative powers. Another method of interpreting statutory language is to compare the particular passage with those of other statutes wherein Congress delegates the disputed power.¹⁸ The simple, brief and unqualified wording of section 6(g) contrasts sharply with the cautious delegation of substantive rule-making power to other administrative agencies, notably the Securities Exchange Commission (SEC),¹⁹ the Federal Power Commission (FPC),²⁰ and the Federal Communications Commission (FCC).²¹ In each of these statutes, Congress expressed its intent clearly and definitely within carefully drawn limits. The plain statement that the FTC is empowered to make "rules and regulations" for the purpose of carrying out the provisions of the Act is not sufficient on its face to confer the far-reaching power to make substantive rules such as the Trade Regulation Rules. Both from the context of the rule-making clause and from comparison with other statutes, then, it is not at all obvious that the words "rules and regulations" should encompass substantive as well as procedural rules. Something more than a casual interpretation of those words as all-inclusive is required to establish clearly the intent of Congress in drafting section 6(g).

In *National Petroleum*, the Commission asked the court to round out the contours of section 6(g) with the definition of "rule" propounded in the Administrative Procedure Act (APA).²² This Act applies generally to all administrative agencies and governs the different procedures employed by those agencies. It defines "rule" as the "whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . ."²³ In short, the APA regards the term "rules" as a generic one including both substantive and procedural rules. The *National Petroleum* court refused to look to the APA definition because there is no cross reference or other legal relationship between "rules" as used in the FTCA and "rules" as defined by the APA.²⁴ Furthermore, the first sentence of the definitions section of the APA states specifically that the definitions are for the purpose of the APA.²⁵ The fact that the APA defines "rules" as meaning either substantive or procedural for the purposes of that Act does not imply that wherever Congress authorizes an agency to make "rules," the agency may regard itself as authorized to promulgate both kinds of rules according to its whim.

Since, then, neither the FTCA nor the APA provided any assis-

¹⁸ 2 Sutherland, *supra* note 16, § 6102.

¹⁹ 15 U.S.C. § 79(t) (1970).

²⁰ 15 U.S.C. § 717(o) (1970).

²¹ 47 U.S.C. § 303(r) (1970).

²² 340 F. Supp. at 1348.

²³ 5 U.S.C. § 551(d) (1970).

²⁴ 340 F. Supp. at 1348.

²⁵ 5 U.S.C. § 551 (1970).

tance in defining the term "rules" as used in Section 6(g) of the FTCA, the court turned to legislative history to resolve the important question of how broadly the Commission might construe the term. Specifically, does the term include substantive rules by which the FTC may define with particularity "unfair methods of competition" and "unfair or deceptive acts or practices" within the meaning of the FTCA,²⁰ or is the term confined to procedural rules by which the FTC may conduct its investigations and adjudications?²⁷

When first proposed in the House of Representatives, the FTCA contained a clause strikingly similar to that of Section 6(g).²⁸ At that time the House regarded the proposed Commission as purely an *investigative* body functioning at the direction of the President, the Attorney General, or either house of Congress.²⁹ The Senate did not act on this bill, but provided its own version,³⁰ which set forth a different purpose for the Commission, namely, to sit as an *adjudicative* body for the hearing of antitrust violations.³¹ The Senate bill, however, conspicuously omitted any provision conferring the power to make rules and regulations either in an investigative or adjudicative context.³² Although the House regarded the FTC as an investigative agency with severely limited rule-making power, the Senate envisioned an agency which would adjudicate in roughly the same manner as the courts.³³ A Conference Committee was appointed to resolve these differences. The Committee proposed a bill which incorporated substantial

²⁰ 15 U.S.C. § 45(a)(6) (1970).

²⁷ The word "substantive," as used in this note, is used in contrast to "procedural." However, it should not be confused with "substantial" or "having the effect of law." Substantive rules may or may not have the effect of law. Those substantive rules that have the effect of law are classified as "legislative"; those that do not are termed "interpretative." See text accompanying notes 57-63 *infra*.

²⁸ "[T]he commission may from time to time make rules and regulations and classifications of corporations for the purpose of carrying out the provisions of this act. . . ." H.R. 15613, 63d Cong., 2d Sess. § 8 (1914).

²⁹ H.R. 15613, 63d Cong., 2d Sess. § 10 (1914); H.R. Rep. No. 533, 63d Cong., 2d Sess. 3 (1914). See 51 Cong. Rec. 8845 (remarks of Judge Covington), 9047-48 (remarks of Representatives Towner and Stevens) (1914).

³⁰ Federal Trade Commission Bill, Comparative Print, S. Doc. No. 573, 63d Cong., 2d Sess. (1914).

³¹ *Id.*, § 5.

³² See note 30 *supra*.

