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 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'' from the respondents. Such a message hardly is consistent with fairness to the respondent or with the

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[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 Fed. Reg._____, 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 (1995), 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 Fed. Reg. _____, 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 exemptions. Rule 4.7, 16 CFR § 4.7.