³³ The bill provided that the FTC was to proceed in the following manner when it believed any person, partnership or corporation was violating the provisions of the proposed Act: the defendant had to be served with a complaint stating the charges and giving notice of a hearing; the defendant had a right to appear at the hearing and show cause why an order should not be entered; upon such hearing the FTC was to make and file its findings; if the FTC found the defendant guilty of the violations charged, it was to enter its findings of record and serve upon the defendant an order requiring the latter to cease and desist from the violations found. Federal Trade Commission Bill, Comparative Print, S. Doc. No. 573, 63d Cong., 2d Sess. 14-15 (1914). This procedure was incorporated into the FTCA in substantially the same form. 15 U.S.C. § 45(b) (1970). It should be noted that the FTC's sole power lies in the issuance of cease-and-desist orders, enforceable only upon the FTC's application to the courts.

parts of the Senate and House bills.³⁴ The *National Petroleum* court reasoned that since neither the Senate nor the House intended to grant the FTC the explicit power to make rules of a substantive nature, the rule-making power which was inserted in the Conference bill could not exceed the limited power enunciated in the House bill.³⁵ Thus, the court ruled, section 6(g) pertains only to housekeeping or procedural matters.³⁶

Furthermore, amendments expressly granting the FTC precisely the power it seeks to exercise in its use of the Trade Regulation Rules were proposed when the House bill was before the House Committee on Interstate and Foreign Commerce³⁷ and when the bill was debated on the House floor,³⁸ but they were roundly rejected. When the Conference bill was subsequently before the House, two members of the Conference Committee explained the bill and made comments which lend further support to the position that the FTC was not intended to have substantive rule-making power.³⁹ Finally, Congress itself has recognized the lack of authority in the FTC to promulgate substantive rules having the effect of law by explicitly conferring this very authority on the Commission in certain narrow commercial areas only, such as textiles, furs and labeling.⁴⁰

Thus, the court concluded, an impartial reading of the legislative history of the FTCA clearly indicates that Section 6(g) confers upon the FTC only the limited authority to make rules and regulations in

³⁴ Conference Rep. No. 1142, 51 Cong. Rec. 14919 (1914).

³⁵ 340 F. Supp. at 1345-46 & n.12.

³⁶ *Id.* at 1346. The FTC, however, has also relied upon section 6(g) to support the issuance of rules which, though lacking in force of law, are nonetheless substantive to the extent that the rules interpret the FTCA. Industry Guides and Trade Practice Rules, 16 C.F.R. §§ 17.1-4 (Supp. 1972).

³⁷ The amendment before the Committee provided that the FTC be given the power to "make, alter, or repeal regulations further defining more particularly unfair trade practices or unfair or oppressive competition." H.R. Rep. No. 533, 63d Cong., 2d Sess., pt. 3, at 21 (1914) (emphasis supplied).

³⁸ "[T]he commission is hereby empowered to make all necessary rules, regulations, orders and decrees for the enforcement of the powers herein granted, and the rules, regulations, orders and decrees . . . shall be *binding* and conclusive . . ." 51 Cong. Rec. 9056 (1914) (amendment offered by Representative Dillon) (emphasis supplied).

³⁹ "The Federal trade commission will have no power to prescribe the methods of competition to be used in future. In issuing its orders it will not be exercising power of a legislative nature." 51 Cong. Rec. 14932 (1914) (remarks of Judge Covington, so-called author of the FTCA). "We desired clearly to exclude that authority [to exercise a legislative function such as is exercised by the Interstate Commerce Commission] from the power of the commission. We do not know as we could grant it anyway." *Id.* at 14938 (remarks of Representative Stevens).

⁴⁰ Labeling of Wool Products Act § 6(a), 15 U.S.C. § 68d(a) (1970); Textile Fiber Products Identification Act § 7(c), 15 U.S.C. § 70e(c) (1970); Labeling of Fur Products Act § 8(b), 15 U.S.C. § 69f(b) (1970); Flammable Fabrics Act § 5(c), 15 U.S.C. § 1194(c) (1970); Fair Packaging and Labeling Program Act § 5(a), 15 U.S.C. § 1454 (1970). It should also be noted that the Flammable Fabrics Act was once phrased in the same terms as Section 6(g) of the FTCA, yet Congress felt the need to spell out the delegation of substantive rule-making power in a subsequent amendment. 340 F. Supp. at 1348; H.R. Rep. No. 972, 90th Cong., 1st Sess. (1967).

connection with housekeeping chores and investigative responsibilities.⁴¹ The only section of the Act which explicitly mentions rule-making power cannot be cited as a basis of authority for Trade Regulation Rules.

The FTC, however, did not depend in *National Petroleum* solely on the wording of Section 6(g), but argued that even if this explicit wording is an insufficient basis for the authority claimed, the central purpose of the FTCA *implies* the power to promulgate rules having the effect of substantive law. This second alleged basis of authority is contained in the general purpose provision of section 5(a)(6):

The Commission is *empowered and directed to prevent . . .* unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.⁴²

Thus, argued the FTC, the Commission may infer from section 5(a)(6) all necessary powers to fulfill this congressional mandate.

The court provided a short answer to this argument, noting that the Commission ignored section 5(b), which immediately follows section 5(a)(6).⁴³ Section 5(b) sets out the adjudicative process which the FTC is required to follow when it issues a cease-and-desist order. Hence, the court concluded, "General rules of statutory construction and the scheme of the FTCA itself demonstrate that the mandate of Section 5(a)(6) is to be carried out by means of adjudicative process specified in Section 5(b)."⁴⁴ Further, if the legislative history of the Act, as previously discussed, demonstrates that Congress specifically meant to withhold substantive rule-making power from the explicit delegation in Section 6(g), such power cannot be based upon an implied grant.⁴⁵

The principal case cited by the Commission which permits the promulgation of rules that have the effect of law based upon authority *implied* by the relevant statute is *National Broadcasting Co. v. United States*.⁴⁶ In that case the FCC had issued several regulations of an antitrust nature which governed the relations between licensed broadcasting stations and network organizations. Failure to comply with the FCC regulations justified revocation of the offending station's license. The Federal Communications Act contained a specific rule-making clause, but it was not immediately apparent that it included rules of such scope and force.⁴⁷ Nevertheless, the Supreme Court held that the

⁴¹ 340 F. Supp. at 1348-49.

⁴² 15 U.S.C. § 45(a)(6) (1970).

⁴³ Respectively, 15 U.S.C. §§ 45(a)(6), 45(b) (1970). 340 F. Supp. at 1349.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 319 U.S. 190 (1943) (cited in 1964 Statement of Basis, *supra* note 6, at 8373).

⁴⁷ See note 123 *infra*. This was the same clause later involved in *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), discussed in text at notes 114-19 *infra*.

power to promulgate these particular regulations was implied by the general purpose provision⁴⁸ of the Act.⁴⁹

The *National Petroleum* court distinguished that case from the instant case on the grounds that neither the statutory scheme nor the legislative history involved in *National Broadcasting* clearly negated an implied grant of legislative power.⁵⁰ An additional reason can be posited for distinguishing the two cases: the FCC, unlike the FTC, is charged with the duty of licensing,⁵¹ which necessarily entails a great deal of discretion.⁵² In contrast, the principal role of the FTC is to adjudicate alleged violations of the law it administers.⁵³ Because the Commission is not involved in a highly discretionary field such as licensing, but in the application of law through adjudication, the powers it may marshal to perform its duty must be strictly construed to protect the procedural rights of respondents.

Having rejected the Commission's arguments, the court held that the FTC does not have the necessary legislative authority to issue substantive rules that have the effect of law.⁵⁴ It should be noted that not all substantive rules were found unauthorized, but only those having the effect of law. In short, the holding assumed as a premise that the Trade Regulation Rules are in fact rules which have the effect of law,⁵⁵ but the court did not discuss this assumption in its opinion.⁵⁶ It is submitted that the court correctly perceived that the nature and effect of the Rules are such that they must be characterized as legislative rules. The remainder of this note will seek to articulate grounds supporting this premise of the court's by delineating the nature and effect of the Trade Regulation Rules. It is necessary, then, first to distinguish between substantive rules that have the effect of law ("legislative" rules) and those that do not ("interpretative" rules), and second to establish in what way the proposed Trade Regulation Rules have the effect of law.

A "legislative" rule is the product of an exercise of legislative power delegated by the legislature to an administrative body.⁵⁷ For that reason it has the effect of law immediately upon promulgation.⁵⁸

⁴⁸ 47 U.S.C. § 303 (1970).

⁴⁹ 319 U.S. at 224.

⁵⁰ 340 F. Supp. at 1349 & n.32.

⁵¹ 47 U.S.C. § 301 (1970).

⁵² See 319 U.S. at 224-27.

⁵³ 340 F. Supp. at 1349.

⁵⁴ Id. at 1350.

⁵⁵ See note 11 *supra*.

⁵⁶ There are two indirect references that imply the assumption. The court expresses the fear that the FTC, through promulgation of such rules, would circumvent the extensive due process procedures in Section 5 of the Act. 340 F. Supp. at 1346. Also, in denying the FTC's claim of implied authority, the court quotes a passage from a law review article which states that the FTC is limited to the promulgation of purely interpretative rules that are open to full-scale judicial review. Id. at 1349 n.32.

⁵⁷ 1 K. Davis, *Administrative Law Treatise* § 5.03, at 299 (1958) (hereinafter cited as Davis).

⁵⁸ Id.

In contrast, an "interpretative" rule is a clarification or explanation of existing laws or regulations.⁶⁰ In short, legislative rules create law whereas interpretative rules are statements by an administrative agency as to what the agency thinks a statute means.⁶⁰ Because legislative rules, like legislation, have the effect of law, thereby binding the courts in the application thereof, the courts usually require promulgation of such rules to be based upon a clear delegation of rule-making power.⁶¹ In comparison, interpretative rules may influence a court's decision and, in that limited sense only, have the "effect of law," but they cannot bind the court.⁶² They are merely interpretations, and an agency is not required to possess specific statutory authority to issue them.⁶³

It is not readily apparent whether the instant Trade Regulation Rules are interpretative or legislative. In the 1964 Statement of Basis, the Commission hedged in confronting the question, stating simply that the rules fit neither pigeonhole exactly.⁶⁴ It would appear that the FTC sensed that it lacked the requisite statutory authority to promulgate legislative rules, for it stated: "Trade regulation rules are not legislative in the sense of *adding new substantive rights or obligations*."⁶⁵ The Commission further admitted that Trade Regulation Rules do not have the force and effect of law and that "the legislative history [of the FTCA] suggests that the Commission was not intended to promulgate 'legislative' rules."⁶⁶ Arguably, then, these statements, if taken alone, remove the rules from the ambit of the *National Petroleum* holding, which denies the FTC only the authority to promulgate rules that have the effect of law. On the other hand, the Commission will not allow its rules to be characterized as merely advisory or interpretative rules. The Commission insisted that "where a rule correctly expresses the requirements of the law, one who disobeys the rule is, for all practical purposes,

⁶⁰ See, e.g., *Seattle-First Nat'l Bank v. United States*, 44 F. Supp. 603, 607 (E.D. Wash. 1942).

⁶¹ *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952); *Continental Oil Co. v. Burns*, 317 F. Supp. 194, 197 (D. Del. 1970). As written, the APA does not distinguish between legislative and interpretative rules. However, the Senate Committee which considered the Act did address this point: "'interpretative' rules—as merely interpretations of statutory provisions—are subject to review, whereas 'substantive' rules involve a maximum of administrative discretion." Senate Committee Print, S. Doc. No. 248, 79th Cong., 2d Sess. 18 (1946). As used by the Committee, "substantive" is synonymous with "legislative." See note 27 *supra*.

⁶² See note 57 *supra*.

⁶³ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

⁶⁴ "In addition to the power to enact legally binding regulations conferred upon many of the agencies, all of them may, if they wish, issue interpretations, rulings, or opinions upon the laws they administer, without statutory authorization to do so." Final Report of the Attorney General on Administrative Procedure 99-100 (1941).

⁶⁵ Statement of Basis and Purpose of Trade Regulation Rule, 29 Fed. Reg. 8325, 8371 (1964) (hereinafter cited as 1964 Statement of Basis).

⁶⁶ *Id.* at 8365 (emphasis supplied).

⁶⁷ *Id.*

disobeying the law."⁶⁷ Hence the FTC has refrained from explicitly classifying the rules as either legislative or interpretative.⁶⁸

The classification of the Rules, however, must depend not upon their labelling by the FTC but upon their effect on a respondent at an adjudicative hearing. When the FTC has reason to believe that there is a violation of the laws it administers, it may summon the allegedly responsible party to appear at such a hearing.⁶⁹ At the hearing, the Commission performs the role of a trial court, adjudicating the issues and determining whether a cease-and-desist order should issue.⁷⁰ The FTC, then, applies its own rules in the first instance. The Commission has already announced to what degree it intends to rely upon the Trade Regulation Rules at a hearing: it will adopt not only the legal conclusions embodied in the Rules, but also their factual underpinnings, and regard both as conclusive for its purposes.⁷¹ Such reliance, it is submitted—and the remainder of this note seeks to provide grounds for this conclusion—requires that the Rules be categorized as legislative rules.

It is true that the Commission's proposed reliance upon the legal content of the Rules is not *in itself* grounds for classifying the Rules as legislative, since it is consonant with the FTC's role as a trial court.⁷² When any court considers an administrative rule which is less than legislative in stature, it is free to adopt the legal conclusions expressed in the rule.⁷³ The rule is not thereby said to "have the effect of law" and to become a legislative rule; it is still an interpretative rule to which a court has decided, in its discretion, to "give the effect of law" in a particular case. The weight that the court may give to such a rule will depend upon a variety of factors.⁷⁴ It may be objected that since the FTC in this case performs the roles of both rule-maker and judge, the so-called substantive Trade Regulation Rules are in fact legislative, it being more likely than not that the FTC hearing examiner will adopt his agency's prior interpretation of the law as expressed in the Rules. The Rules are still not conclusive in this sense, however, because FTC adjudications are subject to appellate review.⁷⁵ An appellate court may

⁶⁷ Id. at 8371 (emphasis supplied).

⁶⁸ Id. at 8365, 8371. The FTC resists further classification than "substantive." Id. at 8365-66.

⁶⁹ 15 U.S.C. § 45(b) (1970). The procedure for an FTC hearing is set forth in 16 C.F.R. Part 3 (Supp. 1972).

⁷⁰ Id.

⁷¹ The nature of reliance in both cases is specified in 1964 Statement of Basis, *supra* note 64, at 8371.

⁷² Id. at 8371-73.

⁷³ *O'Neill v. United States*, 281 F. Supp. 359, 363 (N.D. Ohio 1968) (quoting 1 Davis, *supra* note 57, § 5.05, at 315).

⁷⁴ "The weight of such a judgment in a particular case will depend upon the thoroughness evident in . . . the consideration [given the rule], the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). See 1 Davis, *supra* note 57, § 4.11, at 358.

⁷⁵ Review of an FTC order is available in a Court of Appeals of the United States,

approve of the FTC's use of a rule as an interpretation of FTCA law, but it may also discard the rule completely and render its own interpretation of the disputed legal issues. After all, it is well settled that it is for the courts, not the Commission, to determine ultimately what law the Commission administers.⁷⁶ In other words, the FTC cannot insulate legal conclusions previously drawn by the Commission from the appellate review specifically provided for in the FTCA.⁷⁷ Hence the FTC's reliance upon its prior interpretations of the law as expressed in the Rules does not classify the Rules as legislative as long as appellate courts can fully review that interpretation.

However, the Commission has proposed that it may rely not only upon the *legal content* but also upon the *factual findings* underlying the Trade Regulation Rules. One of the arguments it has advanced in support of this proposition is that courts have approved its reliance upon its Trade Practice Rules.⁷⁸ The difference, it is said, between Trade Practice Rules and Trade Regulation Rules is merely one of degree, not kind.⁷⁹ This argument is manifestly incorrect. Rather, it is submitted that the difference between the two should help to reveal why it is necessary to class the Trade Regulation Rules as legislative. It may be true that the Commission is justified in relying upon the *legal content* of Trade Regulation Rules as it has done with Trade Practice Rules. However, Trade Regulation Rules, unlike Trade Practice Rules, are accompanied by supportive factual conclusions.⁸⁰ When the hearing examiner presiding at an FTC adjudication⁸¹ relies upon a Trade Practice Rule, he is simply accepting prior agency interpretation of the law. Because a Trade Practice Rule is not accompanied by factual conclusions, the Commission cannot utilize a Trade Practice Rule to resolve an issue of fact or to dispense with the introduction of evidence required to make out a *prima facie* case.⁸² Any factual conclusions which underlie a Trade Practice Rule must be proven *de novo*.⁸³ In contrast, if a hearing examiner relies upon a Trade Regulation Rule, as the FTC has proposed that he be able to do, not only will he follow the legal conclusions embodied in the Rule, but he will also adopt—as conclusive—

within any circuit where the method of competition or the act or practice in question took place or where the respondent resides or carries on his business. Such review is final, subject to review by the Supreme Court on certiorari. 15 U.S.C. § 45(c) (1970).

⁷⁶ *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934); *FTC v. Gratz*, 253 U.S. 421, 427 (1920).

⁷⁷ 15 U.S.C. § 45(c) (1970).

⁷⁸ Trade Practice Rules are strictly interpretations of the laws administered by the FTC. Since the Commission's publication of its views in the 1964 Statement of Basis, Trade Practice Rules have been replaced with Industry Guides, which perform the same function. 16 C.F.R. § 1.5 & n.1 (Supp. 1972). The old Trade Practice Rules are still on the books. 16 C.F.R. §§ 18-228 (1972).

⁷⁹ 1964 Statement of Basis, *supra* note 64, at 8365-73, 8370 (1964).

⁸⁰ *Id.* at 8371.

⁸¹ 16 C.F.R. § 3.42 (Supp. 1972).

⁸² 1964 Statement of Basis, *supra* note 64, at 8371.

⁸³ *Id.*

the accompanying factual conclusions which were made at a prior rule-making proceeding.⁸⁴ The difference in the impact of the two types of rules is consequently a radical one.

What, then, is the FTC's justification for such reliance upon the Trade Regulation Rules, if the Rules—as the Commission has asserted—are not to be classified as legislative and, therefore, are not to require the explicit congressional authorization which the *National Petroleum* court found lacking in the FTCA? If the Commission's intended use of the Rules can not be justified, such use would violate an important procedural right of respondents summoned for alleged violations of the Rules, the right to a full hearing on all the issues to which respondents are entitled by both the APA⁸⁵ and the FTCA.⁸⁶ A full hearing means that every party should 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.⁸⁷ Such a hearing is essential to ensure an informed and just application of the authority of administrative boards and agencies.⁸⁸ However, by relying as it proposes to do upon the factual conclusions underlying a Rule, the Commission would avoid the usual full hearing and so reap two distinct advantages: first, it would no longer be required to introduce evidence to support those conclusions; and second, a respondent would be foreclosed from rebutting the factual conclusions with evidence of his own. The remainder of this casenote will weigh in some detail both the Commission's rationale for avoiding the full hearing guaranteed to respondents by statute and the impact such avoidance would have on procedural rights. It will be submitted that the rationale fails; that the impact on procedural rights of the Rules as the Commission proposes to use them requires their classification as legislative; and that the nature of that impact on procedural rights underlines the correctness of the *National Petroleum* holding that rules having such an impact require clear congressional authorization.

The FTC seeks to justify the circumvention of the usual rules of evidence as to the introduction of factual conclusions drawn at a prior rule-making proceeding by invoking a variation of the doctrine of judicial notice.⁸⁹ Under this doctrine, courts possess the discretion to allow the introduction of pertinent general facts without affording the non-introducing party the opportunity to cross-examine.⁹⁰ This general prerogative, nonetheless, is subject to strong limitations. It is usually said that the factual matters introduced must either be so notorious that the production of evidence would be unnecessary, be within the judge's acquaintance as judge, or be capable of instant and unquestion-

⁸⁴ *Id.*

⁸⁵ 5 U.S.C. § 554 (1970).

⁸⁶ 15 U.S.C. § 45(b) (1970).

⁸⁷ *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956).

⁸⁸ *Id.*

⁸⁹ 1964 Statement of Basis, *supra* note 64, at 8372.

⁹⁰ See C. McCormick, *Evidence* §§ 323-31 (1954).

able demonstration.⁹¹ The sort of factual matters which the FTC sought to "notice" through its reliance upon the Trade Regulation Rules plainly do not meet these criteria.⁹² The Commission, moreover, claims a broader discretion in an administrative agency's use of "official notice" than in a court's exercise of judicial notice. Official notice, as defined by the FTC, may be taken of any facts embodied in the record of a prior Trade Regulation Rule rule-making proceeding as long as those facts are what are known as "legislative" facts.⁹³ "Legislative" facts, as distinguished from "adjudicative" facts, are typically general facts which help a tribunal decide issues of law and policy.⁹⁴ In contrast, "adjudicative" facts concern the immediate parties. These facts inform the tribunal as to who did what, where, when, how and with what motive or intent.⁹⁵ Such facts may be established only in an adjudicative setting. In general, facts which may be judicially noticed are narrower in scope than "legislative" facts.⁹⁶ While the limitations on official notice are not as stringent as those which control judicial notice,⁹⁷ the reaction of the courts to this extension of the doctrine of notice is bound to be hostile.⁹⁸

Beyond the question of whether the FTC may permissibly take official notice of the legislative facts embodied in the Trade Regulation Rules, there is a more fundamental objection to the FTC's proposal to rely upon the factual conclusions which underlie those Rules. The Commission maintains that a respondent does not have an unqualified right to introduce evidence *in rebuttal* of officially noticed facts.⁹⁹ The FTC justifies this startling proposition on the ground that only respondents who had ample opportunity to engage in the prior rule-making proceeding, at which the particular rule was promulgated, would be foreclosed from further challenge of the facts noticed.¹⁰⁰ According to the Commission, if the particular respon-

⁹¹ E.g., *In re Knapp-Monarch Co.*, 296 F.2d 230, 232 (C.C.P.A. 1964) (quoting 9 J. Wigmore, *Evidence* § 2571, at 547-48 (3d ed. 1940)).

⁹² Underlying the rule in the instant case, for example, are conclusions regarding the consuming public's conception of the octane rating of gasoline, the true nature of the rating, the buying habits of the public, the needless expense entailed in purchasing grades of gasoline superior to what is actually required, etc. These factual conclusions are set forth in 36 Fed. Reg. 354-65 (1971).

⁹³ 1964 Statement of Basis, *supra* note 64, at 8371-72. The FTC has adopted the theories of "official notice" and "legislative facts" propounded by Professor Davis. See 2 Davis, *supra* note 57, §§ 15.01, 15.03. Davis has in turn approved the application of his theories by the FTC, calling the 1964 Statement of Basis "one of the most outstanding administrative opinions of the twentieth century." 1 Davis, *supra* note 57, § 5.04, at 128 (Supp. 1965).

⁹⁴ 2 Davis, *supra* note 57, § 15.14, at 433.

⁹⁵ *Id.*

⁹⁶ *Id.* § 15.01.

⁹⁷ See, e.g., *Dayco Corp. v. FTC*, 362 F.2d 180, 186 (6th Cir. 1966).

⁹⁸ *Id.* Facts, to be officially noticed, ought to be "of a general nature, representing generalizations distilled from repeated demonstrations." F. Cooper, *State Administrative Law*, Ch. XII, § 5, at 413 (1965) (emphasis supplied).

⁹⁹ 1964 Statement of Basis, *supra* note 64, at 8372.

¹⁰⁰ *Id.*

dents had a prior opportunity to marshal evidence in opposition at the rule-making proceeding there is no reason to provide them with a second chance at the adjudicative hearing.¹⁰¹ The FTC contends that one opportunity to participate is all the opportunity which the APA requires.¹⁰²

Refusal to allow evidence in rebuttal of officially noticed facts reveals the precise nature of the Trade Regulation Rules as the Commission proposes to use them. This factor, it is submitted, ultimately determines whether the Rules are legislative or interpretative. The Commission seeks to characterize the Rules as less than legislative in nature while using the Rules to preclude a respondent from the safeguards guaranteed by the APA¹⁰³ and the FTCA¹⁰⁴ for an adjudicative hearing. In so doing, the Commission exposes its hand: the Rules are legislative. The proposed Trade Regulation Rules do indeed have the effect of substantive law.

The APA specifically states: "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary."¹⁰⁵ This statutory provision is in accord with established law.¹⁰⁶ The Commission, at an adjudicative hearing, would permit the respondent to introduce rebuttal evidence as it pertains to facts officially noticed, *only if* those facts were adjudicative.¹⁰⁷ If the respondent has been afforded the opportunity to challenge legislative facts at the prior rule-making proceeding, he would be foreclosed from further challenge of those facts when officially noticed at the adjudicative hearing.¹⁰⁸ This position, it is submitted, is tenable only when the rule being applied is a legislative rule promulgated *pursuant to a clear delegation of authority from Congress*.

A respondent does not have the absolute right to challenge the facts which underlie the formulation of legislation; the factual underpinnings of a legislative rule are foreclosed from further contest. This is the reason for the strict requirement that potential respondents be given notice and an opportunity to be heard when *legislative* facts are settled at a rule-making proceeding.¹⁰⁹ Interpretative rules, on the other hand, are based upon facts which are open to collateral

¹⁰¹ Id.

¹⁰² Id.

¹⁰³ Those safeguards are listed in 5 U.S.C. §§ 554, 556 (1970).

¹⁰⁴ 15 U.S.C. § 45(b) (1970).

¹⁰⁵ 5 U.S.C. § 556(e) (1970). This provision has been incorporated into the FTC Rules of Practice in substantially the same form. 16 C.F.R. § 3.43 (Supp. 1972).

¹⁰⁶ "[N]otice . . . has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence . . . 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.'" *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 301-02 (1937) (citations omitted). See 9 J. Wigmore, *Evidence* § 2567 (3d ed. 1940).

¹⁰⁷ 1964 Statement of Basis, *supra* note 64, at 8372-73.

¹⁰⁸ Id.

¹⁰⁹ See 5 U.S.C. § 553 (1970).

attack at later adjudicative hearings. Accordingly, the APA exempts proceedings wherein *interpretative* rules are formulated from the notice and hearing requirements necessary for the promulgation of legislative rules.¹¹⁰ Trade Regulation Rules, then, as they are envisioned by the FTC, must stand or fall as *legislative rules*¹¹¹—there can be no other explanation for the FTC's proposal to adopt their underlying factual determinations as conclusive in adjudicative hearings.

This conclusion should not be modified by the fact that the FTC gratuitously affords the public the opportunity to participate in Trade Regulation rule-making procedures conforming to APA requirements.¹¹² The prescription of such rule-making procedures cannot take the place of the missing congressional sanction to promulgate legislative rules.¹¹³ The FTC must *first* meet the threshold question of whether the legislature has delegated to it the authority to issue rules of such effect: public participation in the rule-making procedures cannot make up for a lack of such explicit authorization.

The serious gaps in the logic of the FTC's argument are emphasized, not remedied, by the decisional law upon which the Commission depended in the 1964 Statement of Basis. The FTC cited *United States v. Storer Broadcasting Co.*¹¹⁴ and *Federal Power Commission v. Texaco Inc.*¹¹⁵ as authority for the contention that through its rule-making power it may foreclose a respondent from challenging the officially-noticed factual conclusions which underlie its rules.¹¹⁶ In *Storer*, the petitioner owned five licensed television broadcast stations. The Federal Communications Commission dismissed, without hearing, his application for a license for an additional station. The agency justified its action on the grounds that its rules provided, in effect, that it would issue no license for an additional station to any party already owning five stations. Although the right to a full hearing was guaranteed by statute,¹¹⁷ the petitioner was limited to challenging the application of the rule to the particular factual situation; the petitioner could not challenge the basis of the rule itself.¹¹⁸

¹¹⁰ "Except when notice or hearing is required by statute, this subsection does not apply—(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . ." 5 U.S.C. § 553(b) (1970).

¹¹¹ Wegman, although a staunch supporter of FTC authority to promulgate Trade Regulation Rules, recognizes that the rules are truly legislative. Wegman, *Cigarettes and Health: A Legal Analysis*, 51 Cornell L. Rev. 678, 742 & n.291 (1966).

¹¹² 5 U.S.C. § 553 (1970).

¹¹³ This is the sort of "bootstrap" argument which the *National Petroleum* court refused to endorse. 340 F. Supp. at 1350.

¹¹⁴ 351 U.S. 192 (1956).

¹¹⁵ 377 U.S. 33 (1964).

¹¹⁶ 1964 Statement of Basis, *supra* note 64, at 8372.

¹¹⁷ 47 U.S.C. § 309(e) (1964).

¹¹⁸ 351 U.S. at 200-06. The Court held that the FCC's regulations permitted applicants to show the inapplicability of its rules, but the Court placed the burden upon *Storer* to set forth reasons sufficient to justify a change or waiver of the rule. *Id.* at 205.

In other words, the petitioner was precluded from contesting the legislative facts upon which the rule was based.¹¹⁹

In *Texaco* the respondents had applied to the Federal Power Commission (FPC) for a certificate of public convenience and necessity to supply natural gas to a pipeline. Since the applications disclosed price clauses impermissible under FPC regulations, the FPC rejected the applications without a hearing. Following the *Storer* decision, the Court held that the agency could specify statutory standards through its rule-making process and bar at the outset those whose applications neither met those standards nor showed why, in the public interest, the rule should be waived.¹²⁰ Again, the party concerned was precluded from attacking the legislative facts supporting the rule.

Courts, then, have allowed agencies to perform their regulatory duties through the use of rule-making powers, eschewing the full adjudicative hearings otherwise guaranteed respondents. And the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.¹²¹ But such a choice only exists when *both* methods are available to the agency.¹²² In the two cases discussed above, the far-reaching rule-making power was found to be authorized by a delegation of legislative authority.¹²³ As held by the *National Petroleum* court, the FTC can point to no such delegation of authority.

Absent congressional authorization, the Commission can not insulate fact findings from challenge by respondents at adjudicative hearings by making those findings at prior rule-making proceedings. Indeed, such a procedure is inconsistent with the spirit of the pronouncements of the Supreme Court in *National Labor Relations Board v. Wyman-Gordon Co.*¹²⁴ In that case, the Labor Board had ordered the respondent to furnish a list of names and addresses of employees eligible to vote in an upcoming representation election. The Board based its order on a "rule" announced in a *prior adjudication* involving another respondent.¹²⁵ The Court, although it affirmed the Board's order on other grounds, held that rules, that is, exer-

¹¹⁹ See text accompanying notes 107-08 *supra*.

¹²⁰ 377 U.S. at 39-40.

¹²¹ *SEC v. Chenery*, 332 U.S. 194, 202-03 (1947).

¹²² *Burrus & Teter, Antitrust: Rulemaking v. Adjudication in the FTC*, 54 Geo. L.J. 1106, 1127 (1966).

¹²³ "[The FCC is empowered to make] such *rules and regulations* and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter . . ." 47 U.S.C. § 303(r) (1964) (emphasis supplied).

"[The FPC is empowered to] perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, *rules, and regulations* as it may find necessary or appropriate to carry out the provisions of this chapter." 15 U.S.C. § 717(o) (1964) (emphasis supplied).

¹²⁴ 394 U.S. 759 (1969).

¹²⁵ *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236 (1966).

cises of quasi-legislative power, must be promulgated at rule-making proceedings only, in accordance with the requirements of the APA.¹²⁶ The rule-making provisions of the APA "may not be avoided by the process of making rules in the course of *adjudicatory* proceedings."¹²⁷

Wyman-Gordon is, of course, factually distinguishable from *National Petroleum*. However, the rationale which supports the former case forcefully applies to the latter. In *National Petroleum*, the FTC simply attempted the converse of what the Labor Board was forbidden to do in *Wyman-Gordon*. Instead of avoiding rule-making procedures by promulgating a "rule" at an adjudicative hearing, the FTC sought to avoid the safeguards attending adjudicative procedures by relying on "evidence" introduced at a prior rule-making proceeding. Both agencies attempted to make use of one procedure to effectuate what should properly be accomplished through another procedure, thereby defeating the substance of the Act. The use of the Trade Regulation Rule procedures would be in accord with the APA only if it were authorized by a clear delegation of legislative power.¹²⁸ Until it is, however, reliance by the FTC upon such rules would vitiate the procedural rights of respondents at cease-and-desist hearings.

In summary, the legislative history of the FTCA indicates that section 6(g), the only section which explicitly authorizes rule-making, pertains only to housekeeping or procedural matters. In order to fulfill the congressional mandate to prevent unfair methods of competition and unfair or deceptive acts and practices, the Commission must depend upon the principal method of enforcement specified in Section 5(b) of the Act: case-by-case adjudicative process. The Commission cannot infer a far-reaching rule-making power on the slim authority of the wording of its general purpose clause, especially in the light of an adverse legislative history.

These conclusions are based upon the premise that Trade Regulation Rules have the force and effect of substantive law. If they did not, they would be mere interpretative rules not requiring specific statutory authority and not prohibited by the *National Petroleum* holding. The Rules, however, do possess the effect of substantive law and must be classified as legislative rules owing to the effect which the FTC intends to give them at adjudicative proceedings. By refusing a respondent the right to challenge the officially noticed facts which underlie a particular Trade Regulation Rule, the Commission denies the respondent his statutory rights to a full hearing on all the

¹²⁶ 394 U.S. at 763-66.

¹²⁷ *Id.* at 764 (emphasis supplied).

¹²⁸ A bill is presently before the Senate which would grant the FTC this power in the consumer area. Included in a proposed replacement for section 6(g) would be the words: "The Commission is hereby authorized to issue *legislative rules* defining with specificity acts or practices which are unfair or deceptive to consumers . . ." Title II of the Consumer Product Warranties and Federal Trade Commission Improvement Act, S. 986, 92d Cong., 2d Sess. § 206 (1972) (emphasis supplied).

issues. While case law indicates that rules may legally be given such conclusive effect, this is true only when legislative rules are promulgated pursuant to a delegation of authority from Congress. The FTC can point to no such authority. In essence, the Commission, in reaching for the best of both worlds, has constructed a hybrid rule, one which is "interpretative" in the sense that its legality may be based on tenuous authority, but which is "legislative" to the extent that it operates to foreclose a respondent from questioning its factual basis.

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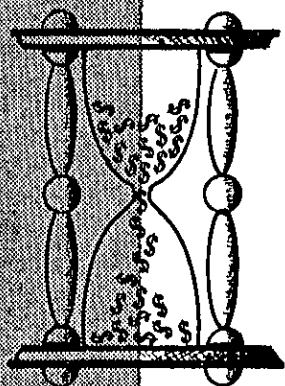
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